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# How National Park Law Really Works

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# HOW NATIONAL PARK LAW REALLY WORKS

JOHN COPELAND NAGLE\*

*This Article provides the first explanation of the relationship between three overlapping sources of national park law. It first explains how the Organic Act affords the National Park Service substantial discretion to manage the national parks, including deciding the proper balance between enjoyment and conservation in particular instances. It next shows how federal environmental statutes push national park management toward preservation rather than enjoyment. Finally, the Article explains that Congress often intervenes to mandate particular management outcomes at individual parks, typically but not always toward enjoyment rather than preservation. The result is that the National Park Service has substantial discretion to manage national parks in a manner that pursues the dual Organic Act purposes of enjoyment and conservation, but Congress occasionally exercises its ultimate authority to specify which purpose should prevail in particular circumstances.*

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## INTRODUCTION

National parks are celebrated for many things, but not for law. For their first forty-four years, different agencies managed the national parks as separate entities.<sup>1</sup> Then Congress enacted the Organic Act in 1916, which created the National Park Service (NPS) and instructed the new agency how to manage the national parks.<sup>2</sup> That statute, with no significant amendment, has governed the national parks for ninety-eight years, but the Supreme Court has never interpreted the Organic Act’s management provisions.<sup>3</sup>

The heart of the Organic Act is its statement of purpose authored by Frederick Law Olmsted, Jr.—the son of the developer of New York City’s Central Park—who became

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1. See JOHN ISE, *OUR NATIONAL PARK POLICY: A CRITICAL HISTORY* 185 (1961).

2. Organic Act, 16 U.S.C. § 1 (2012).

3. The Court was asked to interpret the Organic Act’s management provisions in *Sierra Club v. Morton*, 405 U.S. 727 (1972), which involved a challenge to a proposed ski resort next to Sequoia National Park. See Brief for the Env’tl. Def. Fund as Amicus Curiae, *Sierra Club v. Morton*, 405 U.S. 727 (1972) (No. 70-34), 1971 WL 133798 at \*69, \*72 (denying “that the Secretary [of the Interior’s] judgment is supreme on questions of national park administration,” but recognizing that the NPS’s “authority to construct roads on park lands . . . have never been the object of judicial scrutiny”). Instead, the Court held that the environmental groups lacked standing to bring their claim. Perhaps the closest that the Court came to interpreting the Organic Act was in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 289 (1984), which upheld the NPS’s prohibition on camping in Lafayette Park next to the White House. But *Clark* was a First Amendment case involving the expressive quality of “camping” by protestors; it did not require the Court to interpret the management provisions of the Organic Act. *Id.*

famous himself as a lifelong advocate of national parks. Olmsted wrote that the purpose of the NPS is to

[P]romote 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 purposes of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wildlife 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.<sup>4</sup>

The Organic Act's "fundamental purpose" is to pursue the dual goals of conservation and enjoyment of all national parks. These twin commands of the Organic Act often support the same management actions. Often, one can enjoy a national park while conserving it at the same time. Hiking, nature photography, and wildlife observation are among the many activities that are consistent with both enjoying a park and conserving it. Conversely, other activities threaten both the enjoyment and the conservation of a national park. Dams have played a particularly prominent role in national park disputes.<sup>5</sup> Mining, logging, climate change, and constructing residential subdivisions are additional examples of actions that

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4. 16 U.S.C. § 1. *See National Park Service: Hearing Before the H. Public Lands Comm.*, 64th Cong. 52 (1916) [hereinafter 1916 NPS hearing] (testimony of J. Horace McFarland, President of the American Civic Associations) (stating that it was Olmsted "who framed the sentence" in the Organic Act that described the purpose of the national parks). Besides his work on Central Park, Olmsted's father reported on the scenic value of Yosemite soon after Congress reserved it from development, *see* FREDERICK LAW OLMSTED, *THE YOSEMITE VALLEY AND THE MARIPOSA BIG TREE GROVE* (1865), *reprinted in* AMERICA'S NATIONAL PARK SYSTEM: THE CRITICAL DOCUMENTS 12 (Lary M. Dilsaver ed., 1994), and it is the senior Olmsted whose home is now a national historic site under the National Park Service, *see* Act of Oct. 12, 1979, Pub. L. No. 96-87, § 201, 93 Stat. 664 (1979) (establishing the Frederick Law Olmsted National Historic Site); TOM A. COBURN, M.D., *PARKED! HOW CONGRESS' MISPLACED PRIORITIES ARE TRASHING OUR NATIONAL TREASURES* 148 (2013) (reporting that "[a]t a cost of \$221.30 per visitor, Frederick Law Olmsted National Historic Site is one of the 10 most expensive National Parks per visitor in the continental United States").

5. *See generally* ISE, *supra* note 1, *passim* (describing dam controversies involving national parks); ROBERT W. RIGHTER, *THE BATTLE OVER HETCH HETCHY: AMERICA'S MOST CONTROVERSIAL DAM AND THE BIRTH OF MODERN ENVIRONMENTALISM* (2005); MARK W.T. HARVEY, *A SYMBOL OF WILDERNESS: ECHO PARK AND THE AMERICAN CONSERVATION MOVEMENT* (2000).

interfere with both the enjoyment of a park and its conservation. Those are easy cases under the Organic Act.

But there are many times when the goals of enjoyment and conservation conflict. Snowmobiles provide a memorable opportunity to enjoy winter in Yellowstone National Park, but they can threaten the conservation of wildlife, air quality, and natural soundscapes. Scenic flights provide an unparalleled view of the Grand Canyon, but they interfere with the national park's natural quiet and with the visual experience of people enjoying the scene from the ground. Cell phone towers enable visitors to communicate with friends or with park rangers in the event of an emergency, but they can obstruct the natural scenic view and interfere with the wilderness experience. Roads provide the primary means of access for nearly all visitors to nearly all national parks, but the same roads can be devastating to a park's environmental qualities.<sup>6</sup> There are many other ways to enjoy national parks that are in tension with the conservation of the parks.<sup>7</sup>

The Organic Act does not resolve such conflicts. To be sure, scholars and advocates have gleaned opposing preferences for enjoyment or for conservation from the Organic Act's language and from the purpose of the national parks. The most recent version of the NPS management policies, for example, states a

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6. See, e.g., ROBERT SHANKLAND, STEVE MATHER OF THE NATIONAL PARKS 151 (1951) (noting that the first cars arrived in Mount Rainier in 1911, Glacier in 1912, Sequoia and Yosemite in 1913, Mesa Verde in 1914, and Yellowstone in 1915, but the roads "frightened" all but the most intrepid drivers).

7. See *National Park Service's Draft Management Policies: Hearing Before the Subcomm. on National Parks of the S. Energy and Natural Res. Comm.*, 109th Cong. 13 (2005) (statement of Denis Galvin, former NPS Deputy Director, on behalf of National Parks Conservation Association) (offering additional examples of off-road vehicles at Cape Hatteras National Seashore, artificial watering holes in Mojave National Preserve, cruise ships at Glacier Bay National Park, and the location of a new lodge in Sequoia National Park). For some of the surprising possible ways of enjoying national parks, see, for example, *National Parks of California: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Res. of the H. Comm. on Gov't Reform*, 109th Cong. 6 (2005) (testimony of Michael Tollefson, Superintendent, Yosemite National Park) (noting that Yosemite has one of the last remaining ski areas in the national park system); *National Parks in the Pacific Northwest: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Res. of the H. Gov't Reform Comm.*, 109th Cong. 7 (2005) (testimony of Rep. Jay Inslee) (remarking that "[j]et skis . . . don't belong in Crater Lake National Park, although, it would be intriguing to see them go around the little island there"); RONALD A. FORESTA, AMERICA'S NATIONAL PARKS AND THEIR KEEPERS 28 (1984) (noting that an NPS assistant director once favored the running of a cable car across the Grand Canyon, but NPS Director Stephen Mather opposed it).

preference for conservation.<sup>8</sup> But no court has overturned a NPS decision to favor enjoyment instead of conservation—or vice versa—because it conflicted with the Organic Act.<sup>9</sup>

That would seem to leave enjoyment and conservation on an equal playing field subject to the discretion of the NPS. But laws that protect certain features of the environment push national park management toward preservation. The very characteristics of a national park—rare wildlife, wilderness areas, clean air and water, abundant wetlands, historic structures, free-flowing rivers—subject park management to the additional requirements of the Endangered Species Act (ESA),<sup>10</sup> the Wilderness Act,<sup>11</sup> the Clean Air Act (CAA),<sup>12</sup> the Clean Water Act (CWA),<sup>13</sup> the National Historic Preservation Act (NHPA),<sup>14</sup> and the Wild and Scenic Rivers Act (WSRA),<sup>15</sup> among many other federal environmental statutes. The NPS, therefore, must manage national parks consistent with these other conservation commands. And the courts have overturned NPS management decisions that would have authorized opportunities to enjoy national parks because those decisions violated these other federal environmental statutes.<sup>16</sup>

The tilt toward conservation accomplished by these environmental statutes sometimes faces a statutory push back in the direction of enjoyment. Congress mandates specific management policies for individual parks in two different ways. First, many acts establishing a new national park contain provisions directing the NPS to permit or prohibit certain activities. Second, Congress legislates in response to

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8. NAT'L PARK SERV., MANAGEMENT POLICIES 2006 11 (2006) [hereinafter 2006 NPS MANAGEMENT POLICIES] (stating that “when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant”).

9. The one district court decision relying on the Organic Act to invalidate a NPS management decision to allow the enjoyment of a national park at the risk of interfering with the conservation of the park was reversed on appeal, as I discuss *infra* notes 73–87. See *S. Utah Wilderness Alliance v. Dabney*, 7 F. Supp. 2d 1205 (D. Utah 1998), *rev'd*, 222 F.3d 819 (10th Cir. 2000). It is rare for a court to hold that a NPS management decision violates the Organic Act even in the context of actions that could harm both conservation and enjoyment of a national park.

10. Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2012).

11. Wilderness Act, 16 U.S.C. §§ 1131–1136 (2012).

12. Clean Air Act, 42 U.S.C. §§ 7401–7431 (2012).

13. Clean Water Act, 33 U.S.C. §§ 1251–1274 (2012).

14. National Historic Preservation Act, 16 U.S.C. §§ 470–470x-6 (2012).

15. Wild & Scenic Rivers Act, 16 U.S.C. §§ 1271–1287 (2012).

16. See *infra* Part II.

particular NPS actions to require a contrary management policy in a specific national park. Such specific statutory commands typically favor greater opportunities to enjoy a national park, although Congress occasionally calls for greater conservation than the NPS planned to provide. Similarly, informal congressional oversight of the NPS often encourages certain activities to be allowed in a national park, and the NPS often heeds those suggestions even though they are not legally binding.

The combination of the Organic Act, other federal environmental statutes, and statutes that govern a specific park is normatively desirable from the perspective of ideal park management. This combination presumes that the NPS has the expertise to resolve the competing demands of enjoyment and conservation in most instances. It recognizes that certain environmental values are entitled to the special protection afforded them by federal environmental statutes. And it acknowledges that Congress may intervene to mandate a particular outcome based on its balancing of the competing values.

This Article provides the first explanation of the relationship between these three overlapping sources of national park law. Part I explains first how the Organic Act affords the NPS substantial discretion to manage the national parks, including deciding the proper balance between enjoyment and conservation in particular instances. Part II shows how federal environmental statutes push national park management toward preservation rather than enjoyment. Part III shows how Congress often intervenes to mandate particular management outcomes at individual parks, typically but not always toward enjoyment rather than preservation. The result is that the NPS has substantial discretion to manage national parks in a manner that pursues the dual Organic Act purposes of enjoyment and conservation, but Congress occasionally exercises its ultimate authority to specify which purpose should prevail in particular circumstances. The recognition of this tripartite legal structure shows why no single source of legal authority explains how national parks are managed, and it clarifies the complementary roles that the NPS, Congress, and the courts play in resolving specific park management disputes.

## I. THE ORGANIC ACT

The Organic Act has governed the management of the national parks since 1916, and it remains the principle source of legal authority for the NPS. This Part describes how the Organic Act's broad statutory terms afford the NPS broad discretion in making management decisions. I first explain how the Organic Act evolved from the statutes that Congress enacted to establish new national parks prior to 1916, and I then analyze the meaning of the Act pursuant to current understandings of statutory interpretation.

### A. *The Evolution of the Organic Act*

In 1872, Congress enacted a statute designating the area near the headwaters of the Yellowstone River “as a public park or pleasuring-ground for the benefit and enjoyment of the people.”<sup>17</sup> That act established Yellowstone as the first national park.<sup>18</sup> Similar “benefit and enjoyment of the people” language appeared in many of the statutes that Congress enacted to create fourteen more national parks in the next forty-four years.<sup>19</sup> Those park establishment acts contained an additional

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17. Act of Mar. 1, 1872, ch. 24, 17 Stat. 32 (1872) [hereinafter Yellowstone National Park establishment act].

18. The two competing claimants are Hot Springs National Park, which dates from an 1832 congressional reservation, and Yosemite National Park, which resulted from an 1864 statute deeding the area to the state of California. *See* ISE, *supra* note 1, at 13 (describing but rejecting the claims of Hot Springs and Yosemite to be the first national park).

19. *See* Act of Aug. 9, 1916, ch. 302, § 1, 39 Stat. 442 (1916) [hereinafter Lassen Volcanic National Park establishment act]; Act of Aug. 1, 1916, ch. 264, § 1, 39 Stat. 432 (1916) [hereinafter Hawaii National Park establishment act]; Act of Jan. 26, 1915, ch. 19, § 1, 38 Stat. 798 (1915) [hereinafter Rocky Mountain National Park establishment act]; Act of May 11, 1910, ch. 226, § 1, 36 Stat. 354 (1910) [hereinafter Glacier National Park establishment act]; Act of May 22, 1902, ch. 820, § 1, 32 Stat. 202 (1902) [hereinafter Crater Lake National Park establishment act]; Act of Mar. 2, 1899, ch. 377, § 1, 30 Stat. 993 (1899) [hereinafter Mount Rainier National Park establishment act]; Act of Sept. 25, 1890, ch. 926, § 1, 26 Stat. 478 (1890) [hereinafter Sequoia National Park establishment act] (later renamed King's Canyon). The other national parks that Congress created before it enacted the Organic Act in 1916 include Yosemite (1890), Wind Cave (1903), and Mesa Verde (1906). *See* ISE, *supra* note 1, at 13–222 (describing the establishment of the national parks that preceded the Organic Act). Three other early national parks are no longer national parks. *See* JOHN COPELAND NAGLE, *LAW'S ENVIRONMENT: HOW THE LAW SHAPES THE PLACES WE LIVE* 102–03 (2010) (describing the rise and fall of Sully's Hill National Park in eastern North Dakota); DENNIS MUNCRIEF, *A HISTORY OF PLATT NATIONAL PARK*



number of common provisions. Many of them directed the Secretary of the Interior to provide for “the accommodation of visitors” within the park.<sup>20</sup> They even authorized the construction of private “summer homes.”<sup>21</sup> They also instructed the Secretary to preserve a national park’s “natural curiosities and wonders . . . in their natural condition,” sometimes qualified by “as far as practicable.”<sup>22</sup>

The statutes establishing national parks contained many of the same provisions, but as the number of parks “grew like Topsy” with “no one . . . particularly concerned about them,” the need for their centralized administration became evident.<sup>23</sup> John Lacey, the Iowan who was perhaps the first congressman to emphasize environmental conservation, proposed legislation

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(2007) (recounting the history of an area in Oklahoma that was a national park from 1906 to 1976); ISE, *supra* note 1, at 49 (noting the brief history of Mackinac Island National Park from 1875 to 1895); *see also id.* at 136 (referring to Wind Cave, Sully’s Hill, and Platt as “three inferior national parks”).

20. *See* Lassen Volcanic National Park establishment act § 2; Hawaii National Park establishment act § 4; Glacier National Park establishment act § 2; Mount Rainier National Park establishment act § 2; Act of Jan. 9, 1903, ch. 63, § 3, 32 Stat. 765 (establishing Wind Cave National Park); Crater Lake National Park establishment act § 3; Sequoia National Park establishment act § 2.

21. Lassen Volcanic National Park establishment act § 2; Glacier National Park establishment act § 2.

22. *See* Lassen Volcanic National Park establishment act § 2; Hawaii National Park establishment act § 4; Rocky Mountain National Park establishment act § 4 (authorizing regulations “primarily aimed at the freest of the said recreation purposes by the public and for the preservation of the natural conditions and scenic beauties thereof”); Glacier National Park establishment act § 2 (directing the Secretary to provide “for the preservation of [Glacier National Park] in a state of nature so far as is consistent with the purposes of this act”); Act of June 29, 1906, ch. 3607, 34 Stat. 616 (1906) (directing the Secretary to enact regulations “for the preservation from injury or spoliation of the ruins and other works and relics of prehistoric or primitive man within” Mesa Verde National Park); Crater Lake National Park establishment act § 2 (directing the Secretary to establish rules and regulations, and “cause adequate measures to be taken for the preservation of the natural objects within said park, and also for the protection of the timber from wanton depredation, the preservation of all kinds of game and fish, the punishment of trespassers, the removal of unlawful occupants and intruders, and the prevention and extinguishment of all forest fires” at Crater Lake National Park); Mount Rainier National Park establishment act § 2 (directing the management of Mount Rainier National Park to “provide for the preservation from injury or spoliation of all timber, mineral deposits, natural curiosities, or wonders within said park, and their retention in their natural condition”); Sequoia National Park establishment act § 2 (same); Yellowstone National Park establishment act § 1 (same).

23. PROCEEDINGS OF THE NATIONAL PARK CONFERENCE HELD AT THE YELLOWSTONE NATIONAL PARK, SEPTEMBER 11 & 12, 1911 3 (1912) [hereinafter 1911 NATIONAL PARK CONFERENCE] (statement of Secretary of the Interior Walter L. Fisher).

“to establish and administer [a] national parks office” in 1902.<sup>24</sup> Theodore Roosevelt championed national parks and conservation generally, but the idea of an office to manage the parks remained dormant during his seven years in office.<sup>25</sup> Then it was embraced by two figures who now have considerably less standing in environmental history: President William Howard Taft and his Secretary of the Interior Richard Ballinger.<sup>26</sup> Ballinger’s December 1, 1910, annual report proposed the creation of a “bureau of national parks and resorts.”<sup>27</sup> Five days later, President Taft observed in his annual address to Congress that “[o]ur national parks have become so extensive and involve so much detail of action in their control that it seems to me there ought to be legislation creating a bureau for their care and control.”<sup>28</sup> Taft expanded on that plea in a 1911 speech to the American Civic Association and in his 1912 address to Congress, where he “earnestly recommend[ed] the establishment of a bureau of national parks.”<sup>29</sup> The Department of the Interior convened national

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24. H.R. 11021, 56th Cong. (1st Sess. 1900). Lacey later authored the Lacey Act that prohibits the illegal trade in wildlife, the Antiquities Act, and other important environmental legislation. *See* ISE, *supra* note 1, at 147–53 (describing Lacey as “one of the towering figures in the conservation movement who pushed the legislation that protected Yellowstone’s wildlife, saved forest reserves from congressional repeal, and championed the Antiquities Act”).

25. Roosevelt’s otherwise memorable conservation achievements included only two new national parks. *See* DOUGLAS BRINKLEY, *THE WILDERNESS WARRIOR: THEODORE ROOSEVELT AND THE CRUSADE FOR AMERICA* 450–73 (2009) (describing the creation of Crater Lake and Wind Cave National Parks).

26. Ballinger is remembered today not for his advocacy of national parks, but rather for inciting President Taft to dismiss legendary Forest Service Chief Gifford Pinchot. *See* MICHAEL J. GERHARDT, *THE FORGOTTEN PRESIDENTS: THEIR UNTOLD CONSTITUTIONAL LEGACY* (2013) (briefly describing the dispute between Ballinger, Pinchot, and Taft); JAMES PENICK, JR., *PROGRESSIVE POLITICS AND CONSERVATION: THE BALLINGER-PINCHOT AFFAIR* ix–xiv (1968) (explaining the conflicting historical perspectives on who was at fault for the controversy).

