

Volume One

**A REVIEW of JUDICIAL DECISIONS AFFECTING MANAGEMENT
PLANNING in the NATIONAL PARKS of the UNITED STATES**

**A Report for
Denali National Park and Preserve**

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INTRODUCTION

This report provides a detailed introduction to the case law which significantly affects National Park management in the United States. Park Service personnel will be able to use the material contained within the manuscript to guide them in the development of a variety of management planning initiatives and in specific resource use decisions. The report does not attempt to evaluate the language of the many relevant statutes passed by Congress nor the regulations promulgated by the agency. It is assumed that agency managers are already well acquainted with these statutes and regulations. Case law is an important, but often ill-understood constraint in natural resources management. This report is intended to fill the information gap regarding familiarity with the many court decisions guiding natural resource use and allocations within our nation's park lands.

To accomplish its intended purpose, this report is divided into two separate sections. Section one provides a comprehensive description of the salient legal principles emanating from case law which serve as guide posts in National Park management. Whenever possible, cases are used in which the National Park Service is a litigant. Section two then develops, as case studies, several reported cases that have direct relevance to issues faced by most National Parks.

National Park management involves decisions and plans that are the product of the interplay among constitutional doctrines, statutes, regulations, common law principles, and individual agency decisions. While the Park Service enjoys wide latitude in interpreting the statutes and regulations for which it is responsible, the judiciary has final review authority. Consequently, the interpretation courts give various provisions in a variety of decision contexts has tremendous impact on the potential options held by the Park Service in dealing with park management issues.

In order to best understand the material contained within this report, it is important to be familiar with nature of legal reasoning. The primary feature of case law development is the idea of reasoning from analogy. Courts are called upon to resolve disputes. To accomplish this task, courts embark upon a process which first identifies the factual and legal issues presented by the controversy before them, next the court identifies the relevant aspects of law necessary to make a determination, then the court applies the law to the facts, and finally, the court explains its decision.

While courts try to defer to agency decisions, courts also reserve the final authority to interpret and make law. American courts, as a vestige of our English legal heritage, have the power to make positive law through the common law, not just follow statutory pronouncements from the legislature. Often, too, the statutes which guide agencies are vague, filled with broad and general terms. It is the duty of the judiciary to give meaning to these terms and provisions when disputes arise as a result of the ambiguity found in statutory language. Courts search for the proper fit and balance among these many competing legal sources when deciding cases. Because of the role of precedent, courts try to craft consistent interpretations that guide those responsible for following its decisions.

This report tries to explain the most consistent legal principles affecting national park management in a manner that can be easily understood by park service personnel. In doing so, it

is hoped that this report will improve management efficiency and efficacy by helping guide the decision making process and thereby contribute to avoiding potentially costly litigation and its attendant problems of delay, waste of scarce management resources, and demoralization.

PART ONE: LEGAL OVERVIEW

I. PARK PURPOSES

A. Organic Act

Congress has spoken as to the management of the National Park System. In the Organic Act, (creating the Park Service), Congress stated the agency was, “[To] promote and regulate the use of the Federal areas known as national parks, monuments, and reservations...by such means and measures as conform to the fundamental purpose of said park, monuments and reservations; which purpose is to conserve the scenery and the natural and historic objects and 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.”¹ In subsequent amendments to the Organic Act, Congress explained that the promotion and regulation of the NP system shall be consistent with the protection of park resources, and shall not be exercised in derogation of these values except as may have been specifically provided for by Congress.² In this regard, subsequent park unit legislation is seen as augmenting the Organic Act, not repealing its preservation mandates.³

The Organic Act and its amendments require management of park areas so as not to compromise the park’s natural resources.⁴ However, the Act is silent as to how the NPS is to achieve protection of park resources.⁵

¹ 16 U.S.C. 1

² 16 U.S.C. 1a-1

³ *Mausolf v Babbitt* [hereafter *Mausolf IV*] 125 F.3d 661, 668 ((8th Cir. 1997)

⁴ *Alaska Wilderness Alliance v Jensen*, [hereafter referred to as *AWA*], 108 F.3d 1065 at 1072 (9th Cir. 1997)

⁵ *National Wildlife Federation v NPS*, [hereafter referred to as *NWF*], 669 F.Supp. 384 at 391 (D.Wyo. 1987)

B. Park Purposes

Congress has placed specific emphasis on the preservation and conservation of natural resources within park units.⁶ Thus, the primary management function of the NPS is preservation of wildlife and natural scenery, when conflicts erupt between conservation and visitor enjoyment.⁷ Indeed, the desire to observe wildlife for purely aesthetic purposes in National Parks is a cognizable user interest within the definition of park use and enjoyment.⁸ Congress has repeatedly made clear that it does not consider consumptive uses of park resources to be compatible within park units unless otherwise specifically provided for through statute.⁹

C. Park Uses-Balancing

Under the Organic Act, the NPS have been given the difficult task of balancing use with protection in the management of the National Parks's.¹⁰ To achieve this difficult enterprise, the NPS is given broad discretion in determining what uses of park resources are proper, and what proportion of the park's resources are available for each use.¹¹ The NPS is not expected to increase public use to the extent of compromising the nature and character of park units,¹² and courts have been careful to ensure that the NPS has the authority to strike a reasoned balance between the goals of natural resources protection, recreation, and safety without undue interference.¹³

In carrying out its preservation mission, NPS need not wait for damage to actually

⁶ Michigan United Conservation Clubs v Lujan, [hereafter referred to as MUCC], 949 F.2d 202 at 206 (6th Cir. 1991); Bicycle Trails Council of Marin v Babbitt, [hereafter referred to as BTCM], 82 F.3d 1445 at 1452 (9th Cir. 1996)

⁷ MUCC at 207 (1991)

⁸ Wyoming Farm Bureau v Babbitt, [hereafter referred to as WFB], 987 F.Supp. 1349 at 1360 (D. Wyo.1997)

⁹ MUCC at 207 (1991)

¹⁰ NWF at 390 (1987)

¹¹ BTCM at 1454 (1996); NWF at 391 (1987)

¹² BTCM at 1457 (1996)

¹³ BTCM at 1468 (1996)

occur before taking action to protect its wildlife and other natural attributes.¹⁴ Exotic species such as wild horses, however popular, when their continued existence in the park poses a potential threat to preserving the park's ecological integrity, may be removed.¹⁵

As to the question whether the Park Service may permit activities within national parks that permanently impair unique park resources, the answer is decidedly "no".¹⁶ The Park Service mandate is to permit only those forms of enjoyment and access that are consistent with preservation and inconsistent with significant, permanent impairment.¹⁷ Management of national parks must always be exercised with an eye toward promoting specific regulatory objectives and the protection of scenic, natural, and cultural resources.¹⁸

II. ADMINISTRATIVE DEFERENCE AND PROCEDURE

A. General

Agencies typically engage in three types of activities: adjudications, rule making, and decisions. The latter two can be either formal or informal processes. Informal decisions are reviewed under the arbitrary and capricious standard.¹⁹

Most actions taken by land managing agencies, such as the National Park Service, are informal rule making and informal decision making. Informal rule making takes the form of management plans and regulations that only require notice in the federal register and comment from the public, accompanied by some sort of administrative record. Informal decisions are the vast majority of Park Service actions that are taken pursuant to management plans, regulations, and policy guidelines. These types of decisions must also be accompanied by some form of administrative record.

The Park Service, because it is a "management agency", rather than a "regulatory

¹⁴ Wilkins v Dept. of Interior, [hereafter referred to as Wilkins], 995 F2d 850 at 853 (8th Cir. 1993); New Mexico State Game Commission v Udall 410 F2d 1197 (10th 1969)

¹⁵ Wilkins at 852-853 (1993)

¹⁶ Southern Utah Wilderness Alliance v. Dabney [hereafter SUWA] 7 F.Supp.2d 1205 (D.Utah 1998)

¹⁷ SUWA at 1211 (1998)

¹⁸ Mausolf IV at 669 (8th Cir. 1997)

¹⁹ Wilkins at 852 (1993)

agency”, is rarely subject to formal action requirements.²⁰ This distinction stems from the notion that land owning agencies are acting as managers of federal property, conditioning the use of that property as any private proprietor may. Regulatory agencies, on the other hand, are viewed as exercising the police like powers of the sovereign, truncating the exercise of otherwise permissible human behavior.

The Secretary of the Interior is authorized to “make and publish such rules and regulations as deemed appropriate for the use and management of the national parks.”²¹ NPS discretion in its management decisions is extremely broad.²²

B. Statutory Interpretation

The authority of an agency to administer congressionally created programs necessarily requires an agency to formulate policy and rules to fill legislative gaps, left implicitly or explicitly by Congress.²³ The interpretation put on a statute by an agency charged with administering the statute is entitled to deference from the courts.²⁴

The park service enjoys particularly strong deference from courts in the interpretation that the NPS gives to statutes it administers.²⁵ This considerable latitude for interpretation is granted so long as the NPS demonstrates that the interpretation is reasonable.²⁶

Judicial review of agency interpretation of statutes is a two step process: First, the court must independently determine if Congress has spoken directly concerning the precise question at issue. If so, the Court’s inquiry is over, and the Court must implement the explicit will of Congress. If, however, the statute is silent or ambiguous with respect to the particular issue, then the court must give effect to the agency’s interpretation if it is reasonable.²⁷ The court cannot substitute its own judgement as to

²⁰ Lake Mohave Boat Owners Association v NPS, 78 F.3d 1360 (9th Cir. 1996)

²¹ 16 U.S.C. 3 cited in MUCC at 204 (1991); AWA 1070 (1997)

²² NWF at 391 (1987)

²³ WFB at 1371 (1997)

²⁴ AWA 1069 (1997); MUCC 206 (1991)

²⁵ AWA at 1073 (1997); BCTM at 1454 (1996)

²⁶ AWA at 1070 (1997)

²⁷ BCTM 1452 (1996)

what is the best interpretation.²⁸ However, the court is bound to reject administrative interpretations that are inconsistent with the explicit will of Congress.²⁹

Deference to an agency's interpretation of a statute is greatest when the issue to be resolved involves technical matters within the scope of an agency's specific expertise.³⁰ When reviewing an agency's statutory interpretation, the court looks to whether the interpretation is consistent over time and supportable on the basis of available information, in determining whether the agency has violated the arbitrary and capricious standard.³¹

Consistency over time in an agency's interpretation of a statute is one of the most important considerations in evaluating whether an agency is arbitrary or capricious in its construction of a statute.³² For example, when an agency's interpretation of a statute is open and public over a long period of time, and there is no evidence that Congress sought to alter this interpretation, a strong presumption settles in that the agency has correctly captured the will of Congress.³³ In divining legislative intent, however, an agency cannot use post passage comments from legislators to give meaning to statutory language, not even in footnote.³⁴

C. Rule-making

An even greater degree of deference is accorded to an agency's interpretation of the regulations which the agency administers.³⁵ Regulations promulgated pursuant to express statutory authority will be upheld by the courts unless the agency's rule making

²⁸ MUCC at 206 (1991)

²⁹ MUCC at 206 (1991)

³⁰ *Kunaknana v Clark*, [hereafter referred to as *Kunaknana*], 742 F.2d 1145 at 1150 (9th Cir. 1984)

³¹ MUCC at 206 (1991)

³² *Seldovia Native Association v Lujan*, [hereafter referred to as *Seldovia*], 904 F.2d 1335 at 1346 (9th Cir.1990)

³³ MUCC at 210 (1991)

³⁴ MUCC at 209-210 (1991)

³⁵ *Mausolf IV* at 667-668 (1997)

is arbitrary, capricious, or manifestly contrary to express statutory intent.³⁶ Another factor a court considers in deciding whether a regulation is arbitrary or not is whether the rule is directly related to the purposes of the statute it is purported to implement.³⁷

Under informal rule making, an agency is required to provide a concise general statement of the regulation's purpose and the basis for its implementation.³⁸ Despite what some interest groups have attempted to assert, an agency regulation need not try to correct every issue that may contribute to a particular problem, for an agency must contend with a multitude of matters of varying degrees of importance. Thus, an agency must be permitted to make limited progress as it goes along.³⁹ Rule making would never end if an agency was required to respond to every comment that was given in response to an agency's treatment of public input.⁴⁰

D. Decisions

A court must determine, in reviewing an agency decision, if the agency (1) acted within the scope of its authority, (2) acted in accordance with prescribed procedure, and (3) acted in an arbitrary or capricious manner.⁴¹ Just as in statutory interpretation and regulatory rule making, the NPS enjoys tremendous deference from courts concerning the agency's informal decisions.⁴²

It is extremely important to note that the arbitrary and capricious inquiry, by which

³⁶ *Mausolf IV* at 667 (1997); *Spiegel v Babbitt*, [hereafter referred to as *Spiegel*] 855 F.Supp. 402 at 404 (D.D.C. 1994); *Voyageurs Region National Park Association v Lujan*, [hereafter referred to as *VRNPA*], 966 F.2d 424 at 427 (8th Cir. 1992).

