

Importance of Legal Authorities: How National Park Service Operations Relate to Law and Policy

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Abstract

We take for granted many of the programs and activities that have become a part of the national park experience, both for visitors and for employees. But what are the legal authorities for carrying out these park management operations? What permission do we have to protect natural or cultural resources; or to insist that visitors behave in certain ways; or to provide interpretation and education programs; or to provide and maintain facilities? In truth, the answer is a complex bundle of authorities, some of which are ambiguous and some are obscure. Fortunately, the guidance needed for carrying out most of the traditional, routine responsibilities that we've become accustomed to has been condensed into a relatively straight-forward set of policies and guidelines. Even so, we are seeing a disturbing trend of decisions being made at the park level that are inconsistent with law or policy.

Keywords

national parks, National Park Service Organic Act, National Park Service Management Policies

Hierarchy of Authorities

The management of the National Park System and NPS programs is guided by the Constitution, public laws, treaties, proclamations, executive orders, regulations, and directives of the Department of the Interior.

The property clause of the U.S. Constitution, which is the supreme law of the United States, gives Congress the authority to develop laws governing the management of the National Park System. The property clause specifically directs that "The Congress will have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" (article IV, section 3). Under this authority, the Congress established the National Park Service in 1916 with a law often referred to as the Organic Act (US Code; TITLE 16; CHAPTER 1; SUBCHAPTER I; §

1). Many people can recite the “mission” component of this law: “...which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”

Less familiar is the statement that precedes the “mission,” but which gives the service many of its authorities: “There shall also be in said service such subordinate officers, clerks, and employees as may be appropriated for by Congress. The service thus established *shall promote and regulate the use* of the Federal areas known as national parks, monuments, and reservations hereinafter specified, ... as provided by law, by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, (which purpose is...)” [Emphasis added.]

Congress supplemented and clarified these provisions through enactment of the General Authorities Act in 1970, and again through enactment of a 1978 amendment to that act (the “Redwood amendment,” contained in a bill expanding Redwood National Park), which added the last two sentences in the following provision. The key part of that act, as amended, is as follows:

Congress declares that the National Park System, which began with establishment of Yellowstone National Park in 1872, has since grown to include superlative natural, historic, and recreation areas in every major region of the United States, its territories and island possessions; that *these areas, though distinct in character, are united through their inter-related purposes and resources into one National Park System as cumulative expressions of a single national heritage*; that, individually and collectively, these areas derive increased national dignity and recognition of their superlative environmental quality through their inclusion jointly with each other in *one National Park System preserved and managed for the benefit and inspiration of all the people of the United States*; and that it is the purpose of this Act to include all such areas in the System and to clarify the authorities applicable to the system. Congress further reaffirms, declares, and directs that the promotion and regulation of the various areas of the National Park System, as defined in section 1c of this title, shall be consistent with and founded in the purpose established by section 1 of this title [the Organic Act provision quoted above], to the common benefit of all the people of the United States. *The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.* [Emphasis added.] (16 USC 1a-1)

The importance of the highlighted portions of these laws cannot be overstated, in terms of the responsibilities they place on park and program managers. In short, nothing can be done to derogate the values and purposes of the parks; nor that will affect or set precedent in other units of the system.

Moreover, the Senate committee report stated that under the Redwood amendment, “The Secretary has an absolute duty, which is not to be compromised, to

fulfill the mandate of the 1916 Act to take whatever actions and seek whatever relief as will safeguard the units of the National Park System.” This duty extends to every park and program manager in the National Park Service.

Policies and Other Guidance

Once laws are enacted, authority for interpreting and implementing them is delegated to appropriate levels of government. In carrying out this function, the National Park Service, like other federal agencies, develops policy to interpret the ambiguities of the law and to fill in the details left unaddressed by Congress in the statutes. NPS policy must be consistent with higher authorities and with appropriate delegations of authority.

Arguably, the NPS Management Policies document is the most important for governing what can and can’t happen in national parks. The 2006 volume of NPS Management Policies provides several descriptions of the document’s intent and its importance. The Policy document (The Directives System; page 4):

...is the highest of three levels of guidance documents in the NPS Directives System. *The Directives System is designed to provide NPS management and staff with clear and continuously updated information on NPS policy and required and/or recommended actions, as well as any other information that will help them manage parks and programs effectively.* [Emphasis added.]