27. REPORT OF THE SECRETARY OF THE INTERIOR FOR THE FISCAL YEAR ENDED JUNE 30, 1910 60 (1911) [hereinafter 1910 BALLINGER REPORT]. *See* RICHARD WEST SELLARS, *PRESERVING NATURE IN THE NATIONAL PARKS* 30 (1997) (crediting J. Horace McFarland, the head of the American Civic Association, with suggesting the idea of better national park supervision to Ballinger in light of the ongoing fight about damming Hetch Hetchy Valley in Yosemite National Park).

28. President William Howard Taft, Second Annual Message, The White House, Dec. 6, 1910, *in* 4 *THE COLLECTED WORKS OF WILLIAM HOWARD TAFT* 5, 55 (David H. Burton ed., 2002).

29. William Howard Taft, President, Message Concerning the Work of the Interior Department and Other Matters, Feb. 2, 1912, *in* 16 *COMP. MESSAGES & PAPERS PRES.* 7719, 7724 (1913) [hereinafter Taft Message]. *See* William Howard Taft, President, Address on a National Parks Bureau (Dec. 13, 1911), *in* THE

parks conferences in 1911, 1912, and 1915 to discuss the state of the national parks and their management.<sup>30</sup>

Stephen Mather became the pivotal figure in the establishment of the NPS and its early administration. He left his successful California mining business to work in the Department of the Interior and lead a “crusade for the parks” unlike anything Washington had seen before.<sup>31</sup> “All over the country, newspapers and magazines ran glowing feature stories about the parks—the result of Mather’s constant cultivation of publishers and writers.”<sup>32</sup> The National Geographic Society dedicated an entire issue of its magazine to national parks in April 1916, which was “[p]robably the single most important publication to influence members of Congress.”<sup>33</sup> Congress held hearings on proposed bills to

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AMERICAN CIVIC ASSOCIATION’S MOVEMENT FOR A BUREAU OF NATIONAL PARKS 3–5 (1912). The American Civic Association began to push for a national parks bureau at the beginning of 1910. See ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE 87 (4th ed. 2010) (describing “the idea for a bureau of national parks” as “[e]ntirely traceable to the American Civic Association”). The group’s president, J. Horace McFarland, was a leader of the City Beautiful movement, “the nation’s best-known horticulturalist,” the leader of a successful campaign to block hydroelectric development of Niagara Falls and the unsuccessful campaign to block the Hetch Hetchy dam, and a leader of the campaign for the NPS. See DAYTON DUNCAN & KEN BURNS, THE NATIONAL PARKS: AMERICA’S BEST IDEA 162 (2011) (describing McFarland); HANS HUTH, NATURE AND THE AMERICAN: THREE CENTURIES OF CHANGING ATTITUDES 184 (1990) (same).

30. See PROCEEDINGS OF THE NATIONAL PARK CONFERENCE HELD AT BERKELEY, CALIFORNIA, MAR. 11, 12 & 13 (1915) [hereinafter 1915 NATIONAL PARK CONFERENCE]; PROCEEDINGS OF THE NATIONAL PARK CONFERENCE HELD AT THE YOSEMITE NATIONAL PARK, OCT. 14, 15 & 16, 1912 (1913) [hereinafter 1912 NATIONAL PARK CONFERENCE]; 1911 NATIONAL PARK CONFERENCE, *supra* note 23. A final conference was held in 1917, the year after the Organic Act became law. See PROCEEDINGS OF THE NATIONAL PARK CONFERENCE HELD IN THE AUDITORIUM OF THE NEW NATIONAL MUSEUM, WASHINGTON, D.C., JAN. 2, 3, 4, 5 & 6, 1917 (1917) [hereinafter 1917 NATIONAL PARK CONFERENCE]. See generally SELLARS, *supra* note 27, at 32 (advising that “[e]specially because the Organic Act’s legislative history includes few official congressional hearings and reports, the conference proceedings provide important evidence of the intentions behind the act”).

31. DUNCAN & BURNS, *supra* note 29, at 161.

32. *Id.* See also HORACE M. ALBRIGHT & MARIAN ALBRIGHT SCHENCK, CREATING THE NATIONAL PARK SERVICE: THE MISSING YEARS 142 (1999) (recalling that “the friends and adherents of Stephen Mather and national parks let loose a torrent of publicity for the parks and for the bill”).

33. ALBRIGHT & SCHENCK, *supra* note 32, at 143. See Gilbert H. Grosvenor, *The Land of the Best: Tribute to the Scenic Grandeur and Unsurpassed Natural Resources of Our Own Country*, 29 NAT. GEO. 327 (1916); see also DUNCAN & BURNS, *supra* note 29, at 162 (noting that “Mather made sure that a copy” of the

establish a national parks agency in 1912, 1915, and 1916.<sup>34</sup> Congress finally approved the legislation in August 1916, and President Wilson signed the Organic Act without fanfare.<sup>35</sup>

The Organic Act remains the governing statute for the NPS. The General Authorities Act, enacted in 1970, affirmed that all of the units under the jurisdiction of the NPS “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.”<sup>36</sup> The Redwoods Act of 1978 added that “[t]he promotion and regulation of the various areas of the National Park System . . . shall be consistent with and founded in the purpose established by [the Organic Act], to the common benefit of all the people of the United States.”<sup>37</sup> The act further explained that

The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.<sup>38</sup>

The upshot of the General Authorities Act and the Redwoods Act is that all national park units should receive the same legal treatment under the Organic Act, rather than

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*National Geographic* article “was placed on every congressman’s desk”).

34. See 1916 NPS hearing, *supra* note 4; *National Park Service: Hearing Before the H. Public Lands Comm.*, 63d Cong. (1914) [hereinafter 1914 NPS hearing]; *Establishment of a National Park Service: Hearing Before the H. Public Lands Comm.*, 62d Cong. (1912) [hereinafter 1912 NPS hearing].

35. Horace Albright, who was serving as an assistant in the Department of the Interior and who later became the NPS’s second director, tells the story of the enactment of the Organic Act in ALBRIGHT & SCHENCK, *supra* note 32, at 142–48. According to Albright, President Wilson “was totally uninterested in conservation, national parks, or anything that pertained to the great outdoors.” *Id.* at 301. Wilson signed the Organic Act only when Albright included the enrolled bill in a package containing an army appropriations bill that Wilson was eager to sign. See *id.* at 146.

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

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

38. *Id.*

providing different rules for national parks, national seashores, national historic sites, and the many other categories of land managed by the NPS.<sup>39</sup> Other laws govern the private concessions that provide visitor services within the parks.<sup>40</sup> But none of the subsequent statutes affect the NPS's fundamental obligation "to conserve the scenery and the natural and historic objects and the wildlife 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."<sup>41</sup>

There are many easy cases under the Organic Act. If a management action promotes both conservation and enjoyment, then the law allows it. Efforts to preserve native wildlife that appeals to tourists satisfy both sides of the Organic Act's equation. Similarly, the law prohibits a management decision that would compromise the conservation of a park while interfering with the ability to enjoy the park. That is why, for example, mineral production and other extractive activities do not take place within national parks.<sup>42</sup> The challenge presented by the Organic Act is that promoting the enjoyment of the national parks may compromise the conservation of the parks, while promoting conservation may interfere with enjoyment.<sup>43</sup> The drafters of the Organic Act

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39. See *Nat'l Rifle Ass'n of Am., Inc. v. Potter*, 628 F. Supp. 903, 906 (D.D.C. 1986) (finding that the two laws demonstrate that "Congress conceived of the park system as an integrated whole," thereby refuting the NPS's earlier reliance on separate management categories for each type of unit); see also *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1451-52 (9th Cir. 1996) (explaining the demise of the NPS management categories). There are now 59 national parks and 346 other units in the national park system. See *National Park System*, NAT'L PARK SERV. (Jan. 15, 2015), <http://www.nps.gov/news/upload/CLASSLST405-updated01-15-2015.pdf>, archived at <http://perma.cc/QE5G-CRDD> (listing nineteen types of designations, such as national battlefields and national seashores, along with a catchall category of "other designations").

40. See generally George Cameron Coggins & Robert L. Glicksman, *Concessions Law and Policy in the National Park System*, 74 DENV. U. L. REV. 729 (1997) (providing an overview of concessions within the national parks).

41. 16 U.S.C. § 1 (2012).

42. See *Sierra Club v. Mainella*, 459 F. Supp. 2d 76 (D.D.C. 2006) (holding that the NPS failed to adequately explain its approval of oil and gas drilling near the Big Thicket National Preserve).

43. See, e.g., WILLIAM C. EVERHART, *THE NATIONAL PARK SERVICE* 80 (1972) (asserting that "[s]ince the day the Act was passed, two all-pervasive elements, 'preservation' and 'use,' have been involved in every decision, large or small, that has ever affected the parks"); Robert L. Fischman, *The Problem of Statutory Detail in National Park Establishment Legislation and Its Relationship To Pollution Control Law*, 74 DENV. U. L. REV. 779, 780 (1997) (observing that "the

were aware of that tension. Horace Albright, who was deeply involved in the enactment of the Organic Act and then served as the second director of the NPS, wrote years later that the proponents of the law were aware of the “inherent conflicts between use and preservation.”<sup>44</sup>

These conflicts persist even though we have had nearly one hundred years to determine what the Organic Act means. The Supreme Court has never interpreted the Organic Act’s purpose statement. The Court has, however, explained how to interpret statutes. Statutory interpretation begins with the statute’s text,<sup>45</sup> but the Organic Act does not define its key terms of “conserve,” “enjoyment,” and “impairment.”<sup>46</sup> Contemporary dictionaries fail to shed any light on the meaning of those terms,<sup>47</sup> nor does the legislative history of the Organic Act provide evidence that Congress sought to resolve the potential conflict between conserving and enjoying national parks.<sup>48</sup> Yale historian Robin Winks conducted the most painstaking investigation of the history of the law, even searching the personal papers of the members of the relevant congressional committees.<sup>49</sup> Winks described the law as “the

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Organic Act sets up an elegant tension between providing for enjoyment (often interpreted as recreation) and leaving units unimpaired (often interpreted as preservation”).

44. HORACE M. ALBRIGHT & ROBERT CAHN, *THE BIRTH OF THE NATIONAL PARK SERVICE: THE FOUNDING YEARS, 1913–3*, at 35 (1985).

45. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170 (2012) (noting that “traditional tools of interpretation . . . begin with the text of the” statute).

46. *See* 16 U.S.C. § 1.

47. *Cf. Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (relying on “dictionaries from the era” that a statute was enacted). The Century Dictionary & Cyclopedia was the preferred reference for Congress at the time that it debated the Organic Act. *See* Robin W. Winks, *The National Park Service Act of 1916: “A Contradictory Mandate”?*, 74 *DENV. U. L. REV.* 589, 589–90 (1997). According to that dictionary, “conservation” means “[t]he act of conserving, guarding, or keeping with care; preservation from loss, decay, injury, or violation; the keeping of a thing in a safe or entire state,” 2 *THE CENTURY DICTIONARY & CYCLOPEDIA* 1207 (1903); “enjoyment” means “[t]he possession, use, or occupancy of a thing with satisfaction or pleasure,” 3 *THE CENTURY DICTIONARY & CYCLOPEDIA* 1936 (1903), and “impair” means “[d]iminution; decrease; loss, injury, disgrace.” 6 *THE CENTURY DICTIONARY & CYCLOPEDIA* 3001 (1903).

48. The use of legislative history in statutory interpretation is controversial, but the Court routinely consults it, especially when the text of a statute is unclear. *See, e.g.*, *Hall v. United States* 132 S. Ct. 1882, 1892 (2012) (cautioning “against ‘allowing ambiguous legislative history to muddy clear statutory language’”) (quoting *Milner v. Dep’t of Navy*, 131 S. Ct. 1259, 1266 (2011)).

49. *See* Winks, *supra* note 47, *passim*.

result of some six years of discussion, intense lobbying by a variety of interest groups, and growing public concern.”<sup>50</sup> Yet it is surprising how few members of Congress were actively involved in the development of the Organic Act because they were busy with other legislative business.<sup>51</sup>

With only modest help from the statute’s text and legislative history, the statute’s purpose becomes especially important in ascertaining its meaning. That purpose emerges from the available records, which support a broad conception of the congressional understanding of the goals of national park management. Congress was most concerned about the enjoyment of the national parks, which required efforts to encourage people to visit them, and increased visitation in turn necessitated efforts to make the parks more accessible. These three steps—accessibility → visitation → enjoyment—animated much of the congressional and popular debate that resulted in the Organic Act.

Professor Winks, for example, identified the preservation of scenery and “making the scenery accessible for the ‘enjoyment’ of the public” as prominent themes during the debate over the proposed law.<sup>52</sup> Numerous members of Congress and other officials extolled the scenic value of national parks.<sup>53</sup> The historians who have studied the enactment of the Organic Act agree that there was much more attention paid to enjoying that scenery than conserving it.<sup>54</sup>

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50. *Id.* at 583.

51. For example, Representative Carl Hayden of the new state of Arizona “was fully engaged in speaking out on women’s suffrage, the European war, and prohibition; if he ever spoke in public on the Organic Act, there is no record of it in his papers.” *Id.* at 584 n.9.

52. *Id.* at 583.

53. See, e.g., 1912 NPS hearing, *supra* note 34, at 5 (letter from Secretary of the Agriculture James Wilson) (observing that “there are many areas containing natural wonders or features of great scenic interest which should be included within national parks”); *id.* at 13 (testimony of Secretary of the Interior Walter Fisher) (insisting that national parks ought to be managed “to help the scenic beauty of the parks”); *id.* at 23 (statement of Rep. Raker) (asserting that “you do not find any [area] on earth that contains the scenic beauty and grandeur and necessity for preservation as in those national parks”).

54. See Robert B. Keiter, *Revisiting the Organic Act: Can It Meet the Next Century’s Conservation Challenges?*, 28 *GEORGE WRIGHT F.* 240, 241 (2011) (concluding that “[t]o the extent that anyone at the various hearings spoke about the parks themselves, they did so primarily in terms of their recreational, scenic, and educational value”); SELLARS, *supra* note 27, at 28–29 (agreeing that “[p]roponents saw the parks as scenic recreation areas that should be vigorously developed for public use and enjoyment”); *id.* at 45 (reporting that “the founders

Ironically, it was Secretary of the Interior Ballinger who proclaimed that “[t]he setting apart and dedication of our national parks for the people is the only practical means of preserving their wild grandeur from human desecration,” even as Ballinger was accused of undermining Theodore Roosevelt’s conservation accomplishments.<sup>55</sup> Even more ironically, and even as it was crafting the NPS, Congress rejected the pleas of conservationists to preserve the scenic Hetch Hetchy Valley within Yosemite National Park, and instead Congress authorized a dam which continues to flood the valley to this day.<sup>56</sup>

The debate preceding the enactment of the Organic Act emphasized the need to attract more visitors to the national parks. One railroad official explained that the purpose of the 1911 national parks conference was “to consider in what manner the number of visitors to the various parks can be increased.”<sup>57</sup> The working assumption was that more visitors would result in more popular support for the national parks. Just before the predecessor of the Organic Act was proposed in Congress, the 26,000 people who visited Platt National Park in Oklahoma in 1908 were the most to see any national park.<sup>58</sup> Another 19,542 people visited Yellowstone, and no other national park attracted more than 10,000 visitors.<sup>59</sup> Those numbers jumped as Congress debated the Organic Act. Hot Springs Reservation in Arkansas was the most visited national park in 1915 with 115,000 visitors.<sup>60</sup> Yellowstone was next

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gave no substantive consideration to an exacting biological preservation”). *See generally* John Copeland Nagle, Scenic Law (draft manuscript on file with author) (reviewing the scenic value of national parks).

55. 1910 BALLINGER REPORT, *supra* note 27, at 56.

56. *See* Winks, *supra* note 47, at 592 (noting that the December 1913 congressional and presidential approval of a dam to flood Hetch Hetchy “infring[ed] in the most basic and dramatic way . . . and most clearly contradict[ed] any rhetoric to that point about scenic preservation and recreation being the highest values”). In 2012, San Francisco voters rejected a ballot initiative that would have begun the process of restoring Hetch Hetchy. *See San Francisco Hetch Hetchy Reservoir Initiative, Proposition F*, BALLOTEDIA, [http://ballotpedia.org/San\\_Francisco\\_Hetch\\_Hetchy\\_Reservoir\\_Initiative,\\_Proposition\\_F\\_\(November\\_2012\)](http://ballotpedia.org/San_Francisco_Hetch_Hetchy_Reservoir_Initiative,_Proposition_F_(November_2012)) (last visited Nov. 22, 2014), *archived at* <http://perma.cc/ELW3-E9C7>.

57. 1911 NATIONAL PARK CONFERENCE, *supra* note 23, at 6 (statement of Thomas Cooper, Assistant to the President, Northern Pacific Railway).

58. *See* 1916 NPS hearing, *supra* note 4, at 40. On the rise and fall of Pratt National Park, *see* MUNCRIEF, *supra* note 19.

59. *See* 1916 NPS hearing, *supra* note 4, at 40.

60. *See id.* There were no statistics for Hot Springs in 1908.



with 51,895 visitors, followed by Mount Rainier, Yosemite, and Rocky Mountain with just over 30,000 each.<sup>61</sup> These numbers were better, but the proponents of the national parks wanted more.

The framers of the Organic Act saw the lack of access to the national parks as the greatest impediment to more visitation. “These parks belonging to the people should be made so accessible that all who wish to do so may behold their beauties and wonders,” proclaimed one railroad official.<sup>62</sup> President Taft gave a speech in which he advised that “[i]f we are going to have national parks, we ought to make them available to the people, and we ought to build the roads, as expensive as they may be, in order that those parks may become what they are intended to be when Congress creates them.”<sup>63</sup> In his original report recommending a national park agency, Secretary of the Interior Ballinger reported that “the road and trail problems for public travel and convenience to enable tourists to obtain the benefits of the scenic beauties are primary.”<sup>64</sup> Stephen Mather noted the increasing number of motorists who were visiting national parks.<sup>65</sup> Another

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61. *See id.*

62. 1911 NATIONAL PARK CONFERENCE, *supra* note 23, at 9 (statement of O.W. Lehmer, Superintendent & Traffic Manager, Yosemite Valley Railroad). *See also* 1912 NATIONAL PARK CONFERENCE, *supra* note 30, at 48 (statement of J.J. Byrne, Assistant Passenger Traffic Manager, Santa Fe Railway) (asserting that “one of the great drawbacks that has held the Yosemite from attaining the prominence in the world of travel to which it is entitled is the difficulty of getting in and out”); *id.* at 130 (statement of Col. W.W. Forsyth, Acting Superintendent, Yosemite National Park) (contending that “when the Government sets aside a park for that purpose, it takes on itself the obligation of making that park accessible for all the people”); 1911 NATIONAL PARK CONFERENCE, *supra* note 23, at 13 (statement of A.G. Wells, General Manager Coast Lines, Atchison, Topeka & Santa Fe Railway System) (stating that “[t]hese great wonders of nature, wisely set aside by the Government for the benefit of the people, would be altogether inaccessible but for transportation”).

63. *See* 1914 NPS hearing, *supra* note 34, at 6 (excerpting President Taft’s speech). *See also* Taft Message, *supra* note 29, at 7724 (stating that the national park agency should make “recommendations as to the best method of improving their accessibility and usefulness”). At 300 pounds, Taft confronted special obstacles to enjoying the national parks. *See* 1914 NPS hearing, *supra* note 34, at 6 (President Taft recalling that he could not journey down Bright Angel Trail into the Grand Canyon “because they were afraid the mules could not carry me,” which convinced Taft that “something needs to be done in respect to those parks if we are all to enjoy them”).