³⁷ *VRNAP* at 427 (1992)

³⁸ *Personal Watercraft v Dept. of Commerce*, [hereafter referred to as *PW*], 48 F.3d 540 at 545 (D.D.C. 1995)

³⁹ *PW* at 544 (1995)

⁴⁰ *PW* at 543 (1995)

⁴¹ *WFB* at 1364 (1997)

⁴² *Grand Canyon Air Tour Coalition v. FFA* 154 F.3d 455 (D.D.C. 1998); *Mausolf IV* at 669 (1997); *Alaska Wilderness Recreation and Tourism Association v Morrison*, [hereafter referred to as *AWRT*] 67 F.3d 723 at 727 (9th Cir. 1995); *Fort Sumter Tours, Inc. v Babbitt*, [hereafter referred to as *FS*] 66 F.3d 1324 at 1335 (4th Cir. 1995); *Christianson v Hauptman*, [hereafter referred to as *Christianson*] 991 F.2d 59 at 63 (2nd Cir. 1993); *Conservation Law Foundation v Dept. of Interior*, [hereafter referred to as *CLF*], 864 F.2d 954 at 957 (1st Cir. 1989).

decisions are judged, focuses upon the rationality of the decision making process rather than upon the wisdom of the actual decision made.⁴³ An agency's technical decisions, based upon its particular expertise, must be afforded the greatest amount of deference of all, so long as the agency identifies the methods it used to collect and analyze technical data.⁴⁴

Where many possible solutions exist for a particular problem, the court must uphold the agency's choice of resolution so long as the process of making that choice was not arbitrary.⁴⁵ To pass this procedural standard, the NPS must provide some form of administrative record for its informal decisions for the court to review.⁴⁶

The administrative record must disclose an agency's analysis, reasoning, and methods used at arriving at its decision.⁴⁷ It must also articulate why the facts the agency used were relevant to the issue being resolved.⁴⁸ An agency's record must contain an explanation of the balancing it engaged in when weighing among conflicting policies.⁴⁹ The record must be contemporaneous with the decision and cannot be a post hoc rationalization. On occasion, the reviewing court may request additional information to explain a particular matter, but such post decision augmentation is rare.⁵⁰

In explaining its decision, the agency must articulate the relative weight it assigned to different types of evidence within its deliberative process.⁵¹ An agency must also establish the validity for its evidence prior to reaching conclusions based upon that

⁴³ WFB at 1364 (1997)

⁴⁴ Fund for Animals v Babbitt, [hereafter referred to as FFA] 903 F.Supp. 96 at 114 (D.D.C. 1995); CLF at 960 (1989)

⁴⁵ Wilderness Public Rights Fund v Kleppe, [hereafter referred to as WPRF], 608 F.2d 1250 at 1254 (9th Cir.1979)

⁴⁶ FS at 1324 (1995)

⁴⁷ WFB at 1364 (1997)

⁴⁸ FFA at 105 (1995)

⁴⁹ BTCM at 1456 (1996)

⁵⁰ FS 1336 (1995); Wilkins at 853 (1993)

⁵¹ BTCM at 1463 (1996)

evidence.⁵² Scientific uncertainty does not invalidate a decision so long as an agency explains how it treated the uncertainty.⁵³ The fact that the evidence may not be irrefutable on the issue does not render a decision arbitrary.⁵⁴ Deference is not so great, of course, that the decision can run counter to the data presented.⁵⁵ The agency must also make a good faith effort to identify the salient facts necessary for properly making a decision in the proper context.⁵⁶

Courts must defer to an agency's choice for scientific data and statistical methods so long as the agency explains the rationale for using such data and methods in its administrative record.⁵⁷ Public opinion evidence used to make an agency decision need NOT be generated by a systematic study quantifying particular sentiments; subjective visitor comments and staff reports are sufficient to identify possible user conflicts in parks.⁵⁸

An agency must follow its own regulations and decision precedents; a change in course or policy requires justification even greater than that necessary to establish a decision in the first place.⁵⁹

Despite the great deference the NPS enjoys, it may not use its discretion to the detriment of the conservation of wildlife, scenery, and historic objects the NPS is supposed to protect.⁶⁰ While bearing this in mind, it is useful to note that Non-conforming uses don't inherently entail degradation of park values.⁶¹

The case law concerning informal agency decision making, and the accompanying administrative record, can be summarized into a relatively simple process involving nine

⁵² FS at 1336 (1995)

⁵³ FFA at 105 (1995)

⁵⁴ WFB at 1372 (1997); FFA at 114 (1995)

⁵⁵ WFB at 1364 (1997)

⁵⁶ FS at 1335 (1995); CLF at 958 (1989)

⁵⁷ FFA at 114 (1995)

⁵⁸ BTCM at 1465 (1996)

⁵⁹ BTCM at 1455 (1996); VRNPA at 428 (1992); *Sierra Club v Lujan*, [hereafter referred to as SC], 716 F.Supp. 1289 at 1293 (D.Ariz. 1989)

⁶⁰ AWA at 1070 (1997)

⁶¹ AWA at 1073 (1997)

distinct elements contained within the record. These elements, briefly listed, are⁶²:

1. Identify the purpose of the decision and the goals to be achieved by the decision.
2. State the appropriate statutes, regulations, policies, and prior decisions that serve as legal parameters within which the decision must be made.
3. Identify the types of facts that are relevant to making the decision.
4. State the criteria that will be used to evaluate the relevant facts and identify the relative weight which will be assigned to competing facts when balancing different types of information.
5. Describe analysis techniques and methods used to collect the data and evaluate it.
6. Disclose all major assumptions, areas of uncertainty, and limitations on accuracy.
7. Generate several possible decision alternatives, each of which will meet the goals and objectives identified in step "1".
8. Select an alternative and explain why the choice made is the best one available based upon the objectives in step "1" and the parameters identified in step "2".
9. Explain what factors will precipitate the need to re-evaluate the decision and initiate a new decision making process.

In the event that a departure from precedent is needed, the administrative record must also explain (1) what new information has subsequently come to light necessitating a re-evaluation; or (2) what inaccurate information led to the prior inappropriate decision or policy, creating the need to depart from precedent. Justifying a departure from prior policy imposes a greater duty upon the agency to justify its decision than if the agency were acting upon a problem of first impression.

Step One requires the park service to ask itself what is the core problem and what goals must be met before a resolution to the problem is considered successful. Step Two requires the manager to explain which regulations, statutes, and management plans constrain the solution options available to the park. One does not meet the requirement of Step Two merely by listing the appropriate laws and regulations. The manager must explain what elements of prior plans, regulations, and statutes play a direct constraint upon the options available to the manager to achieve the specific goals identified in Step One.

Step Three serves to prevent a manager from merely relying upon the information currently available or easily obtainable. This step demands that the manager identify the

⁶² See Chapter 5 (by H. Bader) contained in *Outdoor Recreation Management*; Jubenville and Twilight; Venture Publishing, Inc.; State College, PA (1993); pages 67-74.

types of information a reasonable person would want prior to making this type of decision. This information must be identified, even if it is unavailable to the manager or cannot be technically obtained. This step alerts the courts as to whether the agency is operating within an imperfect information horizon. In identifying pertinent facts important to making the decision, it is essential that a manager keep the list short, to just those facts that are most salient in contributing to an understanding of the situation. Finally, this step provides the manager to assess the type of information needed, the data currently available, and whether there is sufficient information to make a rational decision upon the matter.

Not all data is of equal importance when used in solving a particular problem. Therefore, it is imperative that the administrative record explain which information was emphasized, regardless of its availability, in making a decision. Step Four provides the mechanism whereby the manager considers the relative importance of the contribution each set of information will have, if collected, in solving the problem. Just as in Step Three, no consideration is given as to whether or not the information being ranked is even available to the decision maker.

Steps Five and Six are full disclosure requirements, in which the manager explains the treatment of the information he or she has been able to collect and analyze. Once again, it is necessary for the manager to disclose all assumptions used in arriving at a solution. This is particularly important for decisions involving ecological modeling.

Steps Seven and Eight demonstrate that the decision making process is not agenda driven, and that the manager maintained an open mind and took a hard look at the problem, considering an array of options, all of which would achieve the goals identified in Step One and would also meet the constraints in Step Two. Options that are not viable in light of Steps One and Two are not to be considered.

Step Nine maintains management flexibility while ensuring that any departures are premised upon firm threshold criteria.

III. PROPERTY CLAUSE AUTHORITY

Over the past two decades, federal agencies have, under the power of the property

clause, exercised authority to control insecticide spraying⁶³, hunting,⁶⁴ mining activity⁶⁵, snow mobiles⁶⁶, camp fires⁶⁷ and watercraft⁶⁸ on state and private property to prevent interference with federal land management objectives. In each of these cases, no special authorizing legislation was necessary from Congress to validate the extra-territorial application of agency regulations.⁶⁹

The foundation of modern property clause case law was laid down in *Kleppe v New Mexico* in which the U.S. Supreme Court ruled that Congress held plenary authority over federal lands.⁷⁰ At issue was whether Congress possessed the authority to pass a statute that protected wild horses and burros on federal lands in contravention of state estray laws. In the *Wild Horses and Burros Act*⁷¹ Congress declared that free roaming wild horses and burros were an integral part of the natural ecosystem of public lands in the United States. New Mexico challenged the legitimacy of the statute, asserting that only the state Board of Livestock had authority to regulate strays and promptly removed 19 unbranded, unclaimed burros from federal property.

Upholding the statute, the U.S. Supreme Court ruled that the federal government "has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the

⁶³ U.S. v Moore 640 F.Supp. 164 (S.D.W.Va. 1986).

⁶⁴ U.S. v Brown 552 F.2d 817 (8th Cir. 1977).

⁶⁵ U.S. v Vogler 859 F.2d 638 (9th Cir. 1988), and U.S. v Arbo 691 F.2d 862 (9th Cir. 1982).

