

16 USC 19jj

Quite possibly the most powerful act known to the Park Service

By Richard J. Larrabee
Wrangell-St. Elias

Have you ever physically cringed at the extent of resource damage committed by an individual (or group of individuals) in a park area where you work? Have you ever felt completely despondent upon seeing such resource destruction knowing it is lost for eternity and can never be replaced? Having these feelings is only exacerbated by the knowledge that, even if caught red-handed or fully confessed, the individual who is accountable for the destruction of the resource will often suffer only minimal penalties from criminal court in the form of fines, or inadequate restitution payments. These feelings of frustration no longer need to plague national park rangers.

In 1990 Congress enacted Section 19jj of Title 16 of the United States Code (16 USC 19jj), entitled the Park System Resource Protection Act. Congress passed modifications to this statute in 1996 expanding its coverage to all National Park System resources (those federal resources within the boundaries of a unit of the park system). Under this statute, the Attorney General of the United States, upon request of the Secretary of Interior after a finding of damage to a park system resource may commence a *civil* action in the United States district court against any person who destroys, causes the loss of, or injures any park system resource for response costs and damages resulting from that destruction, loss, or injury.

In nonstatutory language, this means the park can sue a responsible party who injures or destroys any park resources (living or nonliving) located within the park boundary for all costs related to the response, assessment of damage, replacing, restoring, or acquiring the equivalent of the damaged resource, the future monitoring of the resource, or the value of the park system

resource in the event the resource cannot be replaced or restored. These recoverable costs also include the value of any significant loss of use of a park system resource pending its restoration or replacement or the acquisition of an equivalent resource (i.e. time the area/structure/wildlife was not available to the public or the ecosystem). Moreover, all of these costs are recoverable regardless of the criminal negligence or intent of the injuring party because 16 USC 19jj is a *strict liability* statute; regardless of whether the resource injury in the park system unit was a result of an innocent mistake or not, the injuring party *will* be held responsible.

A breakdown of the recoverable costs mentioned above are as follows:

Response costs

Response costs include all necessary actions to prevent or minimize the destruction, loss of, or injury to park system resources, or to minimize the imminent risk of such destruction, loss, or injury. Protection rangers' initial response to a report of resource damage, along with any ensuing investigation, will fall under this recoverable "response cost." In addition to their response, protection rangers should call in park employees (biologists, archeologists, maintenance workers) with expertise in the injured resource to assist in identifying the injuries and collecting preliminary information during the response phase. All park personnel involved in the response phase from the first notification of an incident until the point where there is no further threat of injury will also fall under recoverable response costs. The recoverable portion of these response costs not only include *all costs* related to park personnel time (hourly wage plus benefits) but will also

include equipment and supplies (GSA mileage, gas, film) used during the response. All response actions should be detailed in a case incident report which will be used as a response report.

Assessment of damage

Similar to response costs, all costs incurred by the park in preparing an assessment of damage are recoverable under 16 USC 19jj. These costs can include staff time spent conducting the injury assessment and preparing reports, supplies, travel and equipment. Upon completing the injury assessment, an assessment report detailing the resources that were destroyed, lost or injured as a proximate result of the defendant's actions will be prepared. Assessment reports must be professional and comprehensive and should be prepared with the idea that they may eventually fall under court scrutiny; the depth and level of detail needed in the report will depend upon the size and complexity of the injuries. Whenever possible, NPS employees with expertise in the resource being examined should conduct the injury assessment. For example: a biologist should assess injuries to natural resources, an archeologist should assess injuries to cultural resources. If the employee conducting the assessment has the requisite knowledge, skill, experience, training, education, and adequate peer review of published materials, they may be called as "experts" in court by the United States Attorney's Office. Accordingly, if deemed an expert, the employee preparing the report must feel confident about being able to justify the assessment methods and results in face of cross-examination by a defense attorney, and in refuting the defendant's own "expert witness." Many of our park scientists do not routinely provide court testimony and thus should be made aware of this possibility, albeit a rare one (most cases are negotiated prior to trial). Not all NPS employees in these positions may be judged as an "expert" by the court; however they do not need to be an expert in order to collect the necessary data and complete an assessment report. If the case proceeds to litigation and the park employee is not considered an expert, an expert may be hired from the private sector to substantiate the methods and results in the assessment report and to testify in court. In fact, de-

Photo above, brown bear in Wrangell-St. Elias, courtesy of Jim Hannah.



Richard Larrabee

Encroachment with major resource damage

pending upon the size and complexities of the injury, and the number of park staff available to conduct the injury assessment, both the assessment work and completion of an injury assessment report may be contracted out to a reputable private firm. The cost to hire such contractors may be substantial, yet recoverable under 16 USC 19jj.