64. 1910 BALLINGER REPORT, *supra* note 27, at 57.

65. *See* 1916 NPS hearing, *supra* note 4, at 23 (testimony of Stephen Mather) (remarking that “[t]he motorist magazines have been full of accounts of the parks,

Department of the Interior official testified that “the largest part of the money” for Yosemite National Park went “into the maintenance and construction of roads.”<sup>66</sup> Yellowstone became one of the last national parks to open to automobiles in 1915, a development that was “much appreciated by the traveling public.”<sup>67</sup> By contrast, a railroad official noted that “[n]obody wants to travel by wagon any more. It takes too long.”<sup>68</sup>

Accommodations within the national parks were another concern. Walter Fisher, Ballinger’s successor as Secretary of the Interior, testified that “the people who go to the Yosemite Park will come away with a feeling of disappointment and resentment against the National Government, because they have not been properly taken care of” because of the absence of hotel accommodations.<sup>69</sup> Earlier, Ballinger called for “roads, trails, telegraph and telephone lines, sewer and water systems, hotel accommodations, transportation, and other conveniences.”<sup>70</sup> The popular supporters of the proposed Organic Act echoed these calls. The *Outlook* editorialized that the proposed NPS “would act as a means of educating the American people in the use of and enjoyment of their own vast property.”<sup>71</sup> Another journal applauded that the existing laws guaranteed the preservation of national parks “from abuse and reckless exploitation,” but it worried that “the provisions for their enjoyment by the people are inadequate and

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and they have brought the parks nearer the motorists”). *See also* Winks, *supra* note 47, at 583 (observing that “[a]utomobilists wished to see roads to and within the parks upgraded so that visitors could tour the parks in greater comfort”).

66. 1914 NPS hearing, *supra* note 34, at 12 (statement of Adolph C. Miller, Assistant to the Secretary of the Interior).

67. 1916 NPS hearing, *supra* note 4, at 42. *See also* ALBRIGHT & SCHENCK, *supra* note 32, at 127 (recalling that national park supporters “recognized that the introduction of automobiles would vastly increase visitation to the parks and their use. However, we also knew the Congress would count tourist visitation to decide how much money our bureau would get to operate the park system”).

68. 1916 NPS hearing, *supra* note 4, at 68 (testimony of P.S. Eustis, General Passenger Agent of the Burlington Railroad).

69. 1912 NPS hearing, *supra* note 34, at 7 (statement of Secretary of the Interior Walter Lowrie Fisher). *See also* 1911 NATIONAL PARK CONFERENCE, *supra* note 23, at 131 (statement of E.B. Linnen, Inspector, Department of the Interior) (stating that “[i]t is especially desirable that suitable accommodations be provided in the parks for the many visitors where they may be lodged and fed”).

70. 1910 BALLINGER REPORT, *supra* note 27, at 59. *See also* ALBRIGHT & SCHENCK, *supra* note 32, at 127 (noting the need for “accommodations for the people of all incomes in a wide price range”).

71. *Wanted, A National Park Service*, *OUTLOOK*, Mar. 1, 1916, at 491.

ineffective.”<sup>72</sup>

The legislative history of the Organic Act is also notable for what it does not say. There is no indication that Congress sought to alter the purpose for which national parks had already been created. Rather, the goal of the Organic Act was to create an agency—the NPS—that could better manage both the existing and future parks in a coordinated fashion consistent with those existing purposes.<sup>73</sup> The meaning of the Organic Act’s statement of the purpose of national parks may thus be gleaned from the acts establishing national parks immediately before and after Congress passed the Organic Act. Indeed, NPS historian Richard Sellars described the process of approving the Organic Act as “codifying tradition.”<sup>74</sup> The statutes establishing national parks before the Organic Act usually referred to the purpose of the parks as “the benefit and enjoyment of the people,” and they directed the Secretary of the Interior to preserve the scenery, wildlife, and other features of the parks in their natural conditions.<sup>75</sup>

The establishment acts enacted after the Organic Act followed a similar pattern. Six months after Congress approved the Organic Act, it established Mount McKinley National Park “for the benefit and enjoyment of the people,” and it directed the promulgation of regulations for

the care, protection, management, and improvement of the same, the said regulations being primarily aimed at the freest public use of the said park for recreation purposes by the public and for the preservation of animals, birds, and fish and for the preservation of the natural curiosities and scenic beauties thereof.<sup>76</sup>

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72. *A National Park Service*, INDEPENDENT, May 29, 1916, at 321. The journal supported the proposed legislation because it would “make possible the increasing use by the people of these great national playgrounds.” *Id.*

73. See 1912 NPS hearing, *supra* note 34, at 3 (reprinting the bill “[t]o establish a National Park Service, and for other purposes”).

74. SELLARS, *supra* note 27, at 28.

75. See *supra* text accompanying notes 17–19. See also ALBRIGHT & SCHENCK, *supra* note 32, at 127 (recalling that “[e]very previous act demanded that the parks be preserved in their natural state. Their natural state was wilderness.”); SELLARS, *supra* note 27, at 26–27 (noting that “the history of the early national park era suggests that a practical interest in recreational tourism in America’s grand scenic areas triggered the park movement and perpetuated it”).

76. Act of Feb. 26, 1917, ch. 121, 39 Stat. 938 (1917) (establishing Mount

Congress repeated the “benefit and enjoyment” command three times in 1919 when it created the Grand Canyon, Lafayette (now Acadia), and Zion National Parks.<sup>77</sup> In each of those instances, and thereafter, Congress referred to the management direction contained in the Organic Act rather than separately stating the specific objects to be preserved in each national park.<sup>78</sup>

### *B. Interpreting the Organic Act*

Most readers of the Organic Act read this history and reach one of two different conclusions. For some, the Organic Act prioritizes conservation over enjoyment. That is the conclusion of the current iteration of the NPS management policies, which states that “when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant.”<sup>79</sup> In one sense, that approach is self-evident. It would be impossible to enjoy national parks if we did not conserve them. Or perhaps we could enjoy them now without conserving them, but that would contradict the statutory command that the parks be conserved “for the enjoyment of future generations.”<sup>80</sup>

But a strict understanding of conservation would prohibit much of the enjoyment that the national parks were designed to provide. Conservation was not an end in itself. The Organic Act, in other words, did not view national parks in the same way that the Wilderness Act later viewed wilderness areas as places “where the earth and its community of life are

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McKinley National Park).

77. See Act of Feb. 28, 1919, ch. 45, 40 Stat. 1178 (1919) (establishing Lafayette National Park); Act of Feb. 26, 1919, ch. 44, 40 Stat. 1175 (1919) (establishing Grand Canyon National Park); Act of Nov. 19, 1919, 41 Stat. 356 (1919) (establishing Zion National Park).

78. See, e.g., Great Sand Dunes National Park and Preserve Act of 2000, Pub. L. No. 106-530, § 7(a)(2)(A), 114 Stat. 2527, 2530 (providing that the national park shall be administered in accordance with the Organic Act); Act of May 30, 1934, § 3, 48 Stat. 816 (providing that Everglades National Park shall be managed pursuant to the Organic Act).

79. 2006 NPS MANAGEMENT POLICIES 2006, *supra* note 8, at 11.

80. 16 U.S.C. § 1 (2012). The Organic Act was the first federal statute to refer to future generations in the context of environmental conservation. Obligations to future generations are now a prominent feature of environmental law. See, e.g., National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 101(a), 83 Stat. 852, 852 (1970) (stating a national environmental policy for “present and future generations of Americans”).

untrammelled by man, where man himself is a visitor who does not remain.”<sup>81</sup> The purpose of conserving the parks was so that they could be enjoyed. As Professor Winks explained,

‘Enjoyment’ reasonably required access, and at the time roads, trails, hotels, campgrounds, and administrative facilities did not seem unduly invasive. The act cannot have meant that ‘unimpaired’ was to be taken in its strictest sense, particularly since the act included specific approval for certain inevitably compromising actions: leasing for tourist accommodation was the most obvious example.<sup>82</sup>

The framers of the Organic Act were intent on attracting more visitors to national parks, which runs counter to the notion that they viewed conservation as more important than enjoyment. Frederick Law Olmsted, Jr., the author of the Organic Act’s purpose statement, had “a deep-seated, constant and compelling interest in and sympathy with, the people using the parks.”<sup>83</sup> He wrote in 1911 of

the importance of some kind of legislative definition in broad but unmistakable terms of the primary purpose for which the parks and monuments are set apart, accompanied by a prohibition of any use which is directly or indirectly in conflict with that primary purpose without, however, interfering with the serving of other purposes than the primary purpose in so far as they do not in any degree conflict with the most perfect service of the latter.<sup>84</sup>

That is not to say that the purpose of the Organic Act was to favor enjoyment over conservation, but it rebuts the claim that conservation always trumps enjoyment.

The 2006 NPS management policies assert that courts

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81. Wilderness Act, Pub. L. No. 88-577, § 2(c), 78 Stat. 890, 891 (1964).

82. Winks, *supra* note 47, at 597. *See also* Coggins & Glicksman, *supra* note 40, at 761 (contending that “[i]t is far too late in history to argue that national parks should be left totally in a state of nature, without any facilities or amenities for human visitors. National parks were established for present enjoyment as well as preservation, and most Americans could not use them without some support services, whether guides or buses or roads or food.”).

83. ETHAN CARR, *MISSION 66: MODERNISM AND THE NATIONAL PARK DILEMMA* 14 (2007).

84. Letter from Frederick Law Olmsted to J. Horace McFarland, Sept. 13, 1911 (excerpted in 1911 NATIONAL PARK CONFERENCE, *supra* note 23, at 19).

have consistently interpreted the Organic Act to prioritize conservation over enjoyment.<sup>85</sup> Not so. A lengthy dispute involving the use of off-road vehicles (ORVs) in an ecologically sensitive area of Canyonlands National Park illustrates the dominant judicial approach to the Organic Act.<sup>86</sup> The NPS developed a backcountry management plan that allowed ORVs to travel along a road that crossed Salt Creek, the only year-round freshwater creek in the park, en route to a popular and remote arch.<sup>87</sup> The Southern Utah Wilderness Alliance (SUWA) challenged the plan as violating the Organic Act.<sup>88</sup> The district court agreed. It explained that “the Park Service’s mandate is to permit forms of enjoyment and access that are *consistent* with preservation and *inconsistent* with significant, permanent impairment.”<sup>89</sup> Applying that understanding, the court held that allowing ORVs to use the road to reach the arch “is inconsistent with this clear legislative directive.”<sup>90</sup> The court noted that the NPS declined to close the road to vehicle access “solely because of the popularity of four-wheel-drive travel.”<sup>91</sup> That was not a sufficient reason, said the court, because “‘visitor enjoyment’ as used in the statute refers to visitor enjoyment of park scenery, wildlife, and natural and historic objects that are to be preserved.”<sup>92</sup> The court further explained that “[a]s used in this sense, visitor enjoyment does not refer to visitor enjoyment of outdoor recreational activities.”<sup>93</sup> The NPS had argued that the Organic Act allowed “a balancing between competing mandates of resource conservation and visitor enjoyment.”<sup>94</sup> Instead, the court

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85. 2006 NPS MANAGEMENT POLICIES, *supra* note 8, at 11.

86. *S. Utah Wilderness Alliance v. Dabney*, 7 F. Supp. 2d 1205 (D. Utah 1998), *rev’d*, 222 F.3d 819 (10th Cir. 2000).

87. *See S. Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 822–24 (10th Cir. 2000) (summarizing the dispute).

88. *See id.* at 821–23.

89. *Dabney*, 7 F. Supp. 2d at 1211.

90. *Id.*

91. *Id.* at 1212.

92. *Id.*

93. *Id.*

94. *Id.* at 1211. The suggestion that the Organic Act requires a balance between conservation and enjoyment may be a third way of interpreting the Organic Act in addition to the two described in the text above. There is no evidence in the text or history of the law, though, which supports the claim that a balance is required. Rather, as described below, the best view is that the NPS is afforded the discretion to pursue both goals as it deems best. Balancing is permitted, but it is not required. *See S. Utah Wilderness Alliance v. Nat’l Park*

concluded that the unique ecological features of the area and “the availability of less-invasive forms of access” meant that ORV use was contrary to “the Organic Act’s overarching goal of resource protection.”<sup>95</sup> That is the clearest judicial statement favoring the view that the Organic Act prioritizes conservation over enjoyment.<sup>96</sup>

The Tenth Circuit, however, held that the district court improperly interpreted the Organic Act. “Although the Act and the Canyonlands enabling legislation place an overarching concern on preservation of resources,” the court observed, “we read the Act as permitting the NPS to balance the sometimes conflicting policies of resource conservation and visitor enjoyment in determining what activities should be permitted or prohibited.”<sup>97</sup> The proper question, explained the court, “is

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Serv., 387 F. Supp. 2d 1178, 1190 (D. Utah 2005) (holding that “[t]he express language of the Organic Act does not . . . mandate that the NPS equally balance preservation with public use in making its management decision”).

95. *Dabney*, 7 F. Supp. 2d at 1212.

96. See Keiter, *supra* note 54, at 247 (citing the district court’s decision); Denis P. Galvin, *The Organic Act—A User’s Guide: Further Thoughts on Winks’ “A Contradictory Mandate?”*, 24 GEORGE WRIGHT F. 22, 25 (2007). Keiter also cites *Sierra Club v. Dep’t of Interior*, 398 F. Supp. 284, 294 (N.D. Cal. 1975), which relied in part on the Organic Act to require the Department of the Interior “to afford as full protection as is reasonably possible to the timber, soil and streams within the boundaries of the Redwood National Park from adverse consequences of timbering and land use practices on lands located in the periphery of the Park and on watershed tributaries to streams which flow into the Park . . . .” See Keiter, *supra* note 54, at 247 n.35. But the district court did not interpret the requirements of the Organic Act or explain how they applied to that case. Instead, the court relied on the Redwood National Park Act, 16 U.S.C. § 79a, which the court described as “a very unique statute—a statute which did more than establish a national park; it also expressly vested the Secretary with authority to take certain specifically stated steps designed to protect the Park from damage caused by logging operations on the surrounding privately owned lands.” *Sierra Club*, 398 F. Supp. at 286. Likewise, none of the other cases which have been cited as demonstrating the Organic Act’s preference for conservation over enjoyment actually held that a NPS decision violated the Act. See *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 105, 108 n.12 (D.D.C. 2003) (stating that the “NPS is bound by a conservation mandate, and that mandate trumps all other considerations,” but not actually reaching the Organic Act claim raised in the case); *Nat’l Rifle Ass’n of Am., Inc. v. Potter*, 628 F. Supp. 903, 909–10, 912 (D.D.C. 1986) (opining that “[i]n the Organic Act Congress speaks of but a single purpose, namely, conservation,” but also acknowledging that the statutory language may be “inconclusive” and noting that Congress gave the NPS “responsibility for achieving the sometimes conflicting goals of preserving the country’s natural resources for future generations while ensuring their enjoyment by current users”).

97. *S. Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 826 (10th Cir. 2000).

whether the resulting action leaves the resources ‘unimpaired for the enjoyment of future generations.’”<sup>98</sup> The court further noted both that it was unclear whether the use of the road by ORVs would actually result in the impairment of the park, in part because “impairment” is not defined in the Organic Act and the phrase “unimpaired for the enjoyment of future generations” is inherently ambiguous.<sup>99</sup> The court reached that conclusion without deferring to the NPS, which had changed its interpretation of the Organic Act during the course of the litigation so that there was “no current interpretation in front of us that has been formally adopted by the agency.”<sup>100</sup> The Tenth Circuit thus remanded the case for the NPS to apply the correct impairment test.<sup>101</sup>

Instead, on remand, the NPS adopted a different plan that closed the road to ORVs, and this time it was the ORV users who saw a violation of the Organic Act. According to the ORV users, the closure of the road violated the Organic Act “because it deprives members of the public the ability to use and enjoy significant portions of Salt Creek Canyon.”<sup>102</sup> The NPS, by contrast, relied on its newly approved 2001 management guidelines, “which interpret[ed] the Organic Act as placing an overarching concern on preservation of resources where there is a conflict between conserving resources and providing for the enjoyment of them.”<sup>103</sup> The district court got the Tenth Circuit’s message. This time the court opined that “while the Act clearly directs the NPS to regulate parks pursuant to broad objectives, the agency is left with the task of further defining and applying” the Act’s impairment standard.<sup>104</sup> The court then deferred to the NPS’s “permissible” interpretation of the law.<sup>105</sup>

That is the second, alternative way in which courts and commentators have read the Organic Act: instead of prioritizing conservation over enjoyment, the Act is ambiguous so the NPS has broad management discretion. Numerous

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98. *Id.* at 827.

99. *Id.*

100. *Id.* at 829.

101. *See id.* at 830.

102. *S. Utah Wilderness Alliance v. Nat’l Park Serv.*, 387 F. Supp. 2d 1178, 1181 (D. Utah 2005).

103. *Id.*

104. *Id.* at 1189.

105. *Id.* at 1192.



observers have concluded that the Organic Act is hopelessly ambiguous as a source of law governing conflicts between enjoyment and conservation.<sup>106</sup> That ambiguity means that the NPS possesses the discretion to decide between enjoyment and conservation in particular instances. Applying the familiar *Chevron* test, courts routinely defer to the NPS's interpretation of the ambiguous commands of the Organic Act in cases pitting conservation against enjoyment.<sup>107</sup> The general rule of judicial review is that "because the Organic Act is silent as to the specifics of park management, the [NPS] has especially broad discretion on how to implement [its] statutory mandate."<sup>108</sup>

There is also evidence that Congress purposefully delegated broad management authority to the NPS, rather than simply presuming such discretion as the Court recognized much later in *Chevron*. Federico Cheever contends that both Stephen Mather, the founder of the NPS, and Gifford Pinchot,

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106. See, e.g., EVERHART, *supra* note 43, at 80 (advising that "[t]he instruction to preserve the parks unimpaired, while at the same time providing needed facilities for public use, seems on first encounter to be ambiguous, perhaps even meaningless, as a guideline"); Dennis J. Herman, Note, *Loving Them to Death: Legal Controls on the Type and Scale of Development in the National Parks*, 11 STAN. ENVTL. L.J. 3, 17 (1992) (noting that "many scholars have argued that the inherent ambiguity of the statutes makes them of little value in resolving conflicts between preservation and use"); Gerald H. Suniville, *The National Park Service Organic Act: An Exercise in Conflict*, 6 J. CONTEMP. L. 75 (1979) (concluding that "Congress ha[d] never really confronted or determined these difficult value choices" when it enacted the Organic Act); Federico Cheever, *The United States Forest Service and National Park Service: Paradoxical Mandates, Powerful Founders, and the Rise and Fall of Agency Discretion*, 74 DENV. U. L. REV. 625, 639 (1997) (contending that "[a]lmost anything can be justified between the two poles of 'use' and 'preservation'" because those terms "do not significantly constrain agency action").

107. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

108. *Davis v. Latschar*, 202 F.3d 359, 365 (D.C. Cir. 2000). See also, e.g., *River Runners for Wilderness v. Martin*, 593 F.3d 1064 (9th Cir. 2010) (applying the deferential "arbitrary and capricious" standard to uphold the NPS's decision to allow the continued use of motorized rafts in the Grand Canyon National Park); *City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 2004) (rejecting an Organic Act claim against the NPS's management of Fort Baker within the Golden Gate National Recreation Area); *Isle Royale Boaters Ass'n v. Norton*, 330 F.3d 777, 782 (6th Cir. 2003) (acknowledging the NPS's "broad discretion" under the Organic Act). See generally Coggins & Glicksman, *supra* note 40, at 741 (finding that "Park Service discretion to limit recreational activities and facilities by commercial enterprises has been upheld in every litigated instance located"); Winks, *supra* note 47, at 616 (concluding that "[w]ith a few exceptions courts overwhelmingly defer to the discretion of the NPS to regulate within the parks in carrying out the mandates of the legislation").

the early head of the Forest Service, sought and received the congressional approval to act as they thought best:

Men like Mather and Pinchot sought support from Congress, but not direction. The legislative mandates they lobbied for and, in large part, achieved, were so broad they were almost meaningless. They received the authority to operate with the blessing of Congress, but without congressional supervision. Mather and Pinchot received *carte blanche*. Neither man was a lawyer and therefore both lacked a lawyer's customary veneration of legislative text and history. Both men were instrumentalists when it came to Congress, using the assets at their disposal to extract from Congress the authority they needed to further their visions for the public land.<sup>109</sup>

Cheever's thesis draws support from the concerns of Secretary of the Interior Walter Fisher, who worried in 1911 that the proposed Organic Act would impose "too great restriction upon administrative discretion" and would "allow any one who claimed that any particular action would be detrimental to the value of the parks might undertake to restrain the bureau from the proposed action."<sup>110</sup> Fisher acquiesced to the proposed draft of the law only after he was assured that his fears about undue constraint on the NPS were misplaced. On this account, the Organic Act simply blesses the NPS's efforts to achieve both conservation and enjoyment.

The legal constraint on the NPS arises from the impairment provision, not the statutory purposes of conservation and enjoyment.<sup>111</sup> The Organic Act requires the NPS to manage national parks in a manner that "will leave them unimpaired for the enjoyment of future generations."<sup>112</sup> The NPS has interpreted the impairment provision to prohibit

an impact that, in the professional judgment of the responsible NPS manager, would harm the integrity of park

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109. Cheever, *supra* note 106, at 638.

110. See SELLARS, *supra* note 27, at 39–40.

111. See *id.* at 38 (noting that "'unimpaired' set the 1916 mandate's only actual standard" and "became the principal criterion against which preservation and use of national parks have ever since been judged").

112. 16 U.S.C. § 1 (2012).

resources or values, including the opportunities that otherwise would be present for the enjoyment of those resources or values. Whether an impact meets this definition depends on the particular resources and values that would be affected; the severity, duration, and timing of the impact; the direct and indirect effects of the impact; and the cumulative effects of the impact in question and other impacts . . . .<sup>113</sup>

The NPS tolerates some adverse impacts to park resources so long as they do not “harm the integrity of park resources or values,” and mitigation efforts can be employed to ensure that adverse impacts do not rise to that standard or are otherwise outweighed by the beneficial impacts of a project. These conclusions are contained in the “determination of no impairment” that the NPS issues whenever it approves a new project for a park.

Several recent projects illustrate the NPS’s application of the impairment standard. For example, the NPS determined that its plan to modify the tourist facilities at Yosemite National Park’s famed Mariposa Grove of Giant Sequoias would not result in impairment “because there will be beneficial effects on the giant sequoia ecosystem due to the removal of infrastructure within the Grove and active restoration efforts, and no permanent adverse impacts on vegetation outside of the Grove.”<sup>114</sup> Likewise, efforts to restore native ecosystems by removing pigs, goats, and other non-native animals from Hawai’i Volcanoes National Park will not result in impairment because “adverse impacts on vegetation will be relatively limited, given appropriate mitigation, and

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113. 2006 NPS MANAGEMENT POLICIES, *supra* note 8, at 11. The policies further explain: “An impact would be more likely to constitute impairment to the extent that it affects a resource or value whose conservation is necessary to fulfill specific purposes identified in the establishing legislation or proclamation of the park, or key to the natural or cultural integrity of the park or to opportunities for enjoyment of the park, or identified in the park’s general management plan or other relevant NPS planning documents as being of significance. An impact would be less likely to constitute an impairment if it is an unavoidable result of an action necessary to preserve or restore the integrity of park resources or values and it cannot be further mitigated.” *Id.*

114. NAT’L PARK SERV., DETERMINATION OF NO IMPAIRMENT: RESTORATION PLAN FOR MARIPOSA GROVE OF GIANT SEQUOIAS, *in* RECORD OF DECISION, RESTORATION OF THE MARIPOSA GROVE OF GIANT SEQUOIAS, FINAL ENVIRONMENTAL IMPACT STATEMENT 3 (2013).

will be offset by the expected recovery of vegetation associated with the removal of non-native ungulates.”<sup>115</sup> Nor did the reconfiguration of roads and facilities in northern Washington’s Lake Chelan National Recreation Area in response to flooding and erosion result in impairment even though it would have significant impact on soils, a possibly moderate adverse effect on 7.5 acres of habitat suitable for northern spotted owls, and “some long-term adverse effect on scenic resources” along a rerouted section of road.<sup>116</sup> Similarly, the NPS concluded that its oil and gas management plan for the Big Thicket National Preserve adjacent to the Everglades would not result in impairment because the plan was “intended to protect the Preserve[s] natural and cultural resources, and provide for high-quality visitor experiences, while providing holders of oil and gas rights reasonable access for exploration and development.”<sup>117</sup> Moreover, the plan “would have negligible to moderate adverse impacts on” the park’s resources, and “localized, negligible, and short-term” effects on visitor experiences.<sup>118</sup> The no-impairment decision also assumed “the successful implementation of the protective measures included in the [plan].”<sup>119</sup>

The courts have afforded substantial deference to NPS impairment decisions. In one recent case, the NPS found that approving an expanded electric transmission line across an existing right-of-way in the Delaware River Gap National Recreation Area, the Middle Delaware National Scenic and Recreational River, and the Appalachian National Scenic Trail would not impair the area’s scenic or other values.<sup>120</sup> The National Parks Conservation Association disagreed, insisting that the transmission line would “permanently scar the landscape and degrade the visitor experience in some of the

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115. NAT’L PARK SERV., HAWAII VOLCANOES NATIONAL PARK, FINAL PLAN/ENVIRONMENTAL IMPACT STATEMENT FOR PROTECTING AND RESTORING NATIVE ECOSYSTEMS BY MANAGING NON-NATIVE UNGULATES A-3 (2013).

116. NAT’L PARK SERV., RECORD OF DECISION, STEHEKIN RIVER CORRIDOR IMPLEMENTATION PLAN, LAKE CHELAN NATIONAL RECREATION AREA, NORTH CASCADES NATIONAL PARK SERVICE COMPLEX 17, 20, 23 (2013).

117. NAT’L PARK SERV., RECORD OF DECISION, OIL AND GAS MANAGEMENT PLAN ENVIRONMENTAL IMPACT STATEMENT, BIG THICKET NATIONAL PRESERVE, TEXAS 10 (2006).

118. *Id.*

119. *Id.*

120. *See Nat’l Parks Conservation Ass’n v. Jewell*, 965 F. Supp. 2d 67 (D.D.C. 2013).

most visited national parks in the country.”<sup>121</sup> But the court employed a very deferential standard of review that the NPS easily satisfied. It emphasized “that [b]ecause the Organic Act is silent as to the specifics of park management, the Secretary has especially broad discretion on how to implement his statutory mandate.”<sup>122</sup> The court agreed with the substantive understanding of the impairment standard articulated in the NPS’s policy guidelines, and stressed that the agency had explained its rationale.<sup>123</sup> The court held that the NPS’s impairment decision satisfied that arbitrary and capricious standard of judicial review.

The Organic Act as correctly interpreted by the courts thus affords the NPS substantial discretion to manage national parks as it deems best, so the real question is what the NPS deems best. The NPS has alternately emphasized enjoyment and conservation during its ninety-seven-year history. Two years after Congress enacted the Organic Act, Secretary of the Interior Franklin Lane advised NPS Director Stephen Mather that national park management should conform to

three broad principles: First that the national parks must be maintained in absolutely unimpaired form for the use of future generations as well as those of our own time; second, that they are set apart for the use, observation, health, and pleasure of the people; and third, that the national interest must dictate all decisions affecting public or private enterprise in the parks.<sup>124</sup>

Conservation was easy when so many parks were so

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121. Press Release, Nat’l Parks Conservation Ass’n, Conservation Grps. Challenge Approval of Power Line Planned to Cut Through Treasured Nat’l Parks (Oct. 15, 2012), *available at* <http://www.npca.org/news/media-center/press-releases/2012/conservation-groups-challenge-1.html>, *archived at* <http://perma.cc/47FB-E982>.

122. *Jewell*, 965 F. Supp. 2d at 84 (quoting *Davis v. Latschar*, 202 F.3d 359, 365 (D.C. Cir. 2000)).

123. *See id.* at 84–85.

124. Secretary Lane’s Letter on National Park Management, May 13, 1918, *reprinted in* AMERICA’S NATIONAL PARK SYSTEM, *supra* note 4, at 48. Lane’s letter also stated that “[e]very opportunity should be afforded the public, wherever possible, to enjoy the national parks in the manner that best satisfies the individual taste. Automobiles and motorcycles will be permitted in all of the national parks; in fact, the parks will be kept accessible by any means practicable.” *Id.* at 49–50. In fact, Horace Albright later claimed that he wrote the letter on behalf of Lane. *See also* ALBRIGHT & SCHENCK, *supra* note 32, at 274–76.

inaccessible to potential visitors. The early years of the NPS featured extensive efforts to build railroads and roads that would enable tourists to visit the national parks.<sup>125</sup> The success of those efforts produced a predictable backlash from those who feared that the national parks were being “loved to death” by the presence of too many visitors.<sup>126</sup> The 1960s introduced an emphasis on the ecological value of the national parks.<sup>127</sup> Most recently, debates over NPS policy provoked multiple congressional hearings and popular debate over the revised management policies that were finalized in 2006.<sup>128</sup>

Conservation advocates look at this history and see a problematic tendency to favor enjoyment over conservation. Such concerns date back to the 1940s, when the National Parks Conservation Association proposed two separate types of parks: a “National Primeval Park System” for “the older, larger parks,” and a different category for newer, recreational areas.<sup>129</sup> Most scholarship favors a more explicit preference for conservation over enjoyment.<sup>130</sup> As a result, some have called on Congress to codify a preference for preservation that would empower courts to engage in more active judicial review of park management decisions that prioritize enjoyment over preservation.<sup>131</sup> But legislation to amend the Organic Act

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125. See ROBERT B. KEITER, *TO CONSERVE UNIMPAIRED: THE EVOLUTION OF THE NATIONAL PARK IDEA* 41–63 (2013).

126. See RUNTE, *supra* note 29, at 155 (noting complaints about “[p]arks overrun like convention cities, ‘industrial tourism,’ and the ecological effects of ‘providing opportunities for mass recreation’”); ISE, *supra* note 1, at 7 (referring to “swarming hordes” of visitors). See generally CONRAD L. WIRTH, *PARKS, POLITICS, AND THE PEOPLE* 1 (1980) (summarizing the evolution of NPS policy regarding enjoyment and conservation of the parks).

127. A.S. LEOPOLD ET AL., *WILDLIFE MANAGEMENT IN THE NATIONAL PARKS: THE LEOPOLD REPORT* (1963), available at <http://www.craterlakeinstitute.com/online-library/leopold-report/complete.htm>, archived at <http://perma.cc/AQ5Q-F37P>.

128. See, e.g., *National Park Service’s Draft Management Policies Hearing*, *supra* note 7.

129. See NAT’L PARKS ASS’N, *NATIONAL PRIMEVAL PARK STANDARDS: A DECLARATION OF POLICY* (1945), reprinted in *AMERICA’S NATIONAL PARK SYSTEM*, *supra* note 4, at 174. See also ISE, *supra* note 1, at 437–39 (describing the proposal).

130. See Herman, *supra* note 106, at 24 (asserting that “[t]oo often in the history of the parks, when proposed uses conflicted with preservation goals, use and development have won out”); Michael Mantell, *Preservation and Use: Concessions in the National Parks*, 8 *ECOLOGY L.Q.* 1, 2 (1979) (contending that “the use function of the parks embodied in the NPS Organic Act has received far more congressional and managerial attention than the preservation function”).

131. See Denise E. Antolini, *National Park Law in the U.S.: Conservation and*

toward that end failed, leaving the relationship between preservation and enjoyment to the discretion of the NPS.<sup>132</sup>

The result is that the Organic Act allows the NPS to promote conservation and enjoyment as it deems best in particular instances. That discretion is normatively valuable. The NPS has developed extensive professional expertise in the environmental conditions and the use of national parks in its nearly one hundred years of existence. The NPS has proven adept at exercising its discretion differently over the years in response to changing environmental, political, and social conditions. Robert Keiter's masterful book shows how the NPS has promoted national parks as wilderness sanctuaries, tourist attractions, recreational sites, cultural resources, scientific and educational venues, wildlife reserves, and managed ecosystems—and how it now accommodates all of those visions of national parks and more.<sup>133</sup> That is not to say that the NPS always gets its management decisions right, or that the NPS moves quickly enough to incorporate evolving values into national park management. But the record of the NPS justifies the general management discretion that the Organic Act gives it.

## II. FEDERAL ENVIRONMENTAL LAW

The Organic Act is just the first component of national park law. A collection of federal environmental statutes imposes additional obligations on the NPS as it manages national parks. Four statutes in particular generate the most challenges to NPS management decisions: the National Environmental Policy Act (NEPA), the Wilderness Act, the Endangered Species Act (ESA), and the Wild & Scenic Rivers Act (WSRA). Unlike the vast majority of Organic Act litigation, lawsuits asserting that the NPS has violated one of those four statutes are more likely to succeed. Such litigation

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*Conflict*, 33 WM. & MARY ENV'T'L L. & POL'Y REV. 851, 858 (2009) (advocating the amendment of the Organic Act to “unequivocally put conservation of the parks’ unique resources first and promotion of human ‘enjoyment’ second”); Anne Batchelor, *Public Access to National Parks: The Case for Restraint*, 1 ST. THOMAS L. F. 111 (1988) (same).

132. See Antolini, *supra* note 131, at 917–18.

133. See KEITER, *supra* note 125. Elsewhere, Keiter outlined the “compelling” case for retaining the Organic Act as originally written. Keiter, *supra* note 54, at 246.

demonstrates that the discretion available to the NPS shrinks when these statutes require management more favorable to conservation than the Organic Act itself.<sup>134</sup> By contrast, no statute pushes the NPS in the opposite direction of encouraging greater use instead of conservation.

This section will focus on these four statutes, but it should be noted that many other environmental statutes guide NPS decisions as well. The management plans prepared by each NPS unit confirm the importance of other environmental statutes. For example, the new plan for Guadalupe Mountains National Park lists over one hundred federal statutes that affect the management of that park, ranging from the familiar (the Clean Air Act and the Migratory Bird Conservation Act) to the obscure (such as the American Folklife Preservation Act of 1976 and the Federal Cave Resources Protection Act of 1988).<sup>135</sup> The plan describes the conditions to be achieved at Guadalupe Mountains National Park based on service-wide mandates and policies in a table that contains separate goals for air quality, backcountry, ecosystem management, exotic species, fire management, floodplains, geological resources, land protection, lightscape management, native vegetation and animals, natural resource restoration, natural soundscapes, paleontological resources, soils, threatened and endangered species, water resources, wetlands and wilderness—along with six cultural resources topics, three topics related to visitor use, and five more general topics.<sup>136</sup> Similar provisions apply to other units of the national park system.<sup>137</sup> As noted, though,

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134. See KEITER, *supra* note 125, at 266 (observing that “[w]here the Organic Act once stood preeminent as the most powerful federal law promoting nature conservation, laws like the Wilderness Act and the Endangered Species Act extend additional—and, in some cases, greater—protection to the national parks and their resources”); Keiter, *supra* note 54, at 242 (noting that “[t]hese cross-cutting environmental laws have not only influenced how the Park Service addresses its management responsibilities, but they can override inconsistent park management policies or decisions”); Winks, *supra* note 47, at 619 (citing the CWA, ESA, WSRA, and the Wilderness Act as among the environmental statutes that “may be able to be exploited to help the NPS protect resources . . . in the parks”) (emphasis added).

135. See NAT’L PARK SERV., GUADALUPE MOUNTAINS NATIONAL PARK, TEXAS, GENERAL MANAGEMENT PLAN & ENVIRONMENTAL IMPACT STATEMENT 297–300 (2013).

136. See *id.* at 8–11.

137. See, e.g., NAT’L PARK SERV., FINAL GENERAL MANAGEMENT PLAN ENVIRONMENTAL IMPACT STATEMENT, BADLANDS NATIONAL PARK NORTH UNIT 12–21 (2006) (explaining management principles and strategies).



NEPA, the Wilderness Act, the ESA, and the WSRA impose the most environmental obligations on the management of national parks, so I will turn to them now.

A. *National Environmental Policy Act*

NEPA states an eponymous national environmental policy, but it is far better known for requiring federal agencies to prepare an environmental impact statement (EIS) whenever they engage in activities that could substantially affect the environment.<sup>138</sup> The NPS must comply with NEPA whenever it proposes new management activities.

The NPS expends substantial time and resources to comply with NEPA.<sup>139</sup> For example, the NPS recently analyzed five alternative approaches to managing feral pigs and other non-native ungulates in Hawai'i Volcanoes National Park, concluding that it would be best to adopt a flexible approach that employed a combination of fencing, relocation, and lethal techniques.<sup>140</sup> Another recent EIS considered six alternatives to ORV use in Wrangell-St. Elias National Park & Preserve, including the NPS's preferred alternative that would improve all trails to a maintainable standard for recreational ORV use in the National Preserve, but not in the National Park.<sup>141</sup> Additionally, the NPS reviewed the proposed modification of a controversial sixty-six-mile backcountry road that passes through the southern portion of Capitol Reef National Park.<sup>142</sup>

NEPA challenges to NPS management decisions are commonplace. In 2013 alone, the NPS won all six reported federal court cases reviewing the agency's compliance with

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138. See 42 U.S.C. § 4332(2)(c) (2012) (requiring the preparation of an environmental impact statement for "major Federal actions significantly affecting the quality of the human environment").

139. Some argue that the NPS spends too much time complying with NEPA. See Antolini, *supra* note 131, at 901–02 (asserting that "NEPA undermines the NPS conservation mandate" because "[i]n 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").

140. See NAT'L PARK SERV., HAWAII VOLCANOES NATIONAL PARK, *supra* note 115, at i–vi.

141. See NAT'L PARK SERV., NABESNA OFF-ROAD VEHICLE MANAGEMENT PLAN FINAL ENVIRONMENTAL IMPACT STATEMENT i (2011).

142. See NAT'L PARK SERV., BURR TRAIL MODIFICATIONS FINAL ENVIRONMENTAL IMPACT STATEMENT/ASSESSMENT OF EFFECT (2005). A full list with links to current and past NPS NEPA documents is available at <http://parkplanning.nps.gov>, archived at <http://perma.cc/3AD9-UPZ3>.