⁶⁶ Minnesota v Block 660 F.2d 1240 (8th Cir. 1981).

⁶⁷ U.S. v Lindsey 595 F.2d 5 (9th Cir.1979).

⁶⁸ *Stupack-Thall v U.S.* 70 F.3d 881 (6th Cir. 1995); *Free Enterprise Canoe Renters Association v U.S.* 711 F.2d 852 (8th Cir. 1983).

⁶⁹ See also Hiscock, J.W. Protecting National Park Buffer Zones: Existing, Proposed, and Suggested Authority. 7 J. Energy L & Pol. 35-93 (1986); Frank & Eckhard. Power of Congress Under the Property Clause to Give Extra-territorial Effect to Federal Lands Law 15 Nat. Res. L. 663 (1983); Note: The Property Power, Federalism, and the Equal Footing Doctrine 80 Columbia Law Rev. 817 (1980); Coggins, G. Protecting the Wildlife Resources of National Parks from External Threats 22 Land & Water L.R. 1 (1987); and Sax, J. Helpless Giants: The National Parks and the Regulation of Private Lands 75 Mich. L. R. 239 (1976).

⁷⁰ 96 S.Ct. 2285 (1976).

⁷¹ 16 U.S.C. §§1331-1340 (1976)

exigencies of the particular case...[T]he property clause gives Congress the power over the public lands...to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them...In short, Congress exercises the powers both of a proprietor and of a legislature over the public domain."⁷²

It is important to note that the federal interest under the property clause was not in the horses and burros themselves, but rather, in the lands on which the animals were found. The federal government possessed a public interest in owning lands upon which wild horses and burros grazed unmolested.⁷³

Since *Kleppe*, the courts have acknowledged that federal lands, particularly national parks and wilderness areas, can be protected from external threats by the imposition of restrictions that reach to state and private lands. When deciding whether it is appropriate for federal agencies to regulate private and state property to protect federal lands from external threats, several rules must be developed to determine the availability of the property clause for extra-territorial application. The rules that may be gleaned from case law can be generalized as relating to three primary subject areas: (1) location of lands to be regulated in proximity to federal land, (2) purpose which the regulation is to serve, and (3) nature of the federal interest to be protected.

A. Location of Lands to be Regulated

Private and state lands subject to regulations under statutes pursuant to the extra-territorial application of the property clause must be within the perimeter area of a designated conservation unit or entirely surrounded by federal lands under various management agencies. In every case cited for the application of the clause, the lands subject to regulations were either within a particular unit's perimeter,⁷⁴ surrounded by federal land,⁷⁵ or located beneath a federal surface estate.⁷⁶ It is important to limit the application of the clause in this fashion to ensure a close nexus between the affected non-federal land and the protected federal property. Without a clear and distinct demarcation, courts would be drawn into a technically difficult process of fact finding to determine the appropriate "zone of impact" for upholding the clause's reach.

⁷² *Id.* at 2292

⁷³ This is an important point because states have primary legal interests in wildlife management under public trust doctrine unless otherwise pre-empted by federal law. See *Hughes v Oklahoma* 441 US 322 (1979).

⁷⁴ *U.S. v Vogler* (1988); *U.S. v Moore* (1984); *U.S. v Arbo* (1982); *Minnesota v Block* (1981); *U.S. v Lindsey* (1979); *U.S. v Brown* (1977).

⁷⁵ *Stupak-Thall v. U.S.* (1995).

⁷⁶ *Duncan Energy v. U.S.* (1994)

Scientific disagreement abounds concerning zones of impact, and the nature of impacts, for a variety of anthropogenic disturbances ranging from foot paths⁷⁷, to roads,⁷⁸ to timber harvesting,⁷⁹ to global warming.⁸⁰ Indeed, due to the complexities of ecological interconnectedness and the lack of definitiveness within the environmental field sciences, the determination of such a zone would probably be impossible. Under the "inholders rule" a property owner within federal unit perimeters falls subject to potential regulation automatically.

The "inholding rule" gives reasonable notice to potentially regulated parties that the application of agency rules may be extended extra-territorially towards them. As an inholder, one would rationally expect possible federal regulation.⁸¹ The "inholder" rule places an absolute limit on the extra-territorial extension of the property clause.⁸²

⁷⁷ See the following for descriptions of different scientific findings concerning trail impacts and the zone of disturbance: Bader, H. et. al. 1997. Proceedings: Recreational Impacts in Alaskan Ecosystems. "Impacts of recreational trail development on a subarctic alpine tundra of central Alaska." U.S. Fish & Wildlife Service and the University of Alaska-Fairbanks. April 15-17. (Abstract); Cole, D. 1995. "Experimental trampling of vegetation: "Relationship between trampling intensity and vegetation response." 32 Journ. of Applied Ecology 203.

⁷⁸ See: Chapin, F. and Shaver, G. 1981. "Changes in soil properties and vegetation following disturbance of Alaskan arctic tundra." 18 Journ. of Applied Ecol. 605; Ahlstrand, G. and Racine, C. 1993. "Response of an Alaskan shrub-tussock community to selected all terrain vehicle use." 25 Arctic & Alpine Research 742.

⁷⁹ See: Meehan, W. 1991. Influences of Forest and Rangeland Management on Salmonid Fishes and Their Habitats. Fisheries Society Special Publication 19. Bethesda, Maryland; Platts, W. and Nelson, R. 1988. "Fluctuations in trout populations and their implications for land-use evaluation." 8 North Am. J. Fisheries Mgmt. 333; Steinblums, et. al. 1984. Designing stable buffer strips for stream protection." J. of Forestry 49.

⁸⁰ Lindzen, R. 1990. "Some coolness concerning global warming." 71(3) Bulletin of the Am. Meteorological Soc. 288; Reifsnyder, W. 1989. "A skeptical enquirer's view of the carbon dioxide/climate controversy." 47 Agric. and Forest Meteorology 349.

⁸¹ The "inholder rule" therefore protects validly held investment backed expectations as discussed in *Lucas v South Carolina Coastal Commission* 505 U.S. 1003 (1992).

⁸² Otherwise, one might argue that the Park Service, in order to prevent air pollution damage to Joshua Tree National Park, may regulate factories in Los Angeles more than 150 miles distant. While surely, air pollution should be controlled, it should not be the Park Service that sets limits on the more than three million property owners of Los Angeles County.

B. Objective Which the Regulations Serve

Extra-territorial application of the property clause requires that the aim of the agency is to prevent significant interference with the purposes for which the federal land is managed.⁸³ This limitation on the extension of the property clause can be thought of as the "significant interference" rule.

Significant interference is defined as those activities which frustrate federal agency ability to realize its management purposes on the affected lands. Simply making federal tasks more difficult, or adding to administrative costs is not significant. Similarly, frustrating a preferred management technique, when other effective means of achieving a federal purpose are also available, does not constitute a significant interference. The case law indicates the types of situations which constitute "significant interference."

In *U.S. v Brown*, the court ruled that waterfowl hunting upon a lake within a national park posed a direct danger to the safety of visitors and could conceivably alter wildlife migration patterns. These potential consequences associated with hunting significantly interfered with the purpose of the park which was to conserve wildlife unimpaired and provide for the human enjoyment of the park lands⁸⁴ because firearms discharges disturbed wildlife and put visitors in fear.

Like wildlife viewing, wilderness enjoyment too is an important purpose for federal lands management. In *Minnesota v Block*, the Forest Service was to maintain a wilderness area. Wilderness areas are managed to be untrammelled by humans, maintained in primeval character with a substantially unnoticeable human imprint and outstanding opportunities for solitude.⁸⁵ The unrestricted drone of motorboats and snow machines would prevent these wilderness purposes from being realized.⁸⁶

Maintenance of ecological integrity and natural populations of wildlife is an important purpose of national parks. Therefore, the destruction of black flies within a designated national river way which, as a unit of the national park system, significantly interfered with the park goals to conserve wildlife populations.⁸⁷ The black flies in *U.S. v Moore* are to be treated no differently than the ducks in *U.S. v Brown*, despite the mega fauna appeal of these rather pesky critters.

The "significant interference" rule serves as another rational limitation to the

⁸³ *U.S. v Brown*, at 822; *Minnesota v Block*, at 1249; *U.S. v Moore*, at 166.

⁸⁴ *U.S. v Brown*, at 822.

⁸⁵ 16 U.S.C. §1131©

⁸⁶ *Minnesota v Block*, at 1251.

⁸⁷ *US v Moore*, at 167.

extra-territorial application of the Property Clause. Activity on non-federal lands whose effects are a mere inconvenience to the managing federal agency cannot be regulated by agency rules under the Property clause. To allow a more lenient definition would invite the possibility of agency harassment against inholders, an activity which may occasionally occur.⁸⁸

C. The Nature of the Federal Purposes

The federal purpose, which extra-territorial application of the property clause is to protect, must be one that is fundamental to the management of the park unit when viewed in its entirety by considering existing statutory and regulatory mandates for both the unit and the agency. Thus, wildlife conservation, wilderness solitude, and preservation of scenic quality are all fundamental to the mission of national park lands as stated in the Organic Act, the Wilderness Act and individual unit establishing statutes. In order to meet this criteria, a federal agency must directly link regulations to language contained in a relevant statute, and cannot create "fundamental" federal purposes by fiat through the administrative rules process alone to deal with perceived external threats.⁸⁹

These three rules, when taken together, create a consistent doctrine that clearly demarcates the limits of the extra-territorial reach of the property clause while allowing sufficient flexibility to accommodate application to a host of problems without requiring troubling modifications or case specific exceptions. Of particular importance, the three rules lend predictability to the types of situations that the clause will reach and the probable outcomes of those applications. This air of predictability is an essential element because it allows a potential litigant to anticipate whether or not his/her conduct will invoke the clause and the likely consequences. Therefore, an individual can conform behavior in advance to prevent costly surprises and reduce disappointment to expectations.

This extra-territorial property clause doctrine provides the federal government with a potent tool to guard important environmental values, on federal lands, from external threats without requiring additional and complicated statutory authorization. Federal agencies can regulate and stop behavior, on non-federal land, which poses real potential harm to fundamental uses of federal land. As *Camfield*⁹⁰ long ago pointed out,

⁸⁸ A federal district court recently found that conduct by the National Park Service towards an inholding within Katmai National Park in Alaska, was tantamount to harassment. See Case No. A-96-0449-CIV (D. Alaska 1997).

⁸⁹ van Rooyen, Craig. *Going the Extra Mile for the Forty Mile: A proposal for Extra-territorial Regulation of Mining in Alaska's Longest National Wild and Scenic River* 1994. Unpublished Manuscript.

⁹⁰ Camfield v United States 167 U.S. 518 (1897)

no one has the validly held expectation of interfering with the purposes to which federal lands are put.