Replacing, restoring or acquiring the equivalent of the damaged resource and future monitoring

In order to place a value on an injured resource, a park must determine if that resource is capable of being replaced or restored to its pre-injury condition, or if an equivalent resource can be acquired. Costs involved in implementing one of these three options are recoverable. The selected restoration and/or replacement option (primary restoration), the methods of how that option will be implemented and the projected costs will be outlined in a restoration determination report. If a park is not capable of restoring or replacing the injured resource, it may elect to acquire the equivalent of that resource. A park may only elect this option if it has prior approval for such acquisition in appropriations Acts of Congress and is subject to limitations contained in the organic legislation of the park.

Primary restoration costs would include the cost of materials, equipment, and personnel needed to perform the actual restoration or replacement of the resource. It is preferable to obtain costs estimates from private contracting firms for the primary restoration methods chosen as opposed to determining costs for the project based on park staff. Ultimately, park staff may not be available to perform the work when needed due to workload constraints and the park

may choose to hire a private contracting firm to conduct the restoration. If the costs for primary restoration have been estimated using park staff, which is typically lower than costs for a contracting firm, it would undercut the ability of the park to have sufficient funds to hire the contractor in the future. Primary restoration would also include estimated costs for monitoring of the site for restoration success and re-

covery progress, compliance (such as NEPA), oversight and budgeting/administrative support.

Value of resource in the event it cannot be replaced or restored

To place dollar values on such inimitable resources located within the National Parks is oft said to be impossible. However, in order to pursue a civil action against the injuring party, some approach must be incorporated in order to produce a dollar figure. Perforce, whatever approach is decided upon will need to be both creative and scientifically justifiable.

Value of significant loss of use of resource pending restoration, replacement or acquisition of equivalent resource

Park resources provide services/functions that benefit other resources and/or visitors. When an injury to a park resource occurs, not only is the resource impaired but its ability to provide services is also impaired. For example: a forest may provide services in the form of food and shelter to wildlife; when the forest is destroyed, not only are the trees lost but the services those trees provided to the wildlife have been lost. This theory may also be applied to visitor services. Even with primary restoration, park resources may take years to return to their pre-injury condition, if they recover at all. Services are lost from the time of the injury until the resource returns to its pre-injury

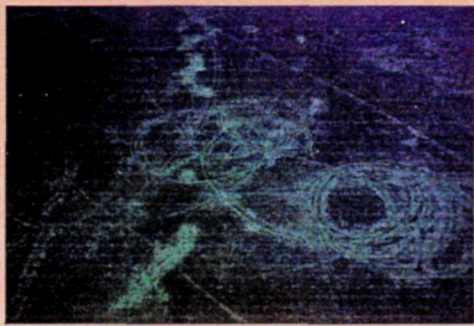
condition, or if the resource can never be restored, into perpetuity. Compensation for lost services must be included into the estimate of total damage in order to sufficiently compensate the public for the total losses incurred due to the injury. Placing a value on the services lost will be accomplished by the park choosing a compensatory restoration project. The compensatory restoration project elected must provide comparable services to those that were lost in the injury. There are a number of scaling methods commonly used to determine how much compensatory restoration will equal the amount of services lost. Costs involved in implementing compensatory restoration are recoverable. The elected project, the methods to be used in completing the project and the estimated costs, along with any primary restoration options, will all be outlined in a restoration determination report.

One of the most significant factors about the recoverable costs articulated above is that the damaged park receives all monies awarded, rather than the United States Treasury, as in the case of a criminal fine. Additionally, the use of these recovered amounts by the park is restricted only in the nature of their use. All costs recovered in relation to the *primary and compensatory restoration projects* must be used as they are outlined in the claim documents and consent decree: to restore, replace, or acquire the equivalent of resources which were the subject of the action and to monitor the recovery of such resources. All costs recovered in relation to the *response costs and damage assessments* are available to the park **for any use** the park deems appropriate inasmuch as they represent monies the park has already spent on payroll, equipment, supplies and/or contracts used to complete restoration and assessment activities.

Illegal encroachment



Karen Battle, EHDAR



Marine grounding scars

Karen Battle, ERDAR

Why a civil action versus a criminal action? Criminal fines paid by a violator are paid to the United States Treasury. Recoveries, for restoration of a resource, may be sought in a criminal action against an individual in the form of restitution which a judge may order to be paid directly to the park. However, if incarceration is not a major objective in the handling of a certain case, and the total dollar value of the injury is substantial, a civil suit under 16 USC 19jj should be considered in lieu of a criminal action. The reason for this preference to bring civil action versus criminal action is twofold: strict liability (do not need to prove criminal negligence or intent) and the potential for monetary recovery for all efforts to respond and assess the injury, and to monitor the injured area (not typically included in a criminal restitution award).