NEPA.<sup>143</sup> The agency's record then slipped in 2014. One court held that the NPS failed to comply with NEPA concerning the opening of ORV trails in the Big Cypress National Preserve.<sup>144</sup> Another court held that the NPS failed to consider all of the appropriate alternatives to proposed fish hatchery programs planned in the aftermath of removing a dam within Olympia National Park.<sup>145</sup>

The willingness of outside parties to litigate NEPA cases against the NPS ensures that the agency takes its statutory responsibilities seriously. Moreover, courts have overturned NPS decisions for failing to fulfill NEPA's study requirements. The Ninth Circuit, for example, rejected the NPS's conclusion that the authorization of more cruise ships to visit Glacier Bay National Park would not have a significant impact on the environment, and thus did not necessitate an EIS.<sup>146</sup> The NPS had proposed a research and monitoring program to learn the effects that increased cruise traffic could have on the park's wildlife.<sup>147</sup> The court, however, held, "[t]hat is precisely the information and understanding that is required *before* a decision that may have a significant adverse impact on the environment is made, and precisely why an EIS must be

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143. See, e.g., *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1081 (9th Cir. 2014) (holding that the NPS did not need to complete a new EIS before deciding not to renew a special use permit for oyster farming in Point Reyes National Seashore); *WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178 (10th Cir. 2013) (holding that the NPS reasonably declined to consider the introduction of wolves as an alternative approach to reducing the elk population in Rocky Mountain National Park); *River Runners for Wilderness v. Martin*, 593 F.3d 1064 (9th Cir. 2010) (holding that the NPS adequately studied the effects of rafting in Grand Canyon National Park); *Nat'l Parks Conservation Ass'n v. Jewell*, 965 F. Supp. 2d 67 (D.D.C. 2013) (holding that the NPS took the required "hard look" at the effects of authorizing an expanded power line through the Delaware Water Gap National Recreation Area); *Coalition to Protect Cowles Bog Area v. Salazar*, No. 2:12-CV-515, 2013 WL 3338491 (N.D. Ind. 2013) (holding that the NPS relied on accurate information and considered enough alternatives to cutting down 3,400 trees in order to restore Cowles Bog to a wetlands prairie); *Grunewald v. Jarvis*, 930 F. Supp. 2d 73 (D.D.C. 2013) (holding that the NPS properly considered the effects of invasive plants, the impacts on park visitors, and the possibility of reproductive controls when it decided to authorize the culling of deer within Rock Creek Park).

144. See *Ctr. for Biological Diversity v. Jewell*, No. 2:13-cv-364-FtM-38DNF, 2014 U.S. Dist. LEXIS 72522 (M.D. Fla. Jan. 9, 2014).

145. *Wild Fish Conservancy v. Nat'l Park Serv.*, No. C12-5109 BHS, 2014 U.S. Dist. LEXIS 41715 (W.D. Wash. Mar. 26, 2014).

146. *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 725-26 (9th Cir. 2001).

147. See *id.* at 727-28.

prepared in this case.”<sup>148</sup> The NPS, in other words, must complete its study of the environmental effects of a proposed project before deciding to engage in that project.

### B. *Wilderness Act*

There are nearly 44 million acres of wilderness areas located on NPS lands.<sup>149</sup> The Wilderness Act directs federal agencies to manage congressionally designated wilderness areas to preserve their wilderness values, in part by prohibiting any motorized vehicles or commercial enterprises.<sup>150</sup> Those restrictions impose a more stringent conservation requirement than the Organic Act. The NPS itself recently stated that “[t]he goal of wilderness stewardship is to keep these areas as natural and wild as possible *in the face of competing purposes* and impacts brought on by activities that take place elsewhere in the park and beyond park boundaries.”<sup>151</sup> Even so, Sandi Zellmer recently concluded that the “NPS has been loath to embrace its wilderness

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148. *Id.* at 733 (“The Parks Service’s lack of knowledge does not excuse the preparation of an EIS; rather it requires the Parks Service to do the necessary work to obtain it.”).

149. *See Wilderness Statistics Reports*, WILDERNESS.NET, <http://www.wilderness.net/NWPS/chartResults?chartType=acreagebyagency> (last visited Nov. 30, 2014), *archived at* <http://perma.cc/XNW2-QQ84>. The NPS manages more acres of wilderness lands than any other federal agency. *See id.* (reporting that the NPS manages 43.9 million acres, the Forest Service manages 36.1 million acres, the U.S. Fish & Wildlife Service manages 20.7 million acres, and the Bureau of Land Management manages 8.8 million acres). The Wilderness Act defines “wilderness” “as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain” and as “an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man’s work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.” 16 U.S.C. § 1131(c) (2012).

150. *See* 16 U.S.C. §§ 1131–1132. Wilderness areas occur within four types of federal lands: national parks managed by the NPS, national forests managed by the Forest Service, wildlife refuges managed by the U.S. Fish and Wildlife Service, and the public domain lands managed by the Bureau of Land Management. *See id.* §§ 1133–1134.

151. NAT’L PARK SERV., DIRECTOR’S ORDER # 41: WILDERNESS STEWARDSHIP 7 (2013) (emphasis added).

management policies as concrete, enforceable, on-the-ground commitments, and that it has failed to take wilderness planning terribly seriously.”<sup>152</sup>

The Wilderness Act pushes national park planning toward actions designed to favor conservation over use. In Death Valley National Park, for example, the purpose of the 2012 wilderness and backcountry stewardship plan was “to provide a framework by which to preserve and improve wilderness character while providing for unique visitor opportunities for quiet, solitude, and primitive adventure.”<sup>153</sup> Similarly, when managing fires within the wilderness area of Saguaro National Park, the NPS committed to conduct such activities “in accordance with the Wilderness Act (using the Minimum Requirement Decision Analysis) and Minimum Impact Suppression Tactics (MIST).”<sup>154</sup>

Courts have invoked the Wilderness Act to overturn NPS management decisions. The Cumberland Island National Seashore authorized the use of vans to transport visitors through the wilderness area to the historic ruined resorts outside of the wilderness area, asserting that such historic interpretation was within the NPS’s discretion.<sup>155</sup> But the Eleventh Circuit rejected the argument that “the preservation of historic structures furthers the goals of the Wilderness Act,” and the court concluded that “the overall purpose and structure of the Wilderness Act demonstrate that Congress has unambiguously prohibited the Park Service from offering motorized transportation to park visitors through the wilderness area.”<sup>156</sup> Similarly, when the NPS wanted to restore

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152. Sandra B. Zellmer, *Wilderness Management in National Parks and Wildlife Refuges*, 44 ENVTL. L. 497, 537 (2014).

153. NAT’L PARK SERV., DEATH VALLEY NATIONAL PARK WILDERNESS AND BACKCOUNTRY STEWARDSHIP PLAN AND ENVIRONMENTAL ASSESSMENT iii (2012) (noting that the backcountry (as opposed to wilderness) provisions of the plan are designed “to accommodate continued use of the park’s unpaved roads and protection of backcountry resources”).

154. NAT’L PARK SERV., RECORD OF DECISION, FIRE MANAGEMENT PLAN ENVIRONMENTAL IMPACT STATEMENT, SAGUARO NATIONAL PARK, ARIZONA (2007). For another example of NPS compliance with the Wilderness Act, see NAT’L PARK SERV., RECORD OF DECISION, GENERAL MANAGEMENT PLAN / WILDERNESS STUDY / ENVIRONMENTAL IMPACT STATEMENT, GREAT SAND DUNES NATIONAL PARK AND PRESERVE 2 (2007) (advising that “[m]ost of Great Sand Dunes National Park and Preserve will remain wild and undeveloped”).

155. *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1090 (11th Cir. 2004).

156. *Id.* at 1091, 1094. Congress responded by redrawing the boundaries of the wilderness area in order to allow the van trips. The Cumberland Wilderness

two historic cabins in Olympic National Park that had collapsed under the natural effects of weather and time, a Washington district court held that the reconstruction of the shelters off-site and the use of a helicopter to return them to their original location violated the mandate to preserve the wilderness character of the wilderness area within the national park.<sup>157</sup>

In other instances, the courts have sustained NPS decisions that were taken to further the goals of the Wilderness Act. Recreational boaters sued the NPS for relocating docks and otherwise limiting access to Isle Royale National Park, but the court held that those actions “further[ed] the Wilderness Act’s goal of providing a ‘contrast’ to ‘those areas where man and his own works dominate the landscape.’”<sup>158</sup> More recently, the NPS allowed a commercial oyster farm’s permit to operate within Point Reyes National Seashore to expire because Congress had designated the area as “potential wilderness” that would become an actual wilderness area once the uses of the area that were inconsistent with the Wilderness Act ceased.<sup>159</sup> In each instance, the NPS had to manage national parks according to the constraints of the Wilderness Act, rather than simply relying on the broad commands of the Organic Act.

### C. *Endangered Species Act*

The ESA prohibits any federal actions that would jeopardize the continued existence of a listed species or that would destroy or adversely affect its designated critical habitat.<sup>160</sup> Over 400 endangered species depend on national parks for their survival, including grizzly bears in Glacier and Yellowstone National Parks, Florida panthers in the Everglades National Park, and numerous birds in Haleakala National Park.<sup>161</sup> Congress established the newest national

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Boundary Adjustment Act, Public Law 108-447, 118 Stat. 3074 (codified at 16 U.S.C. § 459i (2012)).

157. *Olympic Park Assocs. v. Mainella*, No. C04-5732FDB, 2005 U.S. Dist. LEXIS 44230 (W.D. Wash. Jan. 8, 2005).

158. *Isle Royale Boaters Ass’n v. Norton*, 330 F.3d 777, 784 (6th Cir. 2003) (quoting 16 U.S.C. § 1131(c)).

159. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073 (9th Cir. 2014).

160. *See* 16 U.S.C. § 1531 (2012).

161. *See* NAT’L PARK SERV., 2010 SPECIES STATUS SUMMARY (2010) (listing 421 listed species occurring in 1,112 populations within NPS units).

park—Pinnacles National Park, just south of San Francisco—in part because the area is the site of the successful reintroduction of the highly endangered California condor to the wild.<sup>162</sup>

The NPS has also reintroduced several endangered species to national parks. In addition to the California condors in Pinnacles National Park, the NPS has reintroduced black-footed ferrets to Badlands National Park, nēnē to Hawaii Volcanoes National Park, and fishers to Olympic National Park.<sup>163</sup> Most famously, beginning in the 1990s, the NPS reintroduced wolves to Yellowstone National Park, where they once had been systematically exterminated.<sup>164</sup> The wolves thrived so much that they are no longer endangered.<sup>165</sup> Such reintroduction efforts are actually required by the ESA, but they demonstrate the NPS's interest in fulfilling the ESA's purposes.

The courts have upheld NPS decisions to preserve endangered species even at the cost of reducing opportunities to enjoy the national parks. For example, the statute that created Voyageurs National Park contains an exception to the general prohibition on snowmobiles within national parks, but the NPS decided to exclude snowmobiles from certain parts of Voyageurs because of the possible effect on endangered gray

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162. See Pinnacles National Park Act, Pub. L. No. 112-245, §2(5), 126 Stat. 2385 (2013) (finding that “Pinnacles National Monument is the only National Park System site within the ancestral home range of the California Condor. The reintroduction of the condor to its traditional range in California is important to the survival of the species . . .”).

163. See Press Release, Olympic Nat'l Park, Fourteen Fishers Released Yesterday in Olympic National Park (Jan. 21, 2009), available at <http://www.nps.gov/olym/parknews/fourteen-fishers-released-yesterday-in-olympic-national-park.htm>, archived at <http://perma.cc/82UY-XX5G>; *Black-Footed Ferret*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/mountain-prairie/species/mammals/blackfootedferret> (last updated Jan. 8, 2014), archived at <http://perma.cc/R2LR-AY8P> (documenting the black-footed ferret recovery effort); *Nēnē—Hawai'i Volcanoes*, NAT'L PARK SERV., <http://www.nps.gov/havo/naturescience/nene.htm> (last visited Nov. 30, 2014), archived at <http://perma.cc/4HNG-48FF>.

164. See DOUGLAS W. SMITH & GARY FERGUSON, *DECADE OF THE WOLF: RETURNING THE WILD TO YELLOWSTONE* (2005) (describing the reintroduction of wolves to Yellowstone National Park).

165. See Endangered and Threatened Wildlife and Plants; Final Rule To Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and To Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15123 (proposed Apr. 2, 2009) (to be codified at 50 C.F.R. pt. 17). *But see* *Defenders of Wildlife v. Jewell*, No. 12-1833(ABJ), 2014 WL 4714847 (D.D.C. Sept. 23, 2014) (overturning the delisting of wolves in Wyoming).

wolves and bald eagles.<sup>166</sup> The NPS took that action, even though the ESA did not actually require it, because the FWS acknowledged that the snowmobiles would not actually jeopardize the existence of the species.<sup>167</sup> Nonetheless, the NPS acted pursuant to the enabling act's authority to close areas to snowmobiles for the purposes of "wildlife management."<sup>168</sup>

In other instances, courts have rejected claims that the NPS neglected to comply with its ESA duties, holding instead that the challenged NPS management decisions satisfied all of the demands of the ESA and thus remained within the discretion of the agency.<sup>169</sup>

#### *D. Wild & Scenic Rivers Act*

Congress enacted the WSRA in 1968 in order to protect designated rivers in their free-flowing condition.<sup>170</sup> Sections of 203 rivers have been designated pursuant to the Act, including 37 that flow, at least in part, within national parks.<sup>171</sup> The Act distinguishes between "wild" rivers (which "represent vestiges of primitive America"); "scenic" rivers (which are free of impoundments and "still largely primitive . . . and undeveloped," but which are "accessible in places by roads"); and "recreational" rivers (which are readily accessible, perhaps developed, and may have been impounded in the past).<sup>172</sup> The agency responsible for managing a designated river must "protect and enhance the values which caused it to be included

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166. *Mausolf v. Babbitt*, 125 F.3d 661 (8th Cir. 1997).

167. *See id.* at 664 (noting that "the FWS concluded that the NPS's proposed wilderness plan would not jeopardize the animals' survival or adversely affect their critical habitats").

168. *See id.*; 36 C.F.R. § 7.33(b)(3) (2014).

169. *See, e.g., City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 2004) (rejecting an ESA claim against the NPS management of Fort Baker within the Golden Gate National Recreation Area); *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759 (8th Cir. 2004) (rejecting an ESA claim against the reopening of eleven bays for snowmobiling in Voyageurs National Park); *Nat'l Wildlife Fed'n v. Nat'l Park Serv.*, 669 F. Supp. 384 (D. Wyo. 1987) (holding that the continued operation of a campground within Yellowstone National Park did not threaten the survival of the grizzly bear and thus did not violate the ESA).

170. 16 U.S.C. § 1271 (2012).

171. *See NAT'L PARK SERV., WILD AND SCENIC RIVERS TASK FORCE, WILD AND SCENIC RIVERS: CHARTING THE COURSE, NAVIGATING THE NEXT 40 YEARS OF THE WILD AND SCENIC RIVERS ACT 7* (2007) (reporting the number of wild and scenic rivers in national parks as of 2006).

172. *Id.* at 30.

in said system without . . . limiting other uses that do not substantially interfere with public use and enjoyment of these values.”<sup>173</sup> In doing so, the NPS or other managing agency must prepare a comprehensive management plan that “shall address resource protection, development of lands and facilities, user capacities, and other management practices necessary or desirable to achieve the purposes of” the act.<sup>174</sup> The WSRA expressly states that its requirements are in addition to those imposed by the Organic Act.<sup>175</sup>

Yosemite National Park offers the most significant illustration of the preservationist requirements that the WSRA imposes on the NPS. Congress designated the Merced River pursuant to the WSRA in 1987.<sup>176</sup> The designation included 81 miles within the national park and another 41 miles as the river flows outside the national park through land managed by the Forest Service and BLM.<sup>177</sup> The Merced River makes “a dramatic entry into Yosemite Valley, rushing over towering cliffs in prominent waterfalls” and then flowing through the part of the national park that attracts the vast majority of its visitors.<sup>178</sup> The river’s designation triggered a statutory requirement that the NPS prepare a comprehensive management plan within three years, but thirteen years passed before a lawsuit forced the agency to complete its plan.<sup>179</sup>

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173. 16 U.S.C. § 1281(a).

174. *Id.* § 1274(d).

175. *See id.* § 1281(c) (providing that “in case of conflict between the provisions of [the WSRA and the Organic Act], the more restrictive provisions shall apply”).

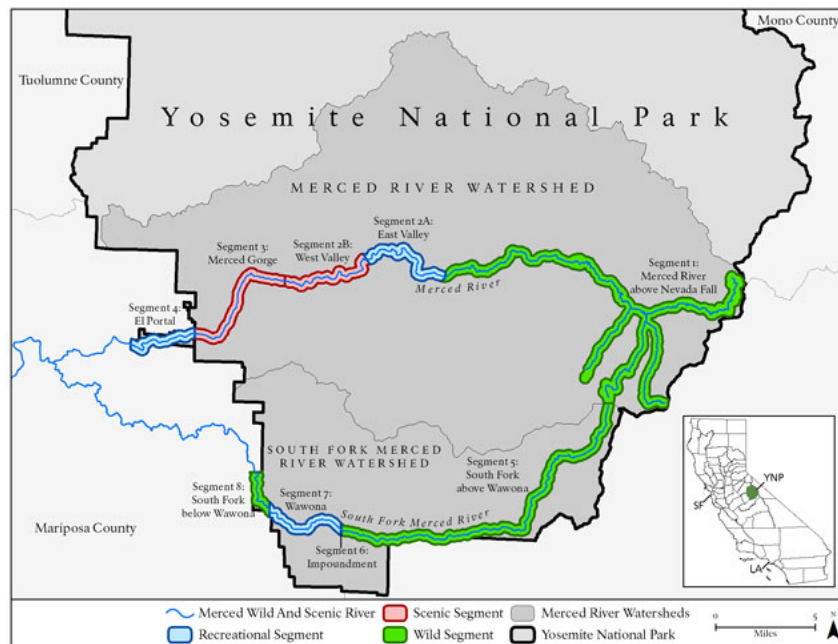
176. *See* Act of Nov. 2, 1987, Pub. L. No. 100-149, 101 Stat. 879 (1987) (codified at 16 U.S.C. § 1274(a)(62)(A) (2012)).

177. *See* NAT’L PARK SERV., MERCED WILD AND SCENIC RIVER FINAL COMPREHENSIVE MANAGEMENT PLAN AND ENVIRONMENTAL IMPACT STATEMENT 1-2 (2014) [hereinafter FINAL MERCED WSR PLAN].

178. *See id.* at 1–2.

179. *See* *Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202, 1263 (E.D. Cal. 1999) (giving NPS 12 months to adopt a plan for the Merced River).





*Merced Wild and Scenic River Segment Boundaries and Classifications*<sup>180</sup>

The Ninth Circuit invalidated both the 2000 plan and a revised plan that the NPS prepared in 2005.<sup>181</sup> In its first decision, the district court upheld the 2000 NPS plan, but the Ninth Circuit reversed.<sup>182</sup> The appeals court emphasized that the WSRA mandates that a management plan “must address . . . user capacities,” which the court interpreted to require “specific measurable limits on use” of the river.<sup>183</sup> The NPS then prepared a revised plan that it released in 2005, but this time both the district court and the Ninth Circuit agreed

180. FINAL MERCED WSR PLAN, *supra* note 177, at 3-2.

181. Friends of Yosemite Valley v. Norton (*Norton II*), 348 F.3d 789, 797 (9th Cir. 2003); Friends of Yosemite Valley v. Kempthorne, 520 F.3d 1024, 1035 (9th Cir. 2008).

182. Friends of Yosemite Valley v. Norton (*Norton I*), 194 F. Supp. 2d 1066, 1120–21 (E.D. Cal. 2002) *aff’d in part, rev’d in part*, (*Norton II*), 348 F.3d 789 (9th Cir. 2003) *opinion clarified*, (*Norton III*) 366 F.3d 731 (9th Cir. 2004).