IV. NEPA

A. Purpose

The purpose of NEPA is to assure that federal agencies are fully aware of the impact of their decisions upon the environment and to inform the public about the factors the agency considered in making its decision.⁹¹ Unlike what many seem to think, NEPA does not elevate the protection of environmental resources over other concerns in agency decision making.⁹²

B. Judicial Review

An EIS is reviewed by a court under the arbitrary and capricious standard.⁹³ In applying this standard to EIS adequacy, the court will look to see if the agency took a “hard look” in “good faith” to identify the likely consequences of their decisions and try to formulate reasonable alternatives for evaluation.⁹⁴ Courts cannot substitute their judgement for that of the agency in evaluating a decision based upon an EIS.⁹⁵

C. Content

NEPA only prescribes the necessary process, it does not mandate particular results.⁹⁶ In reviewing the adequacy of an EIS, the court is limited to determining if the EIS’s form, content, and preparation foster informed agency decision making and

⁹¹ WFB at 1367 (1997); *California Trout v Schaefer*, 58 F.3d at 472 (9th Cir. 1995)

⁹² *Greater Yellowstone Coalition v Babbitt*, [hereafter referred to as GYC] 952 F.Supp. 1435 at 1443 (1996)

⁹³ GYC at 1443 (1996); *California Trout v Schaefer*, 58 F.3d 469 at 473 (9th Cir. 1995)

⁹⁴ WFB at 1367 (1997); GYC at 1443 (1996)

⁹⁵ GYC at 1443 (1996)

⁹⁶ *Sierra Club v Lujan*, [hereafter referred to as SC], 716 F.Supp. 1289 at 1293 (D.Ariz. 1989)

informed public participation.⁹⁷ An EIS need only address the significant aspects of the probable environmental consequences.⁹⁸ NEPA requires cumulative and synergistic effects to be considered in an EIS.⁹⁹ The statute does not require an agency to take into account every conceivable impact of its actions.¹⁰⁰ Neither does an agency need to discuss alternatives that are too speculative, remote, or impractical.¹⁰¹ Risk of accident is not an environmental impact under NEPA.¹⁰² When a programmatic EIS is prepared, site specific impacts need not be fully evaluated until a critical decision has been made to act upon the particular site.¹⁰³

D. Scoping

The park service need not discuss mitigation measures for possible specific actions contemplated in a programmatic EIS if the Programmatic EIS commits the agency to site or project specific analyses where such mitigation discussions take place.¹⁰⁴ The scope of the document must incorporate an assessment of likely cumulative impacts, particularly impacts from activities made possible, but not necessitated, by the conduct evaluated in the EIS. Thus, an EIS addressing the impacts of a road proposal must consider the consequences that the road may eventually have on economic development and the habitat disturbance associated with increased economic activity even if it is not directly related to the physical impacts associated with actual road building.

NEPA does not discuss the specific range of alternatives that must be addressed; it only stipulates that the purpose of alternatives is to inform the agency of options, and

⁹⁷ Northern Alaska Environmental Center v Lujan, [hereafter referred to as NEAC] 961 F.2d 886 at 890 (9th Cir. 1992)

⁹⁸ NEAC at 890 (1992)

⁹⁹ SC at 1307, 1320-21 (1988)

¹⁰⁰ BTCM at 1466 (1996)

¹⁰¹ WFB at 1367 (1997)

¹⁰² BTCM at 1467 (1996)

¹⁰³ NEAC, at 891 (1992)

¹⁰⁴ NEAC, 961 F.2d 886 (9th Cir. 1992)

thereby facilitate reasoned decision making.¹⁰⁵ The range of alternatives discussed in an EIS is somewhat related to the scope of the predicted environmental impacts discussed within the EIS.¹⁰⁶ It is important to note that the range of alternative may be substantively impacted by public comment upon a draft EIS. For example, if a number of comments suggest a particular alternative, that is not addressed within the draft document, yet it is a viable option, and the agency does not develop the suggested alternative in its final EIS, it is possible that a court will invalidate the EIS.¹⁰⁷

The public comment process to be followed by an agency in preparing an EA is not prescribed by law.¹⁰⁸ However, a legally valid EA will contain sufficient alternatives to alert the public of what an agency intends to do and to give the public enough information to be able to participate intelligently in the NEPA process.¹⁰⁹ An agency may change the nature of the alternatives discussed in an EA, in a fashion responsive to public participation, when drafting a final EIS without invalidating the process as a whole.¹¹⁰

V. RECREATION MANAGEMENT

A. Allocation of Uses

Allocation of limited recreational opportunities between competing user groups is well within the administrative discretion granted to the NPS for the management of national parks.¹¹¹ Therefore, the agency may provide for differential treatment among competing park recreational uses.¹¹² If the overall use and enjoyment of a park must be limited to protect park resources, a permit system which allocates among users is not

¹⁰⁵ SUWA at 1213 (1998)

¹⁰⁶ Seattle Audubon Soc. v Moseley, 80 F.3d 1401 (9th Cir. 1996)

¹⁰⁷ Dubois v U.S., 102 F.2d 1273 (1st Cir. 1996)

¹⁰⁸ SUWA at 1213 (1998)

¹⁰⁹ SUWA at 1214 (1998)

¹¹⁰ SUWA at 1214 (1998)

¹¹¹ BTCM at 1454,1462 (1996); WPRF at 1253 (1979)

¹¹² Grand Canyon Air Tour Coalition v. FAA 154 F.3d 455, 467 (D.C. Cir. 1998)

arbitrary so long as the method is rational and fair.¹¹³

B. Discretionary Function Exception

A tort action can be brought by a private party against the US only if the federal government waives its sovereign immunity from tort.¹¹⁴ The federal tort claims act waives immunity and grants permission to individuals to sue the US for tort damages arising out of official government conduct, thereby waiving sovereign immunity.¹¹⁵ However, the FTCA contains an exclusion from tort waiver that applies to government action resulting from the exercise of a discretionary function (DFE).¹¹⁶

Application of the DFE requires a two part test: (1) the court must determine that the agency action involved a matter of choice, not constrained by mandatory prescription, and (2) if the choices involved a balancing of competing social, economic, and political considerations.¹¹⁷ The purpose of this DFE is to prevent the courts from ignoring their duty of administrative deference by second guessing through the avenue of tort law.¹¹⁸

The exemption is not available if rules or policies leave no room for balancing social, economic, and political considerations by prescribing mandatory responses to particular management problems.¹¹⁹ There need not be any evidence that methodical balancing actually occurred in arriving at a management choice; all that is required is that the decision derived from a policy or rule which permits the balancing of competing social, economic, and political factors.¹²⁰

¹¹³ WPRF at 1253 (1979)

¹¹⁴ Blackburn v U.S., [hereafter referred to as Blackburn], 100 F.3d 1426 at 1429 (9th Cir. 1996); Valdez v U.S., [hereafter referred to as Valdez] 56 F.3d 1177 at 1179 (9th Cir.1995)

¹¹⁵ Tippet v U.S., [hereafter referred to as Tippet], 108 F.3d 1194 at 1196 (10th Cir. 1997); Johnson v Dept. of Interior, [hereafter referred to as Johnson] 949 F.2d 332 at 335 (10th Cir. 1991); ARA Leisure Services v U.S., [hereafter referred to as ARA], 831 F.2d 193 at 194 (9th Cir. 1987) all citing 28 U.S.C. 1346.

¹¹⁶ Blackburn at 1429 (1996); Johnson at 335 (1991)

¹¹⁷ Tippet at 1197 (1997); Blackburn at 1429 (1996); Johnson at 336 (1991)

¹¹⁸ Johnson at 338 (1991); ARA at 194 (1987)

¹¹⁹ Blackburn at 1429 (1996); Valdez at 1179 (1995); Autery v U.S., [hereafter referred to as Autery], 992 F2d 1523 at 1526 (11th Cir. 1993); ARA at 195 (1987)

¹²⁰ Johnson at 339 (1991)

Decisions derived from management plans and general policy manuals tend to be protected under the DFE.¹²¹ Decisions pursuant to mandatory road construction and maintenance criteria, however, are not protected by DFE.¹²²

The importance of the DFE is greatest in the management of potentially hazardous recreation. Consequently, many decisions, even negligent actions by agency personnel, are protected by DFE. For example, the NPS cannot warn the public of every conceivable danger in a national park, therefore a degree of discretionary judgement is required to determine which hazards will be pointed out and the manner in which the warnings will be conveyed. This type of decision necessarily requires the balancing of fiscal, safety, and conservation concerns, as well as the debilitating effect of an over proliferation of warning signs.¹²³

There are many examples of the application of DFE to protect park recreation management decisions. A typical set of decisions by NPS rangers as to if, when, and how to conduct a rescue operation is shielded by from judicial review through tort by the DFE because such decisions invoke balancing safety, staffing, funding, and conservation purposes.¹²⁴ Other frequent types of decisions that enjoy protection under DFE are those involving the balancing of the conservation of wildlife with the safety for those who want access to see and enjoy them, are the types of balancing that are protected by the DFE.¹²⁵

VI. WILDERNESS MANAGEMENT

The concept of sanctuary entails the elements of serenity, peace, and tranquility.¹²⁶ Therefore, the wilderness act prohibits commercial or consumptive enterprises except as specifically provided for in establishing legislation and subject to valid existing rights.¹²⁷

Potential wilderness shall be managed with a view to protect such areas for future

¹²¹ Blackburn at 1430 (1996)

¹²² Autery at 1530 (199)

¹²³ Valdez at 1180 (1995)

¹²⁴ Johnson at 338 (1991)

¹²⁵ Blackburn at 1198-1199 (1997)

¹²⁶ PW at 545 (1995) analogize to wilderness area from marine sanctuary.

¹²⁷ AWA at 1069 (1997)

use as wilderness, with uses inconsistent with wilderness held to a minimum.¹²⁸ Park management should take no actions which diminish wilderness suitability for future wilderness designation for that area.¹²⁹

VII. ACCESS MANAGEMENT

A. RS 2477

The grant language of the RS 2477 right of way statute has consistently been construed by the federal courts as an offer to the general public of a potential right of way across federal public lands not already reserved for public uses.¹³⁰ An RS 2477 right of way cannot be established, (during its operative period of 1866 to 1976), on public lands subject to any valid claim or interest which extinguishes the rights of the general public. Federal withdrawals and reservations also operate to terminate the availability of public lands for RS 2477 right of way purposes.¹³¹

Just as a state cannot acquire an RS 2477 right of way interest for a public road across public lands after such lands have been reserved, a state's interest in a valid right of way cannot be extinguished simply because the public lands across which it passes have been reserved subsequent to the right of way acceptance.¹³²

Acceptance of an RS 2477 right of way is a matter of state law, not federal.¹³³ Acceptance may be manifested by either: (1) an express act by a state or territorial government, or (2) less formally through "sufficient use" on the part of the general public, without any affirmative act on the part of government.¹³⁴

¹²⁸ VRNPA at 425 (1992)

¹²⁹ VRNPA at 426 (1992)

¹³⁰ *Sierra Club v Hodel* 848 F.2d 1068, 1078 (10th Cir. 1988)

¹³¹ *Humboldt County v U.S.*, [hereafter referred to as *Humboldt*], 684 F.2d 1276 at 1281 (9th Cir. 1982).

¹³² *Colorado v Toll* 268 U.S. 288, 231 (1925)

¹³³ *Sierra Club v Hodel*, 848 F.2d 1068, 1078 (10th Cir. 1988); *Wilkenson v Dept. Of Interior*, 634 F.Supp. 1265, 1272 (D.Colo. 1986); *U.S. v 9,947.71 Acres of Land*, 220 F.Supp. 328, 335 (D.Nev. 1963); *Girves v Kenai Peninsula Borough*, 536 P.2d 1221, 1226 (Alaska 1975); *Ball v Stephens* 158 P.2d at 209 (1945); *Kirk v Schultz*, 119 P.2d 266, 268 (Idaho 1941).

¹³⁴ *Shultz v Dept. of the Army*, 10 F.3d 649, 655 (9th Cir. 1993). Reversed on other grounds.