When considering which venue to use, the main issue to keep in mind is that the forte of criminal courts does not lie in evaluating monetary cases. They may order restitution, but will do so only if the dollar figure is readily linked to a specific value (i.e. cost of a destroyed building, sign or other inanimate object that normally has a price tag). Once you start requesting restitution for the value of lost vegetation, lost wildlife habitat, soil erosion, impaired aesthetics, lost "use" of a park resource, or the time and money the park spent to initially stop the damage (response costs), most criminal magistrate/judge's eyes will slowly start to roll into the back of their heads. Indeed, they will often be unwilling to order such extensive restitution against a criminal defendant. The civil court system is quite different. They only hear cases that deal with one issue, money. Civil courts deal exclusively with assigning values for wrongful acts committed by one party onto another. They are experienced in consider-

ing comprehensive analysis of how a wrong has affected the victim, *monetarily*. As a result, they are better equipped to fully digest the type of cost package allowed for under 16 USC 19jj that a park would present against a defendant. Additionally, there is no consideration of incarceration against the defendant that may distract the court's attention from assessing monetary liability (as opposed to a criminal action). Finally, if incarceration is a

major objective in a certain case, both a criminal and civil action may be sought against the defendant simultaneously. This multilayered approach is technically legal under our judicial system, however it may not be favored by the United States Attorney's Office due to the potential for a public perception of heavy handedness by the government and if attempted would need to be coordinated with both the criminal and civil divisions of the Department of Justice (U.S. Attorney's Office) and the DOI Office of the Solicitor.

This analysis does not suggest that every case should be pursued civilly. The cost and time involved in preparing a civil action under 16 USC 19jj versus bring a criminal action must be weighed. A civil action may take up to three years to be decided upon, whereas a criminal action would be more expedient. Additionally, the preparation of a civil action will cost the park money *up front* that may not be totally recoverable simply because the defendant does not have the wherewithal to pay the full judgment. Accordingly, an asset analysis should be performed on the defendant before deciding upon a civil action. If the injuring party does not have any means to pay a large judgment, a civil suit would be a largely wasted effort. In sum, the amount of injury/total value of the case, along with the injuring party's in/ability to pay, should both be determining factors used by any park in considering whether to proceed with a civil action versus a criminal action.

Once a park determines that significant resource damage has occurred and the park may be interested in pursuing a 16 USC 19jj action, NPS Director's Order #14 dictates the interested park must contact the Environmental Response, Damage Assessment and Restoration Unit. ERDAR is an NPS task force formed to specifically manage

the use of 16 USC 19jj, including conducting response, assessment and restoration activities, providing and ensuring consistency of claims throughout the NPS, and reporting recoveries and restoration activities to Congress. Upon contacting ERDAR and providing them with the facts of the case surrounding the resource damage, ERDAR will determine if the case falls under the jurisdiction of 16 USC 19jj. If ERDAR feels such an action would be appropriate for your park, they will assign a case officer to assist the park in preparing the entire case, from start to finish. Obviously, the case officer will not be responsible for every aspect of the case, such as preparing reports, logging personnel hours, and performing assessments (although in certain situations the assigned case officer may offer on-scene assistance for some response and assessment activities). Their role will mainly be that of a counselor. They will provide advice on all aspects of the case from response (if needed), to what data needs to be collected in the assessment, how to prepare an assessment report, determining restoration options and methods, and what pitfalls to avoid, in addition to supporting the case in settlement negotiations and/or litigation. Once the case has been settled, ERDAR will also provide the park with a point of contact to assist the park through the restoration implementation. Upon commencement of the case, ERDAR will ask the park to assign a case agent as the primary park contact who may be a protection ranger, district ranger, chief ranger or superintendent. Regardless of who plays this role on behalf of the park, the superintendent and others responsible for the district affected (i.e. district ranger) should be made aware of the case from its nascency. Additionally, they must be prepared to assist in its development since personnel from all divisions in the park may be called upon to assist. A team effort is paramount to a successful case.

What is the timeline for a 16 USC 19jj case? ERDAR will request the Office of the Solicitor to assign an attorney to handle the case as one of the initial steps to preparing the case. This solicitor should be regularly informed about the progress of the case as the assessments are being prepared in order to allow them to become fully conversant with the resources damaged and the issues involved. If the case is of serious import, the regional director's office must also be informed of the action in order to assess any

potential political ramifications and provide support. Basically, once the entire claim package is put together, the Office of the Solicitor is responsible for the initial phase of the claim. The Office of the Solicitor will issue a Demand Letter and attempt negotiations with the defendant in hopes of settling the case. If these attempts fail, the case will be forwarded to the Department of Justice (U.S. Attorney's Office) for filing in federal district civil court.