183. *Norton II*, 348 F.3d at 797 (citing 16 U.S.C. § 1274(d)(1) (2012)). See also *Norton III*, 366 F.3d at 731 (clarifying that the entire 2000 NPS plan was “invalid due to two deficiencies: (1) a failure to adequately address user capacities; and (2) the improper drawing of the Merced River’s boundaries at El Portal”).

that the new plan violated the WSRA, too. The problem with the 2005 plan was that it focused solely on future harm to the Merced River, while ignoring “the problem of past degradation” of the river.<sup>184</sup>

The NPS tried again with a draft plan that it released in January 2013.<sup>185</sup> The NPS studied six alternative plans that would accommodate between 13,900 and 21,800 visitors in Yosemite Valley each day by reducing or increasing lodging, parking, and visitor facilities. As the NPS explained:

Under all alternatives, several structures and facilities will be removed, such as recreational facilities—such as pools, bike rentals, and the ice rink—abandoned bridge footings, and large stretches of riprap. All action alternatives propose a 150-foot riparian buffer to insulate the river from new development and protect views from the bed and banks. The ecological restoration program, included in all action alternatives, would also address disturbance in meadows, along riparian zones, and on riverbanks. The plan alternatives vary when addressing new development or relocation / removal of existing lodging, campsites, parking, and housing.<sup>186</sup>

The NPS’s preferred plan would have maintained visitation at its recent level of around 19,900 people per day.<sup>187</sup> It would have done so by significantly increasing the number of campsites in Yosemite Valley while reducing commercial services.<sup>188</sup> The plan generated substantial controversy, though, so the NPS modified it when it released its final plan in February 2014.<sup>189</sup> The final plan allows ice skating, rafting, and bicycling facilities to remain within the valley, but it otherwise retains the provisions contained in the January 2013 proposed plan.<sup>190</sup> It remains to be seen whether those changes

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184. *Kemphorne*, 520 F.3d at 1035. The court also held that the NPS violated the WSRA by failing to include all of the elements of the plan in a single document. *See id.* at 1036.

185. *See* NAT’L PARK SERV., MERCED WILD AND SCENIC RIVER DRAFT COMPREHENSIVE MANAGEMENT PLAN AND ENVIRONMENTAL IMPACT STATEMENT (2013).

186. *Id.* at ES-11.

187. *Id.* at ES-16.

188. *Id.*

189. *See* FINAL MERCED WSR PLAN, *supra* note 177.

190. *Id.* at ES-4.

will satisfy the vocal demands of the park's users who resist any removal of recreational facilities or any limits on visitors.<sup>191</sup> But one thing is clear: the argument that the Organic Act and the Yosemite National Park enabling legislation "should take precedence over the Wild and Scenic River Act" is wrong as a matter of law.<sup>192</sup> The WSRA demands a greater emphasis on conservation than exists in national parks unencumbered by that law, and those more restrictive provisions add to the law that the NPS must follow.

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NEPA, the Wilderness Act, the ESA, and the WSRA ensure that the NPS manages national parks in a way that considers all environmental values, avoids interference with wilderness areas, and protects biodiversity. Other federal environmental statutes pursue similar goals. The Clean Water Act prevents water pollution and protects wetlands within national parks.<sup>193</sup> The National Historic Preservation Act mandates consideration of the cultural resources in national parks.<sup>194</sup> These and many other federal statutes add to the Organic Act's command to conserve national parks by requiring specific management actions to conserve particular national park resources. They act as a check on any temptation that the NPS would encounter to prioritize enjoyment over conservation in certain instances. They thus ensure that the most important environmental and cultural values codified in federal law are protected in our most important environmental and cultural places, those which Congress has designated national parks.

### III. SPECIFIC PLACE-BASED MANAGEMENT STATUTES

The Organic Act gives the NPS broad discretion to navigate the competing demands of providing for the conservation and the enjoyment of national parks, while numerous federal environmental statutes push that

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191. See generally *Public Impacts of Closing Amenities at Yosemite National Park: Oversight Hearing Before the Subcomm. on Pub. Lands & Envtl. Regulation of the H. Natural Res. Comm.*, 113th Cong. (2013).

192. *Id.* at 18 (statement of Wendy Brown, Yosemite for Everyone).

193. See 33 U.S.C. §§ 1251–1387 (2012).

194. See 16 U.S.C. §§ 470a–470w-6 (2012).

management in the direction of conservation. The push back toward enjoyment results from statutory provisions that Congress enacts for specific parks. Those provisions are either prospective or responsive. The prospective management commands appear in the acts that Congress approves to establish a national park. The responsive commands are contained in statutes or appropriations riders that Congress enacts to mandate a different management policy than had been adopted by the NPS. There are instances in which such specific statutory management commands require more conservation, but most such provisions call for more enjoyment of national parks.

This section begins by explaining how the statutes establishing new national parks often contain provisions directing that the park be managed in a particular way that departs from the commands of the Organic Act. Next it notes that congressional appropriations statutes play an important role in national park management by providing funding that inevitably allows some management projects but not others. The final part of this section analyzes how Congress responds to NPS management choices by attempting to dictate a different result. Three case studies—involving Cape Hatteras National Recreational Seashore, Yukon Charley National Preserve, and Fort Vancouver National Historic Site—show the many tools that Congress employs to achieve its desired outcome.

#### A. *Park-Specific Establishment Acts*

Only Congress can establish a national park.<sup>195</sup> When it does so, Congress typically requires that the new unit be managed consistent with the Organic Act.<sup>196</sup> But those establishment acts also contain specific provisions for the management of the new national park.

Several provisions either require or prohibit roads and other means of transportation within specific national parks. The 1929 Grand Teton National Park establishment legislation prohibited the construction of any roads, hotels, or other

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195. The President, however, may create national monuments pursuant to the Antiquities Act, and those monuments are often placed under the authority of the NPS. *See* 16 U.S.C. § 431 (2012).

196. *See supra* notes 76–78 and accompanying text.

lodging.<sup>197</sup> Similarly, the law creating North Cascades National Park prohibited the construction of a road “from the North Cross State Highway to the Stehekin Road” or a road that would provide “permanent . . . vehicular access between May Creek and Hozomeen along the east side of Ross Lake.”<sup>198</sup> By contrast, the Canyonlands National Park Act contains a provision instructing the Secretary of the Interior to locate a road or roads “to provide suitable access to the [park] and services required in the operation and administration of the park.”<sup>199</sup> The law establishing Assateague Island National Seashore specifies that a road shall be constructed along its length.<sup>200</sup> And the Voyageurs National Park statute authorizes “appropriate provisions for (1) winter sports, including the use of snowmobiles, (2) use by seaplanes, and (3) recreational use by all types of watercraft, including houseboats, runabouts, canoes, sailboats, fishing boats, and cabin cruisers.”<sup>201</sup>

Hunting, fishing, and trapping are another common subject of national park establishment legislation. When Congress established the Great Sand Dunes National Park and Preserve Act in 2000, it authorized “hunting, fishing, and trapping” within the national preserve.<sup>202</sup> Similar provisions apply in the Cape Cod National Seashore, the Delaware Gap National Recreation Area, the Jean Lafitte National Historical Park and Preserve, and numerous other units within the national park system.<sup>203</sup>

Other provisions are designed to preserve certain national parks in their natural condition. The Everglades National Park establishment statute directs that the park “be permanently reserved as a wilderness, and no development of the project or plan for the entertainment of visitors shall be undertaken which will interfere with the preservation intact of the natural

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197. CARR, *supra* note 83, at 26.

198. Act of Oct. 2, 1968, Pub. L. No. 90-544, § 402(e), 82 Stat. 926, 929 (1968) (codified at 16 U.S.C. § 90c-1(e) (2012)).

199. Act of Sept. 12, 1964, Pub. L. No. 88-590, § 4(a), 78 Stat. 934, 938 (1964) (codified at 16 U.S.C. § 271c(a) (2012)).

200. See EVERHART, *supra* note 43, at 82.

201. Voyageurs National Park Establishment Act, Pub. L. No. 91-661, § 303, 84 Stat. 1972 (1971) (codified as amended at 16 U.S.C. § 160h (2012)).

202. Great Sand Dunes National Park and Preserve Act of 2000, Pub. L. No. 106-530, § 7(c)(1), 114 Stat. 2527, 2531 (2000) (codified at 16 U.S.C. § 410hhh-5(c)(1) (2012)).

203. See generally Fischman, *supra* note 43, at 804-05 (listing examples of statutory provisions authorizing hunting).

unique flora and fauna and the essential primitive conditions now prevailing in the area.”<sup>204</sup> The statute expanding Acadia National Park dictates a specific balance between conservation and enjoyment. It first provides that the management and use of the part of the national park situated on Isle au Haut “shall not interfere with the maintenance of a viable local community with a traditional resource based-economy outside the boundary of the park.”<sup>205</sup> It continues, though, to require that “every effort shall be exerted to maintain and preserve this portion of the park in as nearly its present state and condition as possible.”<sup>206</sup> Moreover, the statute restricts visitation in order “to conserve the character of the town and to protect the quality of the visitor experience.”<sup>207</sup>

The Alaska National Interest Lands Conservation Act (ANILCA) is the statute that established more new national parks than any other single law and that contains the most specific management directions.<sup>208</sup> ANILCA created ten new national parks units and expanded three others, established nine wildlife refuges and expanded seven others, designated twenty-six wild and scenic rivers, and produced various new conservation areas and national monuments.<sup>209</sup> ANILCA’s provisions expanding Denali National Park state that the NPS shall manage the park to protect and interpret its scenic values and wildlife habitat, and to provide wilderness recreational opportunities.<sup>210</sup> ANILCA states similar management

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204. Act of May 30, 1934, ch. 371, § 4, 48 Stat. 817, (1934) (codified at 16 U.S.C. § 410c (2012)).

205. Act of Oct. 15, 1982, Pub. L. No. 97-335, § 4(a), 96 Stat. 1627, 1628 (1982).

206. *Id.*

207. *Id.*

208. 16 U.S.C. §§ 3101–3233 (2000). The enactment of ANILCA is described in RODERICK NASH, *WILDERNESS IN THE AMERICAN MIND* 296–315 (4th ed. 2001), and *Congress Clears Alaska Lands Legislation*, CONG. Q. ALMANAC, <http://library.cqpress.com/cqalmanac/cqal80-1175027> (last visited Dec. 1, 2014), archived at <http://perma.cc/P86E-JDTH>. For the problems attendant with lame-duck legislation generally, see John Copeland Nagle, *Lame Duck Logic*, 45 U.C. DAVIS L. REV. 1177 (2012), and John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV. 470 (1997).

209. See *Congress Clears Alaska Lands Legislation*, *supra* note 208.

210. Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, § 202(3)(a), 94 Stat. 2371, 2382–83 (1980) (codified at 16 U.S.C. § 410hh-1(3)(a) (2012)) (providing that Denali National Park “shall be managed for the following purposes, among others: To protect and interpret the entire mountain massif, and additional scenic mountain peaks and formations; and to protect habitat for, and populations of fish and wildlife including, but not limited to, brown/grizzly bears, moose, caribou, Dall sheep, wolves, swans and other

directives for Gates of the Arctic National Park and Katmai National Park.<sup>211</sup> Congress also found that “there is a need for access for surface transportation purposes across the Western (Kobuk River) unit of the Gates of the Arctic National Preserve (from the Ambler Mining District to the Alaska Pipeline Haul Road),” so it directed the NPS to permit such access after the preparation of “an environmental and economic analysis solely for the purpose of determining the most desirable route for the right-of-way and terms and conditions which may be required for the issuance of that right-of-way.”<sup>212</sup> Another ANILCA provision authorizes the NPS “to develop access to the Harding Icefield and to allow use of mechanized equipment on the icefield for recreation” in Kenai Fjords National Park.<sup>213</sup> ANILCA also requires the NPS to “permit aircraft to continue to land at sites in the Upper Charley River watershed” “[e]xcept at such times when and locations where to do so would be inconsistent with the purposes of the preserve.”<sup>214</sup>

Two recent cases illustrate the controversies that arise under the statutes establishing specific national parks. Both cases involved park visitors who wanted to enjoy the current environmental conditions while the NPS sought to restore historic natural conditions. The first case involved the Indiana Dunes National Lakeshore.<sup>215</sup> Congress established the

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waterfowl; and to provide continued opportunities, including reasonable access, for mountain climbing, mountaineering and other wilderness recreational activities”).

211. See *id.* § 201(4)(a), 94 Stat. at 2378–79 (stating that the management of Gates of the Arctic National Park must “maintain the wild and undeveloped character of the area, including opportunities for visitors to experience solitude, and the natural environmental integrity and scenic beauty of the mountains, forelands, rivers, lakes, and other natural features; to provide continued opportunities, including reasonable access, for mountain climbing, mountaineering, and other wilderness recreational activities; and to protect habitat for, and the populations, of fish and wildlife, including, but not limited to, caribou, grizzly bears, Dall sheep, moose, wolves, and raptorial birds”); *id.* § 202(2), 94 Stat. at 2382 (providing that Katmai National Park must be managed “for the following purposes, among others: To protect habitats for, and populations of, fish and wildlife including, but not limited to, high concentrations of brown/grizzly bears and their denning areas; to maintain unimpaired the water habitat for significant salmon populations; and to protect scenic, geological, cultural and recreational features”). See generally John Copeland Nagle, *Enjoying Katmai* (unpublished manuscript) (on file with author) (describing the efforts to facilitate increased visitor enjoyment of this remote national park).

212. ANILCA § 201(4)(b) & (d), 94 Stat. at 2379.

213. *Id.* § 201(5), 94 Stat. at 2380.

214. *Id.* § 201(10), 94 Stat. at 2382.

215. See *Coal. to Protect Cowles Bog Area v. Salazar*, No. 2:12-CV-515, 2013

national lakeshore in 1966, a half-century after biologist Henry Cowles conducted ecological research there.<sup>216</sup> The NPS wanted to restore Cowles Bog to the wetland prairie condition that existed when Dr. Cowles studied it at the beginning of the twentieth century.<sup>217</sup> The neighbors of the lakeshore, though, noted that the establishment legislation stated that the national lakeshore was to be “permanently preserved in its present state,” which would mean the forest that had grown there by the time that Congress established the national lakeshore in 1966.<sup>218</sup> But the court thought it would be “absurd” to hold that Congress intended that language “to mean that the park had to be maintained in something like a hermetically sealed geodome from 1966 on.”<sup>219</sup> Instead, the court found that the act establishing the national lakeshore “grants the Secretary wide discretion to manage the Lakeshore as he deems appropriate.”<sup>220</sup>

The second case concerned the deer population in Washington, D.C.’s Rock Creek Park.<sup>221</sup> The NPS sought to reduce the number of deer by employing sharpshooters.<sup>222</sup> Local users of the park complained that the NPS’s plan would turn the park into “a killing field.”<sup>223</sup> They cited the park’s enabling act, which required that the park be managed in its “natural condition.”<sup>224</sup> Again, the court allowed the NPS to pursue its vision of the natural conditions of the park. The court relied on *Chevron* to find that the park’s enabling act “does not speak directly to deer management,” and the NPS’s “balanced approach” to deer management was permissible under *Chevron* step two.<sup>225</sup>

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WL 3338491 (N.D. Ind. July 2, 2013).

216. See NAT’L PARK SERV., ENVIRONMENTAL ASSESSMENT: RESTORATION OF COWLES BOG WETLAND COMPLEX’S LAKE PLAIN WET LAKE PLAIN WET-MESIC PRAIRIE 5–6 (2012).

217. See *id.*

218. Act of Nov. 5, 1966, Pub. L. No. 89-761, § 7(b), 80 Stat. 1309, 1311 (codified at 16 U.S.C. § 460u-6 (2012)).

219. *Coal. to Protect Cowles Bog Area*, 2013 WL 3338491 at \*7.

220. *Id.* at \*8.

221. See *Grunewald v. Jarvis*, 930 F. Supp. 2d 73 (D.D.C. 2013).

222. *Id.* at 80.

223. *Id.* at 76.

224. *Id.* at 77 (quoting Ch. 1001, § 7, 26 Stat. 492 (1890)).

225. *Id.* at 85 (citing *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984)).



### *B. Funding Legislation*

The statutes providing funds to the NPS also affect the management of national parks. Complaints about the funding for the national parks are as old as the national parks themselves.<sup>226</sup> In 1916—the same year that Congress established the NPS—Oregon Senator Henry Lane objected to any appropriations for the newly-created Hawai'i National Park because “it should not cost anything to maintain a volcano.”<sup>227</sup> That attitude prompted Western author Bernard DeVoto to write an article in 1953 entitled “Let's Close the National Parks,” arguing that “[t]he national park system must be temporarily reduced to a size for which Congress is willing to pay.”<sup>228</sup> But a higher amount of congressional appropriations does not necessarily favor conservation. Rather, most funding goes to building and maintaining facilities used by visitors to the parks, and to paying employees who focus on facilitating the enjoyment of the parks more than their conservation. DeVoto, for example, insisted that the first fiscal priority was to “provide proper facilities and equipment to take care of the crowds,” and only then could we “save from destruction the most majestic scenery in the United States, and the most important field areas of archeology, history, and biological science.”<sup>229</sup>

More money can mean more enjoyment and less conservation. From that perspective, the best thing that Congress can do for conservation is to leave a national park alone. One NPS director reportedly told the Sierra Club's board of directors that “[w]e have no money . . . . We can do no

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226. See 1911 NATIONAL PARK CONFERENCE, *supra* note 23, at 7 (statement of Thomas Cooper, Assistant to the President, Northern Pacific Railway) (“Congress has been parsimonious in its treatment of the national parks to a degree that largely defeats the very purpose of their creation.”).

227. 53 Cong. Rec. 9253 (1916) (statement of Sen. Lane). Senator Shafroth responded to Lane that some funding was necessary because “you have got to have some supervision of the park.” *Id.* (statement of Sen. Shafroth).

228. BERNARD DEVOTO, LET'S CLOSE THE NATIONAL PARKS (1953), *reprinted in* AMERICA'S NATIONAL PARK SYSTEM, *supra* note 4, at 188; see also NAT'L PARK SERV. OFFICE OF SCIENCE AND TECHNOLOGY, STATE OF THE PARKS: A REPORT TO THE CONGRESS (1980) (“The staff and the funding resources currently available within the research and the resource management areas clearly are inadequate to respond to the needs of the Service.”), *reprinted in* AMERICA'S NATIONAL PARK SYSTEM, *supra* note 4, at 408.

229. BERNARD DEVOTO, LET'S CLOSE THE NATIONAL PARKS (1953), *reprinted in* AMERICA'S NATIONAL PARK SYSTEM, *supra* note 4, at 188.

harm.”<sup>230</sup> The National Parks Conservation Association (NPCA) responded to the same impulse during the October 2013 federal government shutdown.<sup>231</sup> The lack of funding meant that no one could visit the parks, so the NPCA felt obliged to respond to the question “[w]ouldn’t it be good for parks to have a break from visitation?”<sup>232</sup> The NPCA answered that “[c]losing our parks is not only depriving visitors of an experience of a lifetime, it is also preventing park staff from monitoring and maintaining natural and historic resources throughout the park system.”<sup>233</sup>

### C. *Specific Responsive Provisions*

Ordinarily, the Organic Act, the statute establishing a national park, and the federal environmental statutes discussed in Part II provide all of the law governing the NPS’s management of a park. Those laws give the NPS significant management discretion, so inevitably the NPS exercises its discretion in a way that displeases some of those who are interested in a park. When that happens, Congress has enacted or proposed numerous statutes directing a particular resolution of a specific national park management controversy. One statutory provision permitted the continued operation of a Kiwanis Club within Olympic National Park.<sup>234</sup> Congress has also enacted numerous statutes governing scenic overflights at the Grand Canyon National Park.<sup>235</sup> In another law, Congress directed NPS to “immediately cease” a plan that resulted in a settlement agreement to exterminate deer and elk on Santa Rosa Island in Channel Islands National Park.<sup>236</sup> And

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230. CARR, *supra* note 83, at 6 (quoting NPS Director Newton Drury).

231. See John Garder, *How Is the Government Shutdown Affecting National Parks?*, PARK ADVOCATE (Sept. 25, 2013), <http://parkadvocate.org/how-would-a-government-shutdown-affect-national-parks>, archived at <http://perma.cc/4BXA-XLBF>.

232. *Id.*

233. *Id.*

234. Act of Nov. 13, 1991, Pub. L. No. 102-154, 105 Stat. 990, 999 (1991).

235. See Wendell H. Ford Aviation and Investment Reform Act of the 21st Century, Pub. L. No. 106-181, § 804, 114 Stat. 61, 192 (2000) (addressing quiet aircraft technology for the Grand Canyon); Airport and Airway Safety, Capacity, Noise Improvement, and Intermodal Transportation Act of 1992, Pub. L. No. 102-581, § 134, 106 Stat. 4872, 4887 (1992) (authorizing a study of air traffic over the Grand Canyon).

236. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 1077(c), 120 Stat. 2083, 2406 (2006).

Congress has repeatedly intervened to dictate the permissible snowmobile usage within Yellowstone National Park “[n]otwithstanding any other provision of law.”<sup>237</sup> The newest provision authorizes an Alaskan native tribe to harvest glaucous-winged gull eggs in their traditional homeland of Glacier Bay National Park.<sup>238</sup> Numerous such statutory provisions have responded to judicial decisions contrary to the desired congressional management policy, including cases involving vehicle access across wilderness lands in the Cumberland Island National Seashore, the construction of a new bridge across the St. Croix National Scenic River, the exclusion of a renovated fire tower in Olympic National Park, the permissible cruise ship traffic in Glacier Bay National Park, and the continued operation of an oyster farm in Point Reyes National Seashore.<sup>239</sup>

Congress also guides the management of national parks without actually enacting legislation. Sometimes the mere introduction of a bill to change an NPS policy prompts the NPS to make the desired change itself.<sup>240</sup> Members of Congress routinely criticize NPS management decisions at committee hearings.

Three ongoing disputes illustrate the interplay between specific legislative management provisions, unenacted proposals, and informal congressional oversight. At Cape Hatteras National Recreational Seashore, Yukon Charley

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237. Department of the Interior, Environment, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-54 § 126, 119 Stat. 499 (2005) (“Notwithstanding any other provision of law, the National Park Service final winter use rules published in Part VII of the Federal Register for November 10, 2004, 69 Fed. Reg. 65348 *et seq.*, shall be in force and effect for the winter use season of 2005-2006 that commences on or about December 15, 2005.”); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447 § 146, 118 Stat. 2809 (2004). Most recently, Congress again mandated that the 2004 Rule remain in effect for the 2006-2007 winter use season. Continuing Appropriations-FY 2007, Pub. L. No. 109-383, § 135, 120 Stat. 2678, 2679 (2006); Revised Continuing Appropriations Resolution, Pub. L. No. 110-5, § 20516, 121 Stat. 8, 27 (2007).

238. See Huna Tlingit Traditional Gull Egg Use Act, Pub. L. No. 113-142, 128 Stat. 1749 (2014).

239. See John Copeland Nagle, *Wilderness Exceptions*, 44 ENVTL. L. 373, 404–08 (2014) (describing the Cumberland Island National Seashore, Point Reyes National Seashore, and Olympic National Park disputes); John Copeland Nagle, *Site-Specific Laws*, 88 NOTRE DAME L. REV. 2167 (2013) (describing the St. Croix National Scenic River dispute).

240. See, e.g., NAGLE, *supra* note 19, at 119 (describing Senator Dorgan’s successful efforts to persuade the NPS to allow private hunters to cull elk in Theodore Roosevelt National Park).

National Preserve, and Fort Vancouver National Historic Site, Congress, the NPS, and interested parties are engaged in ongoing efforts to dictate the balance between conservation and enjoyment of each national park. The controversies at these three parks show how existing law, NPS management discretion, and the threat of new law operate together to guide specific management decisions.

### 1. Cape Hatteras National Recreational Seashore

The first dispute arises in Cape Hatteras, a barrier island off the coast of North Carolina where Congress approved the first national seashore in 1937.<sup>241</sup> The seashore's enabling act stated that

[e]xcept for certain portions of the area, deemed to be especially adaptable for recreational uses, particularly swimming, boating, sailing, fishing, and other recreational activities of similar nature, which shall be developed for such uses as needed, the said area shall be permanently reserved as a primitive wilderness and no development of the project or plan for the convenience of visitors shall be undertaken which would be incompatible with the preservation of the unique flora and fauna or the physiographic conditions now prevailing in this area.<sup>242</sup>

The newly authorized national seashore required further federal legislation before it was even established. In 1940, Congress changed the official name to the "Cape Hatteras National Recreational Seashore" and it expressly authorized hunting there.<sup>243</sup> The seashore became a reality in 1950.<sup>244</sup> The

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241. See Act of Aug. 17, 1937, ch. 687, § 4, 50 Stat. 670 (1937).

242. *Id.* § 4.

243. Act of June 29, 1940, ch. 459, § 1, 54 Stat. 702 (1940). The NPS reverted to the original "national seashore" name to maintain consistency with the additional national seashores that Congress created during the 1960s and 1970s, and subsequent federal statutes have referred to the "national seashore," too. See U.S. DEP'T OF THE INTERIOR, NAT'L PARK SERV., FINAL CAPE HATTERAS NATIONAL SEASHORE OFF-ROAD VEHICLE MANAGEMENT PLAN / ENVIRONMENTAL IMPACT STATEMENT 14 (2010) [hereinafter 2010 CAPE HATTERAS EIS]. But Congress never officially changed the name from "national recreational seashore," as recreation proponents continue to remind the NPS.

244. See generally CAMERON BINKLEY, THE CREATION AND ESTABLISHMENT OF CAPE HATTERAS NATIONAL SEASHORE: THE GREAT DEPRESSION THROUGH

island remained unconnected from the mainland until the construction of a bridge in 1963, which began a vast increase in visitation to the national seashore.<sup>245</sup> The seashore now attracts more than two million visitors annually.<sup>246</sup>

Local residents and tourists have long relied on cars and ORVs to access their preferred location within the national seashore.<sup>247</sup> Such vehicles are especially important given the scarcity of parking and pedestrian access to prime beach locations.<sup>248</sup> But complaints about vehicles on the beach have existed almost as long as there have been vehicles on the beach.<sup>249</sup> These complaints initially targeted the interference

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MISSION 66 97–100 (2007) (crediting a donation from Paul Mellon, the eldest son of Secretary of the Treasury Andrew Mellon, for allowing the NPS to acquire the lands needed to establish the national seashore in 1950).

245. See 2010 CAPE HATTERAS EIS, *supra* note 243, at i (observing “[t]he paving of NC-12, the completion of the Bonner Bridge connecting Bodie and Hatteras islands in 1963, and the introduction of the State of North Carolina ferry system to Ocracoke Island facilitated visitor access to the sound and ocean beaches”).

246. NAT’L PARK SERV., ANNUAL PARK RANKING REPORT FOR RECREATION VISITORS IN: 2012 (2012) (reporting that 2,302,040 people visited Cape Hatteras National Seashore in 2012). See 2010 CAPE HATTERAS EIS, *supra* note 243, at 16 (reporting that “[s]eashore visitors participate in a variety of recreational activities, including beach recreation (sunbathing, swimming, shell collecting, etc.), fishing (surf and boat), hiking, hunting, motorized boating, nonmotorized boating (sailing, kayaking, canoeing), nature study, photography, ORV use (beach driving), shellfishing, sightseeing, watersports (surfing, windsurfing, kiteboarding, etc.), and wildlife viewing”).

247. 2010 CAPE HATTERAS EIS, *supra* note 243, at i (noting that “[h]istorically, beach driving at the Seashore was for the purpose of transportation, and not recreation”).

248. *Id.* at ii (explaining that “[v]isitors who come for some popular recreational activities such as surf fishing and picnicking are accustomed to using large amounts and types of recreational equipment that cannot practically be hauled over these distances by most visitors without some form of motorized access. For many visitors, the time needed and the physical challenge of hiking to the distant sites, or for some even to close sites, can discourage or preclude access by nonmotorized means.”).

249. See BINKLEY, *supra* note 244, at 161 (“During Mission 66, the impact of driving on the beaches was a major concern. Superintendent Hanks declared that ‘driving along the ocean shore by the public must be controlled’ to reduce its impact on the recreational purposes the park was established to meet, specifically picnicking, swimming, and surf-casting, all of which ‘require assurance of non-intervention by shore driving.’”); *id.* at 180 (“Automobile driving on the beach is an infrequent topic in NPS and congressional correspondence from this period, but clearly the National Park Service saw vehicular access to the beach as being necessary to fulfill an obligation to allow continued commercial fishing by legal residents of the city.”); *id.* at 194 (“The first concerned the presence of off-road vehicles or ‘beach buggies,’ especially at Cape Point near the famous Cape Hatteras Lighthouse. Such vehicles, then mainly used by fishermen, concentrated

with other recreational activities, but more recently the wellbeing of the seashore's wildlife has become a greater concern. A variety of birds, turtles, and plants—including several endangered species—use the same beach that many recreational visitors favor.<sup>250</sup>

The conflict between the vehicles and wildlife sharing the Cape Hatteras beach yielded a 2005 lawsuit alleging that the NPS was violating the ESA by failing to regulate vehicles on the beach.<sup>251</sup> The NPS responded in 2007 by developing an Interim Protected Species Management Strategy, but that interim strategy provoked another lawsuit alleging violations of the ESA, the Organic Act, and an executive order governing ORVs within national parks.<sup>252</sup> In 2008, the plaintiff environmental groups, the intervener local governments, ORV users, fishing interests, and the NPS agreed to a consent decree which obligated the NPS to complete an ORV management plan and an accompanying environmental impact statement for the seashore by the end of 2010.<sup>253</sup>

The NPS issued the required EIS in December 2010, evaluating six alternative management approaches ranging from retention of the 2005 interim strategy, continuation of the terms of the 2008 consent decree, and other combinations of regulating beach access and protecting birds.<sup>254</sup> The NPS

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near the best fishing sites in groups of up to fifty or so, leaving piles of beach trash and making it difficult for other visitors to enjoy the scenic vista. The problem may have existed for awhile, but by 1972, as one writer informed Director George B. Hartzog, Jr., a person 'literally could not take a photograph of the waves by themselves without two or three hip-booted intruders in the viewfinder.' This visitor did not want a total ban on the buggies but did want some restrictions. He protested that the NPS mission was to leave the land 'unimpaired' and noted that if there were fifty buggies this year, when would it stop? 'You might as well call it the Hatteras Parking Lot,' he concluded.").

250. See 2010 CAPE HATTERAS EIS, *supra* note 243, at ii (observing that "the Seashore provides a variety of important habitats created by its dynamic environmental processes, including habitats for the federally listed piping plover; sea turtles; and one listed plant species, the seabeach amaranth. The Seashore contains ecologically important habitats such as marshes, tidal flats, and riparian areas, and hosts various species of concern such as colonial waterbirds (least terns, common terns, and black skimmers), American oystercatcher, and Wilson's plover, all of which are listed by the North Carolina Wildlife Resources Commission (NCWRC) as species of special concern. In addition, the gull-billed tern, also found at the Seashore, is listed by the NCWRC as threatened.").

251. See *id.* at 26.

252. See *id.*

253. See S. REP. NO. 113-102, at 2–3 (2013) (summarizing the litigation).

254. See 2010 CAPE HATTERAS EIS, *supra* note 243, at 11.

adopted its preferred alternative in order to “provide a reasonably balanced approach to designating ORV routes and vehicle-free areas and providing for the protection of park resources.”<sup>255</sup>



*Cars on the beach at Cape Hatteras National Seashore, Memorial Day weekend, 2007*<sup>256</sup>

That plan provoked outrage among the residents of Cape Hatteras who were accustomed to unregulated use of the beach and to serving tourists who came for such use themselves. The Coalition for Beach Access—a group of recreational interests and local governments—insisted that “[i]t is imperative that ORV use be recognized for exactly what it is: A historical means of access to an area especially attractive for recreational opportunities.”<sup>257</sup> The Coalition further complained that

Without sensible beach access, there is no reason for tourists to come here. Since 2008, successful businesses that are older than the park itself have started to fail. All walks of business are reporting that staffs have been reduced by 25 to 50% and the same for their sales figures.<sup>258</sup>

It also insisted that “[w]hen conflicts between ‘conserving resources and values and providing for enjoyment of them’ arise, NPS is obligated to vigorously search for solutions, not to defer to potentially more easily implemented conservation

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255. *Id.* at 13.

256. *Id.* at 16.

257. COAL. FOR BEACH ACCESS, CAPE HATTERAS NATIONAL SEASHORE RECREATIONAL AREA, ORV ACCESS ENVIRONMENTAL IMPACT POSITION STATEMENT 6 (2010).

258. *Id.* at 17.

measures.”<sup>259</sup> The NPS had considered numerous alternative solutions—including escorting vehicles around nesting birds, moving chicks to a nearby national wildlife refuge, and fencing chicks away from an ORV corridor—but it declined to fully evaluate them in the EIS because they were judged to be impractical or ineffective.<sup>260</sup>

Local residents unsuccessfully challenged the NPS plan in federal court.<sup>261</sup> The court first rejected the claim that the plan violated the act establishing the national seashore. “ORV use is not a recreational activity explicitly mentioned in the Seashore’s Enabling Act,” explained the court, “and the final rule exhibits that the NPS did extensively consider ORV use on the Seashore.”<sup>262</sup> The court added that “the Seashore’s Enabling Act and the Organic Act are not in conflict on this issue,” though it also asserted that “over twenty years of federal court decisions confirm[] that conservation is the predominant facet of the Organic Act”—a claim that I refute above.<sup>263</sup> The court next rejected the NEPA claim because the NPS properly considered alternative plans and the socioeconomic impacts of the plan, and the plaintiffs failed to raise their objections to the cultural impacts of the plan until they went to court.<sup>264</sup> “At bottom,” the court concluded, the plaintiffs wanted the court “to flyspeck NPS’s environmental analysis in order to identify any minor deficiency to propound as a basis to reject the final rule, which the Court will not and cannot do.”<sup>265</sup>

North Carolina’s congressional delegation moved quickly to scuttle the NPS plan. The delegation’s plan drew bipartisan support from North Carolina’s senators—Democratic Senator Kay Hagan and Republican Senator Richard Burr—and from Walter Jones, who represents Cape Hatteras in the House.<sup>266</sup> Their proposed bill would reinstate the interim strategy adopted by the NPS in 2005.<sup>267</sup> Both the Senate and the House

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259. *Id.* at 20.

260. *See* 2010 CAPE HATTERAS EIS, *supra* note 243, at 89–95.

261. *See* Cape Hatteras Access Pres. Alliance v. Jewell, No. 2:13-CV-1-BO, 2014 U.S. Dist. LEXIS 84596 (E.D.N.C. June 19, 2014).

262. *Id.* at \*16.

263. *Id.* (quoting *S. Utah Wilderness Alliance v. Nat’l Park Serv.*, 387 F. Supp. 2d 1178, 1191 (D. Utah 2005)).

264. *Id.* at \*24–30, \*36–37.

265. *Id.* at \*37.

266. *See* H.R. 4094, 112th Cong. (2012).

267. *See id.*



have held multiple hearings on the controversy.<sup>268</sup> An NPS official voiced the agency's "strong opposition" to the bill because

the final ORV Management Plan / Environmental Impact Statement (EIS) and special regulation are accomplishing these objectives far better than the defunct Interim Strategy. . . . The great majority of the beach is open to ORVs, visitation is rising, and tourist revenues are at record levels. At the same time, beach-nesting birds and sea turtles are finally showing much-needed improvements.<sup>269</sup>

The environmental organizations that initiated the litigation agreed with the NPS.<sup>270</sup> But Representative Jones asserted that "[t]his bill is about jobs, it's about taxpayers' right to access the recreational areas they own, and it's about restoring balance and common sense to Park Service management."<sup>271</sup> Joe Manchin, the Democratic Senator from West Virginia who cosponsored the bill, agreed that the NPS plan failed to strike the right balance because "[i]t's actually hurting the local economy and affecting the experience of vacationers." Manchin added that "in this instance the Park Service is acting as an adversary and not an ally. I've always said government should be your partner and your ally, trying to find the balance between the economy and the environment."<sup>272</sup> And Wyoming Senator John Barasso was impressed by the "example of an entire delegation, elected by the people who live and work and recreate in an area supporting the same legislation,"

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268. See *National Parks Bills: Hearing Before the Subcomm. on Nat'l Parks of the S. Energy & Natural Res. Comm.*, 113th Cong. 1 (2013) [hereinafter *National Parks Bills Hearing*]; *H.R. 4094, "Preserving Access to Cape Hatteras National Seashore Recreational Area Act"*; and *Oversight Hearing on "Access Denied: Turning Away Visitors to National Parks": Hearing Before the Subcomm. on Nat'l Parks, Forests & Pub. Lands of the H. Natural Res. Comm.*, 112th Cong. 4 (2012) [hereinafter *Hearing on H.R. 4094*].

269. *National Parks Bills Hearing*, *supra* note 268, at 17 (statement of Peggy O'Dell, NPS Deputy Director for Operations).

270. *Id.* at 46 (statement of Derb. S. Carter, Jr., Director of the North Carolina Offices of the Southern Environmental Law Center) (contending that the NPS "weighed all the comments and public input and struck a careful and fair balance among competing uses of the Seashore").

271. *Hearing on H.R. 4094*, *supra* note 268, at 4 (statement of Rep. Jones).

272. *National Parks Bills Hearing*, *supra* note 268, at 23 (statement of Sen. Manchin).

supporting the bill on a bipartisan basis.<sup>273</sup>

The House approved the proposed legislation in 2012, but the Senate failed to act on it.<sup>274</sup> Then, in September 2013, the Senate Energy and Natural Resources Committee approved a substitute bill without dissent.<sup>275</sup> Rather than simply tossing the 2010 NPS plan and reinstating the 2005 interim strategy, the committee's bill directed the NPS to "designate pedestrian and vehicle corridors around areas of the National Seashore closed because of wildlife buffers"; to "ensure that the buffers are of the shortest duration and cover the smallest area necessary to protect a species"; to engage in a public process to consider reducing some of the vehicle closures; and to "construct new vehicle access points and roads . . . as expeditiously as practicable."<sup>276</sup> But instead of acting on that bill, the House again approved the reinstatement of the interim management plan as part of a controversial package of public lands measures that the Senate declined to consider.<sup>277</sup> Another year passed, and then Congress added a provision to the military funding bill, passed in December 2014, to address the Cape Hatteras dispute. The legislative fix directs the Secretary of the Interior to "review and modify wildlife buffers" by imposing the minimum buffer necessary and by allowing pedestrian and vehicle access to unaffected areas.<sup>278</sup> The Secretary must also build new roads and vehicle access points and consider additional beach openings.<sup>279</sup> Congress thus maintained the core of the NPS's plan while instructing the agency to consider additional steps to provide access to the national seashore.

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273. *Id.* at 30 (statement of Sen. Barasso). Senator Barasso added that "[e]very effort, I believe, should be made by the Administration and Members of Congress to support the desires of the local people, the delegation".

274. See Jessica Estepa, *House Clears Controversial Package On Party Lines*, E&E NEWS (Feb. 6, 2014), <http://www.eenews.net/eenewspm/2014/02/06/stories/1059994181>, archived at <http://perma.cc/LWM9-6B7G>.

275. See S. REP. NO. 113-102, at 1-2 (2013).

276. *Id.*

277. See Public Access and Lands Improvement Act, H.R. 2954, 113th Cong., §§ 501-04 (2014) (title containing the "Preserving Access to Cape Hatteras National Seashore Recreational Area Act").

278. See Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, H.R. 3979, § 3057(b)(2) (2014).

279. *Id.* § 3057(c).