No formal criteria have been developed to guide the courts in determining what precisely constitutes “sufficient public use” for the purpose of RS 2477 acceptance. Courts have tended to employ a context specific ad hoc approach in making decisions concerning whether or not an RS 2477 right of way has validly vested or not. Despite the lack of clear rules, courts tend to look at the character of the use to determine if the use is sufficient for acceptance. One very important principle that has emerged, however, is that courts reject analogy to easements by prescription. RS 2477 right of ways are not obtained through adverse use.¹³⁵

When examining the character of the use, the courts look to the duration of use, the nature of the route itself, (whether it is clearly marked, a well defined or a dispersed path, and the degree of improvements made upon the route or path), and the purposes for which the route has been used.¹³⁶

Though the statute creating the RS 2477 easement is silent as to whether state or federal law determines the manner of use of the easement, once recognized as accepted, most courts have ruled in favor of state law controlling the scope of the easement.¹³⁷ However, when identifying the line between the retained federal legal interests in the land over which the right of way passes, and the state’s legal interest in the right of way itself, all doubts must be resolved in favor of the federal government.¹³⁸

Under the property clause, the NPS, pursuant to the Organic Act, has the authority to regulate right-of-ways in the nature of a police power in order to protect the park for the purposes for which it was established.¹³⁹ Therefore, it is probably safe to assume that any doubts as to the use of the grant under RS 2477, within a national park, must be resolved in favor of federal government interests.¹⁴⁰

¹³⁵ *Berger v Ohlson*, 9 Alaska 389, 395 (1938); *Hatch Bros. v Black*, 165 P.518, 519 (Wyo. 1917); and *Okanogan County v Cheetham*, 80 P. 262 (Wash. 1905).

¹³⁶ *Sierra Club v. Hodel* 848 F.2d 1068 (10th Cir. 1988); *Humboldt County v U.S.* 684 F.2d 1276 (9th Cir. 1982); *Wilkenson v. Dept. of Interior*, 634 F.Supp. 1265 (D.Colo. 1986); *Dillingham Commercial Co. v City of Dillingham*, 705 P.2d 410 (Alaska 1985); *Hamerly v Denton*, 359 P.2d 121 (Alaska 1961); *Rogge v U.S.*, 10 Alaska 130 (1941); *Clark v Taylor*, 9 Alaska 298 (1938); and *Berger v Ohlson*, 9 Alaska 389 (1938).

¹³⁷ *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988)

¹³⁸ *United States v Gates of the Mountains Lakeshore Homes, Inc.*, 732 F.2d 1411 (9th Cir. 1984); *Humboldt County v U.S.* 684 F.2d 1276 (9th Cir. 1982); and *Shultz v. Dept of the Army* 10 F.3d 649 (9th Cir. 1993) reversed on other grounds.

¹³⁹ NWF at 391 (1987); *U.S. Vogler*, 859 F.2d 638 (9th Cir. 1988)

¹⁴⁰ *Adams v U.S.*, [hereafter referred to as *Adams*] 3 F.3d 1254 (9th Cir. 1993)

B. ANILCA

Congress intended ANILCA to ensure that owners of parcels within federal lands had a right of access subject to reasonable regulation.¹⁴¹ In passing ANILCA, Congress made clear the intent to make common law access easements pre-empted by ANILCA if the common law interest had not already vested.¹⁴²

The issue in ANILCA section 1110(b) access controversies centers upon what constitutes reasonable regulation and economically practicable access commensurate with the reasonable expectations of the inholder. There is a paucity of federal litigation on this point, so it may be necessary to turn to the example of hard rock mining regulation for an adequate analogy.

Regulation of perfected, unpatented hard rock mining claims may provide some insight into what constitutes reasonable access interests for inholders under ANILCA. The U.S. has an interest to require conduct to protect its land from harm, even by those who possess some vested interest in the use of the public lands.¹⁴³ However, this regulation must be reasonable, and reasonable is defined as that level of regulation which does not rise to becoming a de facto termination of the private interest.¹⁴⁴

C. Common Law Access Easements

There are two primary common law access easements that could be at issue. A prescriptive easement can be obtained as a public right of way across the bed of a non-navigable stream and its bed.¹⁴⁵ An easement by necessity entitles the holder to reasonable use and width on only one route, to the extent required for the beneficial use of the land to which such right of way is attached.¹⁴⁶ But as just previously mentioned, both ANILCA and FLPMA pre-empt future applications of common law easements.

¹⁴¹ Adams at 1258 (1993)

¹⁴² Adams at 1259 (1993)

¹⁴³ U.S. v Weiss, 642 F.2d 296 (1981)

¹⁴⁴ U.S. v Doremus, 888 F.2d 630 (1991); U.S. v Weiss, 642 F.2d 296 (1981)

¹⁴⁵ Buffalo River Conservation Council v NPS, [hereafter referred to as BFC] 558 F.2d 1342 at 1345 (D.Ark. 1977)

¹⁴⁶ Adams at 1259 (1993)

VIII. SUBSISTENCE MANAGEMENT

A. Judicial Review

Agency actions and the 810 analysis are reviewed on the basis of the available administrative record created at the time of the decision under the arbitrary and capricious standard.¹⁴⁷

B. 810 Analysis

Analysis of federal land management programs must take possible impacts to subsistence opportunity into account.¹⁴⁸ This analysis is a two step process. First, the land manager must determine if the contemplated agency action may significantly restrict subsistence opportunity. If the answer is yes, then the agency must complete a thorough review assessing alternative actions and effective mitigation.¹⁴⁹ The trigger for the second level of analysis is not a “likely” significant impact, but rather, a “credible threat” of a significant impact.¹⁵⁰

Significant interference with the subsistence use may result from: 1) a reduction in availability of harvestable resources due to a population decline, 2) a reduction in availability of harvestable resources caused by an alteration in behavior, location, or habitat, and 3) limitation on access to harvestable resources.¹⁵¹ In determining if a particular management activity may significantly impact subsistence activity, ANILCA requires evaluation of cumulative impacts from related management activities upon the subsistence opportunity.¹⁵²

IX. ENDANGERED SPECIES

Species preservation is afforded the highest priority in accommodation of

¹⁴⁷ Kunaknana at 1149 (1984)

¹⁴⁸ Kunaknana at 1151 (1984)

¹⁴⁹ Kunaknana at 1153 (1984)

¹⁵⁰ Hanlon v Barton, 740 F.Supp. 1446 (D.Alaska 1988)

¹⁵¹ Kunaknana at 1152 (1984)

¹⁵² Sierra Club v Penfold, 857 F.2d 1307 at 1321 (9th Cir. 1988)

competing interests.¹⁵³ An agency must not only seek to avoid elimination of a species, it must also promote recovery of the species.¹⁵⁴ ESA demands consideration of sub-species and separate populations as well as distinct species, so that overall diversity and evolutionary potential are maintained.¹⁵⁵ A population is a regulatory definition; isolated anecdotal sightings and dispersing individuals does not a population make.¹⁵⁶

Decisions under the ESA are reviewed by courts under the arbitrary and capricious standard.¹⁵⁷ Harm does not require direct physical injury, but may also result from impairment of essential behavioral patterns or the degradation of habitat.¹⁵⁸ A taking may also occur where normal behavior patterns are significantly disrupted.¹⁵⁹

An agency must use the best scientific data available in making decisions under the ESA.¹⁶⁰ Anecdotal evidence may be sufficient under certain circumstances to serve as the basis of an ESA decision, though such information raises issues of grave concern as to whether wholly anecdotal observations can ever constitute the best scientific data available as required in ESA.¹⁶¹ Purely speculative assertions will not support an agency decision under the ESA.¹⁶²

X. NAVIGABILITY DOCTRINE

The implications of navigability upon the management of water courses located upon federal lands is made particularly problematic because there are two entirely separate navigability doctrines, designed for two entirely separate purposes, administered

¹⁵³ NWF at 386 (1987)

¹⁵⁴ FFA at 104 (1995)

¹⁵⁵ WFB at 1368 (1997)

¹⁵⁶ U.S. v. McKittrick 142 F.3d 1170, 1175 (1998)

¹⁵⁷ FFA at 105 (1995); NWF at 391 (1987)

¹⁵⁸ *Mausolf v Babbitt* [hereafter *Mausolf III*] 913 F.Supp. 1334, 1336 (1996); *Palila v Hawaii Dept. of Lands and Natural Resources* 852 F.2d 1106 at 1108 (9th Cir. 1988)

¹⁵⁹ *Mausolf III* at 1336 (1996)

¹⁶⁰ NWF at 387 (1987)

¹⁶¹ *Mausolf III* at 1343 (1996)

¹⁶² *Mausolf III* at 1344 (1996)

by two separate sovereigns. National Park managers must understand the fundamental differences between the two doctrines and apply their respective authorities appropriately. Federal navigability doctrine is designed to ensure the orderly control and safe use of waterways, by the federal sovereign, under the commerce clause interest of the U.S. Constitution. Under the federal navigability doctrine, those streams that are navigable in fact are encumbered with the federal navigational servitude. This servitude is not a proprietary interest and does not give rise to title.¹⁶³ Thus, the federal government cannot exercise wildlife, fisheries, or habitat management within in stream flows under this servitude.¹⁶⁴

State navigability doctrine identifies those water flows and beds of water bodies that fall under state title and give rise the state public trust doctrine responsibilities. Under public trust doctrine, the state is both empowered and encumbered.¹⁶⁵ The public trust doctrine grants states the authority to manage the waters and beds of navigable streams and lakes for the use of fish and wildlife. The doctrine also imposes responsibilities upon the state in the management of public trust resources which cannot be abrogated.¹⁶⁶

Application of navigability doctrines is complicated because state and federal standards for the determination of navigability need not be the same.¹⁶⁷ Thus, the federal interest in the safe and orderly use of waterways may, or may not, overlap with state public trust duties concerning lands, waters, and wildlife associated with navigable waters.

A. Federal Navigability

Despite the assertions of many state management authorities, the tests for navigability (both for title and for commerce) reside with the federal government.¹⁶⁸ The

¹⁶³ Alaska v Babbitt 54 F3d 549 (9th Cir. 1995).

¹⁶⁴ Totemoff v Alaska 905 P2d 954, 966 (Alaska 1995).

¹⁶⁵ Arnold v Mundy 6 N.J.L. 1 (1821); Martin v Waddell's Lessee 41 US 367 (1842); Illinois Central Railroad v Illinois 146 US 387 (1892)..

¹⁶⁶ Pullen v Ulmer 923 P2d 54 (1996); McDowell v Alaska 785 P2d 1 (1989); Owsichek v State 763 P2d 488 (1988).

¹⁶⁷ Alaska v Ahtna, Inc. 891 F2d 1401 (9th Cir. 1989).

¹⁶⁸ Utah v U.S. 403 US 9 (1971); U.S. v Appalachian Electric Power Co. 311 US 377 (1940); U.S. v Utah 283 US 64 (1931); Packer v Bird 137 US 661 (1891); The Daniel Ball 77 US

federal test focuses upon whether the water body in question is capable of being navigable in fact, in its natural condition. Navigable means the flow of goods, people, or articles of commerce in a customary fashion. This may include the flow of logs destined for milling, canoeing, boating, barging, or, in the case of Alaska, dog sled travel in winter. Both historical and technical evidence is appropriate in this determination.