The up-front costs of preparing a 16 USC 19jj case may be substantial and it should be noted that due to the litigious nature of these cases, there are never any guarantees that your park will recover all the damages included in your claim. However, the rewards of a successful case will not only allow for recovery of these up-front costs but reach far beyond them. Congress enacted this act in order to help the National Park Service preserve the national treasures under its aegis and hold those accountable who wish to deface them. Since its legislation, this act has been used by several parks throughout the nation to recover the costs of injuries to many types of resources, including coral reefs, historical landscapes, cultural artifacts, vegetation, and endangered species. This is a powerful statute that should be used when warranted. To do otherwise, would be a disservice to yourself, the Park Service and all "future generations."

If you have questions concerning the steps to proceed with a civil action under 16 USC 19jj or concerning the use of 16 USC 19jj methods in a criminal case, contact ERDAR Damage Assessment Case Officer Karen Battle at 404-331-0334 or Karen_Battle@nps.gov. If you already have a 16 USC 19jj case underway and want a case officer assigned, have your park superintendent send a written request to ERDAR Damage Assessment Program Manager Rick Dawson at Rick_Dawson@nps.gov or fax, 404-331-0186; (voice) 404-331-0185). If your park is interested in hosting an eight-hour 19jj training course, contact Dawson or Battle. 🏠

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ANPR ACTIONS

Actions by President Ken Mabery

The word is getting around that ANPR has something to say regarding outsourcing and the need for increases in the ONPS budget for field staffing.

I have been contacted regularly since Ranger Rendezvous by the media to comment on issues, usually about twice per month). The major press contacts have been American Park Network, Eastern Research Group (clearinghouse for media), Washington Post (twice), Environmental Media West (clearinghouse), Sierra Magazine, USA Today (Denver Bureau), Arizona Republic, E&A's "The Arrowhead" and Knight Ridder Syndicate.

To prepare our responses and develop talking points, I've held regular conference calls with Bill Halainen, special concerns board member, and Jeff McFarland, executive director. As needed we bring in board members Bill Supernaugh and Bill Sanders. These contacts also resulted in a draft action plan and an action letter sent out in March. We keep the Directorate apprised of our actions through regular telephone and e-mail contacts.

The other major action was to adopt a suggestion from McFarland to establish a corporate advisory panel (still looking for the right name) to advise ANPR on dealings with companies, including grant applications, donations and exhibitor incentives. Their first assignment is to help develop a donor recognition policy. The panel consists of:

- Linda Balatti, government sales representative, Lion Brothers
- Bob Gates, former owner of R&R Uniforms
- Vickie Miller, VF Solutions
- Mark Saferstein, publisher, American Park Network (see page 15)
- Chesley Moroz, Eastern National

Other actions over the last quarter have included:

- Developed talking points on effects of outsourcing, budget shortfalls and detail assignments.
- Sent a letter Jan. 6 to the Interior secretary on stovepiping (about two dozen people helped with drafts).
- In January we sent a letter to the Wall

Street Journal (not published) responding to the newspaper's article on Kris Eggle's death.

➤ We donated 25 copies of *Ranger* magazine on partnerships (Spring 2003) to a NPS partnership meeting. Two organizations present may contribute to ANPR programs: Sonoran Institute (western conservation with interest in supporting NPS employee issues) and Atlantic Center for the Environment's International Exchange program (cooperating on international ranger exchanges – referred to Tony Sisto)

➤ We sent a letter and copy of the book, "Live the Adventure," to each region's Human Resources Division with the suggestion to forward the information to parks, and a similar letter to Director Mainella (at her request).

➤ We obtained a commitment from American Park Network to advertise "Live the Adventure" in each of its 28 publications (see page 15).

➤ We initiated coordination contacts with the California State Parks Ranger Association and New England Park Ranger Association including invitations to attend Rendezvous. CSPRA is now cross-linked with our website.

➤ ANPR responded to a referral from the Office of Policy by sending three rangers and McFarland to the "Serious Games" development workshop (see full details on our website).

➤ We initiated personal e-mail messages regarding the Rendezvous "Call for Papers" to all partners and like-minded organizations. ☐

ANPR's award-winning "Lost . . . But Found, Safe and Sound" video



Designed to show children, ages 4-12, what to do if they become lost in remote areas such as parks or forests.

\$10 for ANPR members; \$15 for others; quantity discounts available; credit card payment (Visa/MC) accepted

Contact ANPR's business office:
P.O. Box 108, Larned, KS 67750-0108