## 2. Yukon Charley National Preserve

The second dispute began when a seventy-year-old boater refused to allow NPS personnel to conduct a boat inspection while he was traveling along the Yukon River in the Yukon Charley National Preserve in Alaska.<sup>280</sup> The incident raised a latent legal question under ANILCA of whether the NPS or the state had jurisdiction over certain Alaskan rivers. Alaska's Representative Don Young engaged NPS director Jonathan Jarvis in a colloquy about the dispute during a 2011 hearing on the mission of the NPS.<sup>281</sup> Young began by reminding Jarvis about their discussion "in my office about the incident on the river" and how Jarvis had "made a pledge to work with me to correct the behavior of the law enforcement rangers in the management of the Yukon Charley Preserve."<sup>282</sup> Jarvis replied that "we have intervened pretty aggressively in Alaska . . . to have a great discussion around your concerns and the concerns of the local communities."<sup>283</sup> Young interrupted Jarvis, saying "I haven't got all day," and proceeded to attack the "real snotty attitude" of the NPS regional director in Alaska.<sup>284</sup> Young concluded his second round of questioning at the hearing by telling Jarvis that "I am going to hound you until something is done up there."<sup>285</sup>

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280. See Tim Mowry, *Lawyer in River Arrest by Park Service Files Federal Appeal*, ALASKA DISPATCH NEWS (Apr. 11, 2012), <http://www.adn.com/article/20120411/lawyer-river-arrest-park-service-files-federal-appeal>, archived at <http://perma.cc/HW56-EYF5> (reporting that "[a] federal judge in October found Wilde guilty of three misdemeanor charges stemming from a September 2010 run-in with park rangers in the Yukon-Charley Rivers National Preserve east of Fairbanks. Wilde cursed out two rangers when they tried to stop him for a boat safety inspection on the Yukon River and continued upriver. The rangers pursued him, with one of them drawing a pistol and then a shotgun. Wilde pulled over to the riverbank, where a brief scuffle ensued and the rangers wrestled Wilde to the ground and arrested him. He spent four days in jail.").

281. See *Spending, Priorities and Missions of the National Service and the President's FY 2012 Budget Proposal Oversight: Hearing Before the Subcomm. on Nat'l Parks, Forests and Pub. Lands of the H. Comm. on Natural Res.*, 112th Cong. 22 (2011).

282. *Id.* (statement of Rep. Young).

283. *Id.* (statement of NPS Director Jarvis).

284. *Id.* (statement of Rep. Young).

285. *Id.* Representative Rivera questioned Jarvis why more lands in Big Cypress couldn't be designated as backcountry recreation instead of as wilderness. Jarvis responded that "Big Cypress is a complicated, and often controversial, place," and he then described the "arduous public process that took almost 10 years to get to a point where there is an appropriate balance." *Id.* at 27. But Rivera was unconvinced, and he "strongly urge[d] the service to reconsider the

True to his word, Representative Young attached a rider to the Department of the Interior's funding bill that would preclude the NPS from using any of its appropriations "to implement or enforce regulations concerning boating and other activities on or relating to waters located within Yukon-Charley National Preserve."<sup>286</sup> Representative Norman Dicks introduced an amendment that would have stripped Young's rider from the bill, thus provoking an extended discussion of the issue on the floor of the House.<sup>287</sup> Dicks insisted that Young "has already won the case. The people there, the two rangers, have been reassigned to another duty . . ."<sup>288</sup> Representative Moran worried that the rider "creates a precedent. Any time something happens on a national preserve or park land, they could come to the Congress and say, all right, no more inspections, and we could get a proliferation of these kinds of things specific to individual national reserves or parks."<sup>289</sup> To which Representative Simpson replied, "Exactly. If we can't have oversight about what goes on and about what the Park Service does, why are we even here?"<sup>290</sup> Representative Young upped the ante by proclaiming that "[t]he Park Service is for the people; it's not for the Park Service. The Park Service in Alaska has become, very frankly, I'd say, like an occupying army of a free territory."<sup>291</sup> The House agreed with Representative Young and voted against Representative Dicks' proposed amendment 237 to 174.<sup>292</sup> The provision survived the Senate, and was part of the government funding law that President Obama signed in December 2011.<sup>293</sup>

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designation" of wilderness. *Id.* (statement of Rep. Rivera). The management of Big Cypress was also the subject of a congressional field hearing in Florida. *See National Parks of Florida: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Res. of the H. Comm. on Gov't Reform, 109th Cong. 1* (2006) [hereinafter *Florida National Parks Hearing*].

286. 157 CONG. REC. H5605 (daily ed. July 7, 2012).

287. *See id.* at H5605-08.

288. *Id.* (statement of Rep. Dicks). *See also id.* at H5605 (statement of Rep. Moran) (noting that "normally we don't change national policy to deal with misconduct, if that's what it was, on the part of certain individuals").

289. *Id.* (statement of Rep. Moran).

290. *Id.* at H5608 (statement of Rep. Simpson).

291. *Id.* (statement of Rep. Young). *See also id.* at H5606 (statement of Rep. Young) ("Think about the little people. Quit thinking about these agencies. These agencies aren't God.").

292. *See id.* at H5629.

293. *See Consolidated Appropriations Act 2012, Pub. L. No. 112-74, § 119, 125 Stat. 786* (2011).

### 3. Fort Vancouver National Historic Site

The third dispute involves Fort Vancouver National Historic Site, whose namesake is a replica of the stockade built by the Hudson Bay Company in 1829 along the northern bank of the Columbia River in what is now Vancouver, Washington.<sup>294</sup> In addition to a replica of the nineteenth century trading post, the historic site includes the Pearson Air Museum, which features historic airplanes presumably unimaginable to the traders of the Hudson Bay Company.<sup>295</sup> A municipal airport had grown up near the fort before it was protected, so in 1972 the City of Vancouver sold seventy-two acres of airport property to the NPS “to allow the City to move active airport operations further away from the NPS’s reconstruction of historic Fort Vancouver.”<sup>296</sup> The agreement also allowed the city “to build the air museum on a small parcel of the NPS’s larger historic site that was adjacent to the city-owned, and also historic, Pearson Airfield.”<sup>297</sup> Soon “the museum was filled with privately-owned planes that highlighted the rich history of aviation in Southwest Washington.”<sup>298</sup>

The combination of a historic nineteenth century trading post and an air museum, along with the cooperative management agreement between the NPS and the city, collapsed in 2012 due to disagreement about the permissible use of the museum. The NPS denied permits for benefit

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294. See NAT’L PARK SERV., FORT VANCOUVER NATIONAL HISTORIC SITE GENERAL MANAGEMENT PLAN 2003 & MCLOUGHLIN HOUSE UNIT MANAGEMENT PLAN 2007 1 (2008) (noting that Congress acted in 1948 “to preserve as a national monument the site of the original Hudson’s Bay stockade (of Fort Vancouver) and sufficient surrounding land to preserve the historical features of the area” for “the benefit of the people of the United States” (citing 62 Stat. 532 and the Senate Report on the legislation)).

295. See *Pearson Air Museum*, NAT’L PARK SERVICE, <http://www.nps.gov/fova/planyourvisit/pearsonairmuseum.htm> (last visited Dec. 1, 2014), archived at <http://perma.cc/RJQ7-YBHK>.

296. See H.R. 588, *Vietnam Veterans Donor Acknowledgment Act of 2013*; H.R. 716, *to Direct DOI to Convey Certain Federal Land to the City of Vancouver, Washington*; and H.R. 819, *Preserving Access to Cape Hatteras National Seashore Recreational Area Act: Hearing Before the Subcomm. on Pub. Lands and Env’tl Regulation of the H. Natural Res. Comm.*, 113th Cong. 26 (2013) [hereinafter *Fort Vancouver Hearing*] (testimony of Elson Strahan, President & CEO, Fort Vancouver National Trust).

297. *Id.*

298. *Id.* at 7 (statement of Rep. Beutler).

concerts for the USO and for a veteran's group, a picnic for area churches, and a youth soccer fair because such large, noisy events violated "federal law and policy."<sup>299</sup> The conflict escalated to the point where the NPS demanded the keys to the museum from the trust that ran it for the city, and the city responded by removing all of the historic aircraft from the museum.<sup>300</sup>

Jaime Herrera Beutler, the local member of Congress, "organized and attended countless meetings with staff from every level of the Park Service, from Director Jon Jarvis to the local level" in an effort to resolve the dispute.<sup>301</sup> Similarly, the director of the trust that had managed the museum met with the NPS regional director, who reportedly said that "NPS regulations are the same for all NPS parks and that our site is no different than Yellowstone in this respect."<sup>302</sup> Representative Beutler then introduced legislation that would transfer the museum out of the NPS and back into city ownership.<sup>303</sup> She soon noted that her "office has been flooded with pleas by my constituents to pass this legislation."<sup>304</sup> The Public Lands and Environmental Regulation subcommittee of the House Resources Committee held a hearing on that bill and the overall controversy in March 2013.<sup>305</sup> The NPS voiced its "strong opposition" to the bill because

[r]emoval of this land from the management of the National Park Service would diminish the level of protection afforded to this area and would diminish the integrity of resources, including the reconstructed fur trade post, within the rest of

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299. *Id.* at 3, 38 (testimony of Dr. Herbert C. Frost, NPS Associate Director, Natural Resource Stewardship and Science Frost).

300. *See id.* at 5 (statement of Rep. Beutler) (noting that the NPS "demand[ed] the immediate handover of the museum's alarm code and keys").

301. *Id.* (statement of Rep. Beutler). *See also* Press Release, U.S. Congresswoman Jamie Herrera Beutler, Jaime Herrera Beutler Tells Nat'l Park Service to Preserve Local Cmty. Access to Fort Vancouver (June 20, 2012), available at <http://herrerabeutler.house.gov/news/documentsingle.aspx?DocumentID=300259>, archived at <http://perma.cc/6FM9-FDRJ> (advising that "[i]f compromise fails, the Park Service needs to know that a legislative fix is moving forward").

302. *Fort Vancouver Hearing, supra* note 296, at 27 (testimony of Elson Strahan).

303. *See* 159 CONG. REC. H546 (daily ed. Feb. 14, 2013) (statement of Rep. Beutler).

304. *Fort Vancouver Hearing, supra* note 296, at 4 (statement of Rep. Beutler).

305. *See id.*

the National Historic Site that are essential to the enabling legislation of the park.<sup>306</sup>

By contrast, the director of the trust that had managed the museum testified that “since the community built and funded the museum, the doors should be open to everyone for special community events—for example, benefit concerts for the military, church picnics, weddings and proms.”<sup>307</sup> He also rebutted the NPS’s concern about maintaining the tranquility of the site by observing that it is located within the middle of the city, bordered by a freeway and a rail line, and on the flight path for Portland International Airport.<sup>308</sup>

*D. The Case for Congressional Decisions Respecting National Park Management*

Congressional intervention in national park management decisions is controversial. For some, it evidences the exaggerated role of wealthy special interests. For others, it

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306. *Id.* at 12 (testimony of Dr. Herbert C. Frost, NPS Associate Director, Natural Resource Stewardship and Science) (noting that “[r]emoving this property from federal ownership would also remove federal protections under cultural resources preservation laws such as the National Historic Preservation Act, the Archeological Resources Protection Act, the Native American Graves Repatriation Act, and the American Indian Religious Freedom Act”).

307. *Id.* at 24 (testimony of Elson Strahan, President & CEO, Fort Vancouver National Trust) (noting that “[s]ince the museum opened its doors in 1995, it has operated using a sustainability model with the purpose of independently supporting operations and educational programs without federal funds”); *id.* at 26 (estimating “the total community investments in the Pearson Air Museum to be well over \$8 million, inclusive of initial capital contributions and operational support since the museum complex was developed. Over these past eighteen years, the NPS has contributed negligible capital and operational support to the museum.”). *But see Park Assumes Direct Operational Responsibility for Pearson Air Museum—Frequently Asked Questions*, NAT’L PARK SERVICE, <http://www.nps.gov/fova/parkmgmt/pamops2013.htm> (last updated Feb. 13, 2013), archived at <http://perma.cc/559V-7N3A> (explaining that “[s]ince 1998, the National Park Service has provided more than \$1,300,000 in funding support to the Museum and its immediate environs”).

308. *Fort Vancouver Hearing*, *supra* note 296, at 27 (testimony of Elson Strahan). *See also id.* at 3 (testimony of Rep. Beutler) (describing the site as “[b]ordered by freeways, an airport, and a busy rail line”). The supporters of Representative Beutler’s bill have also questioned the inconsistency with which the NPS applies its standards for permissible events. *See id.* (testimony of Rep. Beutler) (noting that the NPS sponsored its own “Get Outdoors Event” with activities “that are nearly identical to the activities” proposed in the denied permit applications).

displaces the professional judgment of the NPS with the political whims of members of Congress. Another concern, voiced by Rob Fischman, is that separate rules for different national parks contradict the idea of a national park *system*.<sup>309</sup>

These concerns are misplaced or exaggerated. Controversies regarding the conservation and enjoyment of national parks often feature parties with roughly equal political power. Indeed, contrary to the popular perception of large corporations turning to Congress to secure special benefits, it is common for those seeking to enjoy the parks to complain that they possess less political power than their conservationist opponents. At Cape Hatteras, for example, the residents of small local communities that oppose the NPS policy frequently complain that they are at the mercy of the outsized power of national environmental groups.<sup>310</sup> Nor are the aggrieved parties at Fort Vancouver wealthy special interests.<sup>311</sup> A surprising number of national park enjoyment-versus-conservation controversies feature similar political dynamics.<sup>312</sup> Indeed, sometimes environmental advocates beseech Congress to engage in additional oversight needed to protect national parks “for future generations.”<sup>313</sup>

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309. See Fischman, *supra* note 43, at 808.

310. See *Hearing on H.R. 4094*, *supra* note 268, at 17 (statement of Warren Judge, Chairman, Dare County Board of Commissioners) (describing those affected by the environmental restrictions as “hundreds of grassroots entrepreneurs who operate restaurants, gift shops, motels, cottages, fishing tackle stores, and all the mom-and-pop businesses that provide the necessary infrastructure to support our visitors”).

311. See *Fort Vancouver Hearing*, *supra* note 296 (reporting that the parties opposed to the NPS management of Fort Vancouver National Historic Site included the USO, a veteran’s group, area churches, and a youth soccer league).

312. See KEITER, *supra* note 125, at 266–67 (observing that “[w]hen political realities have intervened and constrained the Park Service’s ability to resolve thorny resource management issues, Congress has occasionally weighed in with targeted amendments to address the problem, as seen in the case of the Redwood Amendment, concessions reform, air tour overflights, the new science mandate, and Elwha River restoration. The net result has not always been as sensitive to nature conservation priorities as it might have been, but no law can provide ironclad protection against politically powerful competing demands.”); FORESTA, *supra* note 7, at 77 (reporting that during the 1970s “environmental organizations were often on an equal or even firmer moral footing than the Park Service when they went to Congress with their wishes for the National Park Service” because of “the widespread view” that the NPS “was an overly aggressive, empire-building agency”).

313. *Florida National Parks Hearing*, *supra* note 285, at 40 (statement of Nathaniel Reed, Member of National Council, National Parks Conservation Association).



Concerns that congressional lawmaking undercuts the authority of the NPS are misplaced.<sup>314</sup> Congress overturns a tiny fraction of the management decisions made by the NPS. When it does so, Congress typically acts because it balances the values of conservation and enjoyment differently than the NPS in a particular case, not because Congress disagrees with the professional scientific judgment of the NPS. Similarly, the fact that Congress reverses judicial interpretations of federal statutes does not impugn the integrity of the federal courts. It simply means that Congress has the last say about the meaning of the statute, just as Congress gets to decide the proper content of the statutes that it enacts.

Moreover, the existence of a national park system should not preclude special rules for special places. It would be odd if the NPS were forced to manage the spectacular scenery of Grand Teton National Park in the same way that it manages the historic features of Abraham Lincoln Birthplace National Historical Park. Every unit of the national park system is governed by the Organic Act, but the NPS manages those units to achieve the specific purposes for which they were created. That Congress occasionally acts to adopt a new management policy shows the system's flexibility, which has long been one of its hallmarks.

The point is not that Congress always gets the answer right. Sometimes it does; sometimes it doesn't. But the same is true of the NPS. If I were somehow vested with the authority to resolve those three disputes, I would side with the NPS in the Cape Hatteras dispute because I believe that it strikes the right balance between wildlife preservation and visitor use, but I would agree with Representative Beutler about Fort Vancouver because the historic trading post and the airplane museum seem mismatched in a way that is destined to produce

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314. This argument was advanced, for example, by the National Parks Conservation Association in response to the proposed legislation to divest the NPS of the airplane museum at the Fort Vancouver National Historic Site. See OutThere, Comment to *Fort Vancouver National Historic Site*, NAT'L PARKS CONSERVATION ASS'N, <http://www.npca.org/parks/fort-vancouver-national-historic.html> (last visited Nov. 30, 2014), archived at <http://perma.cc/9S7F-B2M7> (accusing Representative Beutler of "legal bullying," asserting that "[c]arving up any national park to satisfy the wants of any event or group sets dangerous precedent [sic] and should not be permitted and certainly not legislated!"); see *id.* (quoting NPCA Northwest program manager David Graves as saying "[i]t is not appropriate for Congress to step in and take away part of a park to punish them for a decision they made that is their prerogative").

future conflicts. I am not sure of the best policy for the Yukon River, but I would expect that Congress is better positioned than the NPS to resolve such fundamental federal-state jurisdictional disputes. But I am not vested with that decision-making authority, nor should I be. Congress entrusted such decisions to the NPS in the Organic Act, subject to the environmental constraints imposed by other federal laws, while reserving the right to overrule the NPS when the daunting constitutional requirements for federal lawmaking are satisfied.

### CONCLUSION

The national parks are “America’s best idea.”<sup>315</sup> The October 2013 federal government shutdown provides the most recent evidence of the unparalleled popularity of the national parks, for it was the fact that the national parks were closed to visitors that came to symbolize the government’s closure.<sup>316</sup> It is understandable, then, that the public remains more interested in national park management than it is in many other seemingly more pressing questions of public policy. This combination of popular interest and NPS professional expertise manifests itself in the tripartite structure of national park law. The Organic Act gives the NPS broad discretion to make most management decisions as it deems best, federal environmental

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315. *E.g.*, DUNCAN & BURNS, *supra* note 29; Wallace Stegner: A Word for Wilderness, WILDERNESS.NET, <http://www.wilderness.net/NWPS/Stegner> (last visited Nov. 30, 2014), *archived at* <http://perma.cc/CG4P-NQS3>. The frequent reference to national parks as America’s best idea has prompted a variety of other nominations. *See, e.g.*, *National Parks in the Pacific Northwest: Hearing Before The Subcomm. on Criminal Justice, Drug Policy & Human Res. of the H. Comm. on Gov’t Reform*, 109th Cong. 9 (2005) (statement of Rep. Baird) (“[T]here’s jazz and baseball and lots of other stuff, but the Bill of Rights and the National Parks are profoundly important to me and to all of us . . . .”); THE NATIONAL PARKS: AMERICA’S BEST IDEA (Florentine Films and WETA Washington D.C., Sept. 27, 2009) (statement of Clay Jenkinson that “the best idea” is that “all human beings, irrespective of the accident of their birth, are entitled to enjoy the aspirations of being fully complete and free human beings”). *See also* Joseph Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 240 (1976) (describing the national parks as “among the few unambiguous triumphs of American public policy”).

316. *See generally* Garance Franke-Ruta, *How the National Parks Became the Biggest Battleground in the Shutdown*, ATLANTIC (Oct. 11, 2013, 3:16 PM), <http://www.theatlantic.com/politics/archive/2013/10/how-the-national-parks-became-the-biggest-battleground-in-the-shutdown/280439>, *archived at* <http://perma.cc/7PJ8-RJYW>.

statutes ensure that the most important environmental values are respected within national parks, and occasionally Congress intervenes to dictate a specific management outcome. This system has evolved from the establishment of Yellowstone National Park in 1872 to the adoption of the Organic Act in 1916 to the enactment of numerous federal environmental statutes in the 1970s, with Congress all the while legislating and overseeing specific park decisions. It has proved to be sufficiently flexible to accommodate shifting understandings of the national park while also being sufficiently definite to prevent some of the more outrageous ideas for enjoying or conserving the parks. The law governing the national parks, in short, has played an important if overlooked role in securing the place of national parks in the American consciousness today.