Once a water body is determined to be navigable under the federal test, the navigational servitude immediately attaches. The navigational servitude is a dominant legal interest authorizing federal regulatory management over the uses of the water body for the purposes of promoting safety and commerce without compensation for interference with private and state water interests. This servitude pre-empts any countervailing legal interest promoted by a state.¹⁶⁹

Federal navigational servitude interests, however, grant no authority in the federal government to manage for fish, wildlife, or habitat occurring within, on, or adjacent to the navigable waters.¹⁷⁰ This statement, though, does not diminish the authority of the federal government to regulate the use of state navigable waters, not previously reserved by the federal government, for the protection of fish, wildlife, habitat, and visitor safety under the property clause.¹⁷¹ Therefore, the National Park Service may, under its property clause interests, regulate boating activities on unreserved state waters within and adjacent to parklands, if that activity is found to interfere with the primary purposes for which the park was established. This authority includes the regulation of watercraft to promote visitor safety, habitat protection, and the prevention of wildlife harassment and water pollution. The decision to impose such restrictions upon state waters will be judged under the standards for extra-territorial application of the property clause and under the administrative procedure law for informal land management decision making and rule making.

C. Federal Reserved Water Rights

Federal reserved water rights are not directly related to navigability, but are important limitations on state title to waters and submerged lands under navigability doctrine. Waters may be reserved by the federal government either expressly or by

557 (1870).

¹⁶⁹ United States v Virginia Electric & Power Co 365 US 624 (1961); Boone v U.S. 944 F2d 1489 (9th Cir. 1991).

¹⁷⁰ Alaska v Babbitt 54 F3d 549 (1995); Totemoff v Alaska 905 P2d 954 (1995).

¹⁷¹ Free Enterprise Canoe Renters Association v United States 711 F2d 852 (1983); United States v Brown 552 F2d 817 (Th Cir. 1977).

implication. Express reservations are straight-forward legislative withdrawals of unappropriated waters prior to statehood or at the time a federal conservation system unit is established.

Implied federal reserved water rights are more problematic. This doctrine infers that unappropriated state waters are reserved to meet the primary original purposes of a federal land conservation unit at the time that unit is established. No express language is necessary to acknowledge this reservation of state water for federal purposes.

There are, however, several significant limitations upon this implicit reservation. The amount of water reserved is limited to only that which is necessary to accomplish the primary original purpose of the federal conservation unit.¹⁷² The same criteria used in determining the fundamental purposes for which the federal land was reserved in the extra-territorial application of the property clause, are employed in determining the primary purposes for which waters are impliedly reserved.

XI. MISCELLANEOUS

A. Regulatory Takings Considerations

Prior existing inholding establishments are protected in the park as private property. However, American property law recognizes that private property rights are subject to broader public interests, and that government, within certain constraints, is empowered to regulate the use of property to protect those public interests.¹⁷³ Thus, property law can be seen as a balancing act between both private and public interests, the outcome of which depends upon the particularities at hand.

The term private property in this report refers to real property or contractual property interest held by an individual which allows for freedom to sell, divide, devise or inherit the interest for an indefinite or infinite duration. Public property, on the other hand, refers to that land which is owned directly by the federal sovereign. Public land is owned by the sovereign in a capacity reflecting both private and government attributes. As a property owner, the sovereign may fix the terms for use of public lands, including an absolute prohibition upon access.¹⁷⁴ In addition to owning land as an individual, however, the sovereign also exercises the authority of a legislature, prescribing

¹⁷² *Cappaert v United States* 426 US 128 (1976); *United States v New Mexico* 438 US 696 (1978).

¹⁷³ Mark Cordes, "Leapfrogging the Constitution: The Rise of State Takings Legislation" 24 *Ecology Law Quarterly* 187 at 230-231 (1997).

¹⁷⁴ *Light v US* 220 US 523 at 536-537 (1911).

regulations ensuring that the land is protected and managed as the government sees fit.¹⁷⁵ When conflicts arise between the state and federal sovereigns, federal law, under the supremacy clause of the constitution, pre-empts state law if the conflicts are direct and irreconcilable.

Most property law in the United States is a matter of state law, not federal. This situation stems from the fact that the federal government may exercise only those powers directly delegated to it by enumeration in the Constitution. Those powers not delegated at the time the Union was formed, remained with the states. Thus, common law generally, public trust doctrine specifically, and the police powers were not delegated to the federal government by enumeration in the constitution. This is not to say that the federal government does not possess authority to regulate private lands. The federal government does find regulatory power primarily in the interstate commerce clause, which enables the federal government to regulate any conduct, which, when taken cumulatively across the nation, may have the ability to affect interstate commercial activity. As has been previously discussed, another important source of authority, lies with the constitution's property clause, allowing the federal government to regulate private lands so as to protect public lands from potential harm resulting from activity occurring on private lands.¹⁷⁶

Regulation of private property by state sovereigns pursuant to these authorities is subject to the constraints imposed by the equal protection clause of the 14th amendment in the constitution. The federal government's regulatory conduct is constrained by the due process clause found in the 5th amendment to the constitution. Under these amendments, sovereign regulatory action is reviewed by courts, which have the power to invalidate statute and regulation alike pursuant to a three test analysis. If the sovereign is regulating a fundamental right (speech, press, religion, assembly, travel, voting, or privacy) or regulating a class of people (based on race or national origin) then the court employs a test known as strict scrutiny. Under such a test, the regulation is presumed invalid unless the sovereign can prove that the regulation is necessary to achieve a compelling government purpose. The ability of a sovereign to meet this demanding test is quite rare. Intermediate scrutiny is applied to those occasions where government is regulating the sexes differently. In those situations, the government also bears the burden of proof, but under the less demanding standard of closely related to an important government purpose. Because property ownership is not a fundamental right, regulation of private property is reviewed under the rather relaxed rational basis standard. Under this test, the private individual bears the burden of proof to demonstrate that the regulation is NOT rationally related to any legitimate government purpose. It must be

¹⁷⁵ Kleppe v New Mexico 426 US 529 at 539, (1979)

¹⁷⁶ Minnesota v Block 660 F.2d 1240 (1981).

noted that “takings” analysis is structured just slightly differently than this latter rational basis test.

Under its “police like” powers derived from the property and commerce clauses, the federal government may exercise legislative and regulatory authority to invoke adjustments in private property rights to ensure the public welfare.¹⁷⁷ Thus, government and its authorized agencies may significantly curtail individual discretion in the use of private property so long as the regulation of the property is reasonably necessary to effectuate a substantial public purpose in ensuring the health, safety, and general welfare of society.¹⁷⁸ Indeed, government does not exceed its constitutional powers by deciding upon the destruction of one class of private property in order to save another which, in the judgment of the legislature, is of greater value to the public.¹⁷⁹ The limitation on the police powers is contained in the federal constitution, which is designed to bar government from forcing some people alone to bear burdens which, in all fairness and justice, should be carried by the public as a whole.¹⁸⁰ It is this inquiry which is the subject of the 5th amendment, and it is an inquiry which is essentially ad hoc, depending largely upon the particular circumstances in specific cases.¹⁸¹

Government may forbid the sale of particular types of property, foreclose future potential uses, alter the manner of current uses, and indeed order the destruction of parts of the property and still remain well within constitutional bounds. Consequently, property owners may experience considerable diminution in values in their property, (in some cases a loss in value of as much as 90%) and still not be owed compensation by the government.¹⁸² This is possible because American jurisprudence views property as a bundle of interests and expectations, the destruction of any one strand of which will not constitute impermissible government conduct because the aggregate of interests must be viewed in their entirety.¹⁸³ That the owners of property are burdened in this way for the public good is simply considered a burden borne by all to secure the advantage of living

¹⁷⁷ *Andrus v Allard* 444 US 51 at 65 (1979).

¹⁷⁸ *Penn Central Transport Co. v New York City*, [hereafter referred to as *Penn Central*], 438 US 104 (1978); *Euclid v Ambler* 272 US 365 (1926).

¹⁷⁹ *Miller v Schoene* 276 US 272 at 279 (1928).

¹⁸⁰ *Penn Central* at 122.

¹⁸¹ *Penn Central* at 124.

¹⁸² *Cordes supra* at 193.

¹⁸³ *Andrus* at 66.

and doing business in a civilized community.¹⁸⁴

There are, however, limits to the exercise of this power, for the police powers must not be used so as to destroy a fundamental attribute of private ownership.¹⁸⁵ These limits take the form of three tests, (1) physical intrusions, (2) denial of all economical uses, (3) balancing of burdens and benefits.¹⁸⁶ Physical intrusion is defined as the actual seizure of property by the government for public use. In determining if property has been denied all economic uses, the court refuses to segment the property interest, and instead looks to the entire parcel as a whole under the bundle of interests theory. In the balancing test, the court looks at the economic impact of the regulation, its interference with valid investment backed expectations, and the purposes the regulation is designed to promote.¹⁸⁷

B. Concessions Management

The NPS may develop concessions that are limited to those activities necessary and appropriate for the public use and enjoyment of the park unit.¹⁸⁸ Management of concessions by NPS is controlled by the Concessions Policy Act¹⁸⁹ Under this act, concessionaires enjoy considerable privileges, including compensable possessory interests in the physical improvements they make, preferential renewal status, and granted a guarantee of a reasonable return on investment.¹⁹⁰ Indeed, a threatened economic loss may be an irreparable injury when the loss threatens the very existence of the business concession.¹⁹¹

Despite this apparent largesse to concessionaires, the NPS possesses considerable regulatory authority over these operators through the contracts they enter into. NPS

¹⁸⁴ Andrus at 67.

¹⁸⁵ *Agins v Tiburona* 447 US 255 (1980).

¹⁸⁶ Cordes at 201-203.

¹⁸⁷ Cordes at 203, discussing *Dolan v Tigard* 512 US 374 (1994); *Lucas v South Carolina* 505 US 1003 (1992); and *Nollan v California* 483 US 825 (1987).

¹⁸⁸ WPRF at 1253 (1979)

¹⁸⁹ 16 U.S.C. 20

¹⁹⁰ *Lake Mohave Boat Owners Assoc. v NPS*, 78 F3d 1360 (9th Cir. 1996)

¹⁹¹ *Clipper Cruise Line, Inc. v U.S.*, [hereafter referred to as *Clipper*] 855 F.Supp. 1 at 4 (D.D.C. 1994)

relies on the its policy manual NPS-48 for its contracting guidelines. The validity of the manual and the agency actions taken pursuant to it have been consistently upheld by the courts.¹⁹²

C. Pre-emption Doctrine

The federal government may pre-empt state law under three different tests derived from the supremacy clause of the U.S. Constitution. The three forms of pre-emption are: (1) Express, (2) Field Occupancy and (3) Conflict pre-emption.¹⁹³ Express pre-emption occurs when Congress declares its intent through statute to replace state law over a given subject.

Field Occupancy is an implied form of pre-emption derived from the nature of the federal regulation. When federal regulations are comprehensive and detailed, leaving little room for additional state regulation, it is assumed that the federal government intended to completely occupy the field of regulation. Thus, any silence concerning a potential aspect of regulation is to be interpreted as a deliberate omission by Congress and the delegated agencies to leave that aspect of conduct free from government interference. The principal issues in field occupancy pre-emption is the proper definition of the field occupied and the parameters of its scope.

Conflict pre-emption is also an implied application of the supremacy clause.¹⁹⁴ Conflict pre-emption can occur under two conditions. First, when it is impossible for an entity to simultaneously comply with both federal and state law. The second form of conflict pre-emption is invoked when otherwise legitimate state law imposes a significant impediment to the realization of federal objectives. The principal issue in this latter form of conflict pre-emption centers on what constitutes a significant impediment.

It must be remembered that under no circumstances, is balancing between state and federal interests, under a pre-emption calculation. The supremacy clause is clear; when applying pre-emption, no consideration is given to the relative merits between federal and state policy or law. If pre-emption applies, the federal law replaces the offending state regulation, even if state management may be far superior in promoting the public welfare.

¹⁹² Lake Mohave Boat Owners Assoc. v NPS, 78 F.3d 1360 (9th Cir. 1996); Fort Sumter Tours v Babbitt, 66 F.3d 1324 (4th Cir. 1995); Clipper Cruise Line, Inc. v U.S., 855 F.Supp. 1 (D.D.C. 1994); Spiegel v Babbitt, 855 F.Supp. 402 (D.D.C. 1994)

¹⁹³ California Coastal Commission v Granite Rock Co. 480 US 572 (1987); Pacific Gas and Electric Co. v California 461 US 190 (1983).

¹⁹⁴ Hines v Davidowitz 312 US 52 (1941).

D. Statutory Interpretation

Even when a court defers to an agency's reasonable interpretation of a statute that contains ambiguity,¹⁹⁵ an agency must still adhere to the canons of statutory construction.¹⁹⁶ The primary rules in the canons of construction are as follows:

1. Later enacted statutes control over earlier enacted statutes.
2. More specific statutory language controls over general language provisions.
3. Statutes in derogation of common law are to be narrowly construed.

Given these rules, it is imperative for National Park Managers in Alaska to understand that ANILCA modifies the Organic Act for park administration and purposes in the state.

PART TWO: CASE STUDIES

To illustrate the application of the principles discussed in the legal overview, this report shall briefly review 10 specific cases:

Recreation/Use Allocation Cases

1. *Mausolf v Babbitt* (1997)
2. *Alaska Wildlife Alliance v Jensen* (1997)
3. *Bicycle Trails Council of Marin v Babbitt* (1996)
4. *Wilderness Public Rights Fund v Kleppe* (1979)

Access Cases

5. *Southern Utah Wilderness Alliance v. Dabney* (1998)

Development Plan Cases

6. *Grand Canyon Air Tour Coalition v. FAA* (1998)
7. *Sierra Club v Lujan* (1989)

Property Clause Cases

8. *U.S. v Brown* (1977)
9. *Minnesota v Block* (1981)
10. *U.S. v Moore* (1986)

Discretionary Function Exception Cases

11. *Johnson v U.S.* (1991)
12. *ARA Leisure Services v U.S.* (1987)

Navigability

¹⁹⁵ *Chevron v Natural Resources Defense Council* 467 US 837 (1984).

¹⁹⁶ ENVIRONMENTAL LAW AND POLICY, Plater, Z. et. al. (1992) page 259. West Publishing Company, St. Paul, MN.

13. Totemoff v Alaska (1995)
14. Free Enterprise Canoe Renters Assoc v US (1983)
Reserved Water Rights
15. Alaska v Babbitt (1995)

RECREATION ALLOCATION CASES

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

Voyageurs National Park was authorized in 1971 with enabling legislation permitting recreational snow machining within the park. Two decades later, in 1991, the National Park Service issued regulations restricting snow machine use to certain corridors and on frozen lake surfaces. The decision was predicated on a wildlife impact report issued by the agency. The Park Service concluded, in its report, that snow machining may possibly impact wolf populations by disrupting hunting behavior. The U.S. Fish and Wildlife Service (FWS) concurred with the Park Service in its own report. After additional study, the Park Service, along with FWS, implemented supplemental restrictions on snow machine use in 1994. Local snow machine operators sued arguing that the Park Service had engaged in an “about face” on snow machining and had not considered the best available scientific and most definitive information before issuing the new restrictions.

The Circuit Court ruled in favor of the National Park Service. The court noted that the agency enjoys broad discretion in carrying out the mandates of its governing statutes, particularly in areas involving the agency’s specific expertise. Even when snow machining is permitted by statute in parks, it may occur only where such activity is consistent with park management objectives, and will not disturb wildlife or damage park resources. Consistent with the NPS’s responsibility to manage and regulate park resources, the NPS has been given wide latitude to make management decisions regarding the scope of permitted activities on park property. Indeed, the information relied upon by the agency in its decision need not be definitive nor irrefutable; it need only provide a sufficient basis to conclude that its decision is neither arbitrary nor capricious. The statutory authority for the decision to restrict snow machine use could be found in the Organic Act alone.

*Alaska Wildlife Alliance (AWA) v Jensen, 108 F.3d 1065 (1997).

The AWA sought to overturn an NPS decision to permit commercial fishing within non-wilderness waters of Glacier Bay National Park. AWA believed that the NPS Organic Act circumscribed NPS discretion on issues of consumptive resource uses within National Parks.

The NPS contended that its interpretation of both the Organic Act and ANILCA permitted the NPS the discretion to manage or prohibit commercial fishing within the park as an exercise of the agency's expertise.

The court found that the administrative record provided by the NPS demonstrated that the agency's interpretation of the relevant statutes were neither arbitrary nor capricious. Furthermore, the record indicated that the NPS had made a good faith effort to determine whether fishing activity would degrade park resources. Given this administrative record and the great degree of deference granted to NPS in park management, the court refused to overturn the decision of the agency.

*Bicycle Trail Council of Marin v Babbitt 82 F3d 1445 (9th Cir. 1996)

This particular case provides a useful backdrop to begin discussion for the Denali Back Country Plan because it involves recreational restrictions and allocations among competing recreationists, it invokes issues of NPS administrative discretion in developing management plans, and it was litigated in the Ninth Circuit.

The issue in this case was the NPS decision to limit use of mountain bikes in the Golden Gate National Recreation Area (GGNRA) after a period in which the recreational activity had been tolerated in a manner that left bicyclists virtually unregulated. In 1987, the NPS adopted a regulation pursuant to notice and comment, that created a uniform rule for all park units. The rule prohibited all bicycle use in off road areas unless local park unit managers specifically designated particular trails open to mountain bike use. Exercising prosecutorial discretion, the GGNRA superintendent chose not to enforce the regulation in Golden Gate National Recreation Area until a recreation management plan had been developed, addressing, in part, the role of bicycling as a recreational activity in the park. Therefore, bicyclists continued to enjoy unfettered access to all trails throughout the unit.

By 1992, the NPS had completed a trail management plan for GGNRA. The plan had been generated after a process that involved four public hearings, three "advisory committee" meetings with various organizations with a vested interest in trail use within the park, letters submitted to the NPS from concerned individuals, and a variety of informal staff reports and observations. The plan discussed four alternatives which differed only in that the allocation of trail availability among bicyclists, equestrians, and hikers were different within each option. According to the plan, bicyclists were prohibited from approximately 36 percent of the recreational trails. The rationale provided for by NPS was that the trails from which bikes were banned were those in which user conflicts were likely between bikers and hikers due to trail configuration, and where bicycling posed a threat to the protection of park resources because of erosion and vegetation destruction.

In arriving at its plan, the NPS stated that it had considered the recreational

interests of bicyclists, hikers, and equestrians. The NPS said it had balanced these interests against what it viewed to be competing interests in resource protection and visitor safety, as well as the desire of hikers to enjoy access to some biker free trails.

The Bicycle Trails Council of Marin filed suit, challenging the plan for, among other reasons, that the NPS had improperly prioritized hiker desires over bicyclists, that the NPS had not adequately evaluated the needs for the "bicycling experience", and that the data used to determine user conflicts and resources damage was inadequate or improper.

The federal court, on appeal, upheld the NPS. The court pointed out that balancing and allocating recreational opportunity in a park unit was well within the management discretion granted to the park service. The plan clearly articulated that it had considered the plaintiffs concerns and then rejected those concerns. The court commented that the plan explained the connection between the facts that it found and how those facts resulted in the decision made.

The plaintiffs contended that the data used by the NPS to identify user conflicts was flawed, because it was generated by staff observations and informal individual visitor comments, rather than from a systematic study derived from a scientific survey or a review of official accident and complaint forms. The court rejected this argument and said that subjective reports by park visitors is a reasonable method by which an agency can determine that conflicts exist. Individual comments from competing users is a very persuasive indicator of conflict. The mere fact that the bicyclists argued that hikers were pursuing an anti-bike political agenda is enough to satisfy the court that conflict existed.

*Wilderness Public Rights Fund v Kleppe, 608 F.2d 1250 (9th Cir 1979)

The court upheld the decision of Grand Canyon National Park in the development of a permit system which allocated rafting permits for the Colorado River. The permit system allocated permits between guided rafting concessionaires and private rafters. The apportionment, (which eventually settled upon a permit allocation of 70 percent of user days to commercial trips and 30 percent for noncommercial trips), was based upon a study which addressed disturbance to the riparian ecosystem, user demand, and user preferences. The study found that there was a finite limit to the level of rafting trips before damage to park resources ensued.

In upholding the Park Service allocation decision, the court stated that if over-all use of the river must, for the river's protection, be limited, a permit system is a reasonable approach so long as it is conducted fairly and pursuant to appropriate standards. The court believed the system was fair because it took into account past user history, safety, and visitor demand.

ACCESS CASES

*Southern Utah Wilderness Alliance v. Dabney 7 F.Supp.2d 1205 (D.Utah 1998)

A Back Country Management Plan (BMP) for Canyonlands National Park allowed the use of four wheel drive vehicles on rough jeep trails traversing the park. The management planning process was motivated by Park Service concerns for dramatic increases in visitors to the park. The scoping process identified impacts from aircraft, rock climbing, off road vehicles, bicycles, and horse back riding as major issues. The final BMP was released in 1995. It contained a zoning system for the park based upon resource uniqueness and susceptibility to disturbance. Visitor use and intensity within each zone is apportioned in accordance to the zone assimilative capacities. Jeep trails were to remain open, but subject to permit restrictions. An environmental organization filed suit alleging that the plan violated the Park Service mandate to preserve resources.

The District Court agreed in part and disagreed in part with the plaintiffs. Relying on the Organic Act, the court ruled that some trail use by off road vehicles violated the mandate to preserve park resources. The court acknowledged that the Park Service must balance between the competing mandates of resource conservation and visitor enjoyment. Indeed, the court noted, the agency is granted tremendous deference in making just such decisions. But in rejecting the plan provisions for motorized vehicles in particularly fragile areas, the court stated that the Park Service may only permit those forms of visitor enjoyment and access that are *consistent* with preservation and *inconsistent* with significant, permanent impairment.

DEVELOPMENT PLAN CASES

*Grand Canyon Air Tour Coalition v. FAA 154 F.3d 455 (D.C. Cir. 1998)

The Federal Aviation Administration and the National Park Service promulgated regulations restricting the use of aircraft within Grand Canyon National Park in accordance with the Overflights Act. These regulations were designed to provide for substantial restoration of the natural quiet experience of the park and protection of public health and safety. The regulations, imposing standards based upon decibels above natural ambient, were designed to achieve natural quiet at least 75 percent of the time in 50 percent of the national park.

Coalition members filed suit arguing that the definition of natural quiet created by the agencies, and the process for developing the regulations, were arbitrary. The court rejected these arguments. In upholding the regulations, the court stated that the agency reasonably chose to measure that increment above natural quiet as the smallest sound an attentive listener could hear, because that measure could easily be related to visitor

reaction. Such an approach, the court commented, reasonably protected the experience of the back country user. Similarly, the court continued, nothing in the statute instructs the agencies to create only one or more locations of quiet and to herd all visitors who desire solitude into those quiet zones. Natural quiet is an important element of the feeling of solitude. Quiet also affords the visitor an opportunity to hear faint and distant sounds creating an important experience and perspective on vastness. Finally, the court noted that agencies have wide discretion to attack regulatory problems in phases, and that a phased attack often has the best results. Consequently, the FAA and NPS need not wait until it had finalized rules on air corridors and tour routes prior to implementing the sound restrictions.

*Sierra Club v Lujan, 716 F.Supp. 1289 (D.Ariz. 1989)

In this case, the NPS lost in court because the departure from its own management plan was not sufficiently justified in an administrative record explaining the reasons for the new direction embarked upon by the park. The case came out of the North Rim Management Plan for Grand Canyon National Park. The plan called for maintaining the rustic and remote character of the North Rim, while focusing visitor use development on the already developed South Rim.

Then, in 1984, the NPS, without adequate reference to the Management Plan, committed itself to a contract with a private developer for a large hotel complex on the North Rim. The court was already pre-disposed to reduce the amount of deference owed to the NPS in part because the court took a dim view of the fact that NPS released its administrative record regarding its decision only after plaintiffs succeeded in an Freedom of Information Act request.

In striking down the NPS decision, the court pointed out that the agency lost the court's accommodation because the decision making process regarding the hotel was arbitrary and capricious. In finding the process arbitrary, the court stated that the NPS failed to consider options for development outside the park unit perimeter, the NPS gave no evidence as to how it weighed various information relative to each other, nor how the provisions of its management plan were or were not consistent with the decision at hand.

PROPERTY CLAUSE CASES

* U.S. v Brown, 552 F.2d 817 (8th Cir. 1977)

Brown was a Minnesotan hunter who possessed all lawful hunting permits and stamps for the taking of waterfowl under state and federal law. Taking care not to make landfall upon the shores of Voyageurs National Park, Mr. Brown navigated state waters until he eventually arrived upon a state lake, surrounded by the National Park.

Brown was convicted of hunting in violation of Park Service regulations which forbade the possession of firearms and hunting activity within the perimeters of the park. Brown appealed, arguing that the property clause cannot authorize federal land management regulation to apply to state property.

In upholding the conviction, the court ruled that "the Property Clause is broad enough to reach beyond territorial limits. Applying this rule to the facts presented in the case, the court stated that congressional power over federal lands includes the authority to regulate activities on non-federal public waters in order to protect wildlife and visitors on the federal park land.

"In this instance," the court found, "hunting on the waters in the park could significantly interfere with the use of the park and the purpose for which it was established...[b]ecause duck hunting occurs in close proximity to adjacent lands, [and] there is potential danger of unwarranted intrusion on public lands, injury to park users, and disruption of wildlife migration patterns."¹⁹⁷

The regulations prohibiting hunting within the perimeter of the park boundaries were valid prescriptions designed to promote the purposes of national parks. These park purposes, the court determined, are contained within the Park Service Organic Act of 1916 which extend to all national parks.

* Minnesota v Block 660 F.2d 1240 (8th Cir. 1981)

This case is helpful to the Denali Back Country Plan because it discusses the extent to which federal land management agencies may impact state and private lands in order to protect wilderness qualities in Congressionally designated wilderness areas. It dealt with provisions of the Boundary Water Canoe Area Wilderness Act which imposed restrictions upon motorized transportation occurring on state and private property within the perimeter boundary of a designated wilderness area. In Minnesota v Block, the state of Minnesota and the National Association of Property Owners brought action to invalidate the statutory provisions which limited motorized boat and snow machine use on 121,000 acres and 7,000 acres of state and private land respectively. Federal lands constituted ninety percent of the area contained within the wilderness boundaries. The court upheld the statute ruling that "Congress' power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of the federal lands."¹⁹⁸ Under the property clause, Congress possesses the ability to protect its lands against interference with their intended purposes, and that unregulated use of

¹⁹⁷ Brown at 822.

¹⁹⁸ Minnesota v Block at 1249.

motorized boats and snow machines on private land inholdings would "significantly interfere with the use of the wilderness by canoeists, hikers, and skiers..."¹⁹⁹

* U.S. v Moore, 640 F.Supp. 164 (S.D.W.Va. 1986)

In 1986, the National Park Service sought to prevent the broadcast of insecticides by the state of West Virginia on state and private property within the perimeter area of the New River Gorge National River without first seeking an agency permit. The New River was established by Congress in accordance with criteria mandated by the National Wild and Scenic Rivers Act.²⁰⁰ Unlike the situation in both *Brown* and *Block*, the federal government, in *Moore*, was the minority land owner within the park perimeter. Of the 63,000 acres encompassed within the designation, less than ten percent (about 6,000 acres) was federal property. The remaining ninety percent of the land was in either private or state ownership. The state asserted that under its general police powers to protect public health, safety, and welfare, the state was empowered to control black fly infestations without first seeking federal permission, especially on those properties the federal government held no title.

In rejecting the state's claim, the court noted that general federal regulations for the park system as a whole forbid the destruction, injury, or removal of wildlife unless otherwise permitted. "[H]owever pesky or annoying" black flies may be to the human population, black flies are wildlife for purposes of the regulation and therefore subject to the ban. Consequently, the court decided that the state could not move forward with a spraying program within the designated perimeter until after the state first sought and obtained a federal permit for the activity. The court based its decision on the property clause, noting that conduct outside of federally owned lands can be regulated by federal agencies if such conduct threatens the designated purpose of the federal land. Because the designated purposes of national parklands is to protect wildlife from capture, harm, or death absent other authority, the spraying program would certainly interfere with the management of the New River Gorge Wild River by killing large numbers of black flies. Specific statutory authority was not necessary to empower the Park Service to alleviate an external threat posed by state conduct.

¹⁹⁹ *Minnesota v Block* at 1251.

²⁰⁰ 16 U.S.C. §§460M-15 (1990)

DISCRETIONARY FUNCTIONS CASES

* *Johnson v U.S.* 949 F.2d 332 (10th Cir. 1991)

This case may be particularly instructive for Denali National Park concerning the Discretionary Functions Exemption (DFE) because it involves decisions concerning the timing and manner of rescue operations. At issue was whether the NPS could be held tortiously liable for rescue decisions that arguable, were negligent. The NPS contended that the decision to rescue and the approach to a rescue is the process of balancing competing social, economic, and political issues. Consequently, NPS asserted that such decisions were shielded under DFE even if they were indeed negligent.

Johnson and another climber became separated from the rest of their party, and unknown to the other climbers, Johnson had fallen and seriously injured himself. When the rest of the climbing party could not locate the missing two climbers, they contacted a ranger at a NPS visitor center. That ranger then radioed another ranger about the potential problem. The latter ranger radioed back and said that he had seen two climbers descending, assuming it was the missing climbers. NPS did not seek to confirm the sighting. Six hours later, when Johnson and the other climber still had not shown up, the members of the team again contacted the NPS. At this time, the NPS realized the error of the prior mistaken sighting, and initiated a rescue. After almost seven hours, the NPS found Johnson's body. He had died of hypothermia almost ten hours earlier.

The court applied DFE and ruled that NPS could not be held liable because rescue policy granted rangers the discretion to consider issues of staff safety, cost, likelihood of success, visitor enjoyment, and protection of park resources. Such balancing, the court reasoned, falls within the DFE, thus shielding NPS from liability.

* *ARA Leisure Services v U.S.*, 831 F.2d 193 (9th Cir. 1987)

ARA sued Denali National Park for a tour bus accident that resulted in death of five tourists and the injury of twenty-five. NPS asserted DFE as a defense to liability. The court rejected the NPS claim.

While DFE shielded decisions related to road design and safety features, DFE was not available when decisions were made to negligently allow the road to deteriorate in violation of mandatory road specifications. Thus, the decision not to install guard rails was protected from potential liability by DFE, but the decision to allow the road to erode from a width of 28 feet to less than 15 was not so shielded. NPS maintenance personnel are required to conform to road design. There is no policy balancing involved. Therefore, Denali National Park was held liable for possible negligence in failing to maintain the park road.

NAVIGABILITY CASES

* Totemoff v Alaska 905 P.2d 954 (Alaska 1995)

The Totemoff case involved complicated administrative and criminal procedure issues. However, part of the case hinged upon the definition of navigable waters and the respective authorities of the federal and state governments to regulate the use of those waters for purposes of hunting. It is important to note that this is a state case, and that the Park Service could argue that the case improperly interprets appropriate federal law. However, the main dicta in Totemoff was closely mirrored in Alaska v Babbitt, a federal case decided in the same year.

Totemoff was cited for illegal deer harvest by the state of Alaska because of his use of spot lights to blind the animal prior to shooting it. Mr. Totemoff countered that he was subsistence hunting and that the deer was harvested off federal land on Naked Island within the Chugach National Forest. The state asserted that the spotlighting occurred from a boat that was navigating state waters at the time of the alleged activity.

The court rejected Totemoff's assertion that the state had no jurisdiction as a result of ANILCA's subsistence provisions. The court stated that public lands for purposes of defining the application of ANILCA does not extend to unreserved navigable waters retained under state jurisdiction, even though those waters may lie within federal lands. The navigational servitude, the court elaborated, which attaches to all navigable waters, even those in which the state holds title, does not grant the federal government authority to regulate the use, taking, and enjoyment of wildlife and fisheries upon those waters in contravention of state law.

*Free Enterprise Canoe Renters Association v U.S. 711 F2d 852 (Th Cir.1983)

The Eighth Circuit held that the National Park Service could regulate the use of navigable waters within the perimeter of the Ozark National Scenic River way, even though the state retained jurisdiction over the waters and title to the stream bed. At issue in this case was Park Service regulations controlling the number canoeists upon the river. The Association challenged the federal regulations, arguing that their members never actually entered upon federal property, and that, therefore, were not subject to federal management so long as they remained clearly within state waters. The court rejected the plaintiff's arguments.

Park Service regulations were imposed to prevent crowding on the river and to promote safety for the visitors and protect riparian habitat for resident fish and wildlife. In ruling in favor of the Park Service, the court identified the property clause as a sufficient justification to prevent alleged harms to park resources. The controls were valid because they met the standard for reasonableness under the rules of informal

administrative decision making.

FEDERAL RESERVED WATER RIGHTS

*Alaska v Babbitt 54 F3d 549 (9th Cir. 1995)

This case, too, is borne of the conflicts between state and federal agencies over the management of subsistence uses of Alaska's fish and wildlife resources. A rural resident who qualified for a federal subsistence priority for fish and game on federal lands under the management of Wrangell St. Elias National Park and Preserve argued that all navigable waters were considered public lands for ANILCA purposes, and therefore, not subject to state game management except as provided under the federal statute.

The federal court rejected this argument, and, following the rationale employed in *Totemoff*, ruled that the federal navigational servitude, which attaches to all navigable waters, does not create a title interest in the United States. Therefore, the navigational servitude could not implicate the term public lands under ANILCA. However, the court did rule that the United States did implicitly reserve navigable waters under ANILCA pursuant to the implied reserved water rights doctrine.

Under this doctrine, the federal government reserves appurtenant waters unappropriated under state law at the time the conservation unit was created. The scope of this reservation is measured by the amount of water necessary to accomplish the primary purpose of the conservation unit. Before the court will find an implied reservation of water, however, the court must first determine if it was the intent of Congress to reserve such waters, and second, if without those waters, the purpose of the unit would be entirely defeated. Because the U.S. has a title interest in reserved waters, those water courses to which the doctrine applies, are defined as public lands under ANILCA.

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