Interim updates or amendments to the Policies may be accomplished through director’s orders (the second level of the Directives System), which also serve as a vehicle to clarify or supplement the Management Policies to meet the needs of NPS managers. Under the Directives System, the most detailed and comprehensive guidance on implementing Service-wide policy is found in “level 3” documents, which are usually in the form of handbooks or reference manuals issued by associate directors. These documents provide NPS field employees with compilations of legal references, operating policies, standards, procedures, general information, recommendations, and examples to assist them in carrying out Management Policies and director’s orders.

The Policy document (The Directives System; page 5) makes an important statement:

This document is intended to be read in its entirety. While certain chapters or sections provide important guidance by themselves, that guidance must be supplemented by the overriding principles listed below, which provide insight into the reading of this document. In addition there is an interrelationship among the chapters that provides for clarity and continuity for the management of the National Park System. [Emphasis added.]

The principles state that the Policies should:

- comply with current laws, regulations, and executive orders;
- prevent impairment of park resources and values;
- ensure that conservation will be predominant when there is a conflict between the protection of resources and their use;

- maintain NPS responsibility for making decisions and for exercising key authorities;
- emphasize consultation and cooperation with local/state/tribal/federal entities;
- support pursuit of the best contemporary business practices and sustainability;
- encourage consistency across the system—“one National Park System”;
- reflect NPS goals and a commitment to cooperative conservation and civic engagement;
- employ a tone that leaves no room for misunderstanding the Park Service’s commitment to the public’s appropriate use and enjoyment, including education and interpretation, of park resources, while preventing unacceptable impacts;
- pass on to future generations natural, cultural, and physical resources that meet desired conditions better than they do today, along with improved opportunities for enjoyment.

The Policies (Section 1.4.4; page 11) further require that, “The impairment of park resources and values may not be allowed by the Service unless directly and specifically provided for by legislation or by the proclamation establishing the park. The relevant legislation or proclamation must provide explicitly (not by implication or inference) for the activity, in terms that keep the Service from having the authority to manage the activity so as to avoid the impairment.”

Moreover, (Policies, Section 1.4.7.1; page 12):

Park managers *must not allow uses that would cause unacceptable impacts*; they must evaluate existing or proposed uses and determine whether the associated impacts on park resources and values are acceptable. [Emphasis added.]

Virtually every form of human activity that takes place within a park has some degree of effect on park resources or values, but that does not mean the impact is unacceptable or that a particular use must be disallowed. Therefore, for the purposes of these policies, unacceptable impacts are impacts that, individually or cumulatively, would

- be inconsistent with a park’s purposes or values, or
- impede the attainment of a park’s desired future conditions for natural and cultural resources as identified through the park’s planning process, or
- create an unsafe or unhealthful environment for visitors or employees, or
- diminish opportunities for current or future generations to enjoy, learn about, or be inspired by park resources or values, or
- unreasonably interfere with
 - park programs or activities, or
 - an appropriate use, or
 - the atmosphere of peace and tranquility, or the natural soundscape maintained in wilderness and natural, historic, or commemorative locations within the park.
- NPS concessioner or contractor operations or services.

The chapters of the NPS Management Policies cover all aspects of resources protection and visitor enjoyment and management:

- Park System Planning
- Land Protection
- Natural Resource Management
- Cultural Resource Management
- Wilderness Preservation and Management
- Interpretation and Education
- Use of Parks
- Park Facilities
- Commercial Visitor Services

Appendices also list 59 laws and 19 Executive Orders and Memoranda that are referenced in the Policies; and list the more than 90 Director's Orders that offer additional guidance to decision-makers.

Perhaps the most important statement in the Policies (Compliance, Accountability and Enforceability; page 4) is: "*NPS employees must follow these policies unless specifically waived or modified in writing by the Secretary, the Assistant Secretary, or the Director.*" [Emphasis added.] Also (same section): "Park superintendents will be held accountable for their and their staff's adherence to Service-wide policy."

Why then, with all this guidance and requirement for strict compliance with the Policies do we see what seems to be an increasing number of actions by park and program managers that are inconsistent with law and policy? Recent examples include:

- Failure by management of the Intermountain Region and Yellowstone National Park to follow many applicable provisions of law and policy relative to allowing snowmobile use in Yellowstone National Park.
- An attempt by the superintendent of Little Bighorn National Battlefield to expand the visitor center in defiance of the General Management Plan for the park; simply because funds were available for the expansion under the NPS entrance/user fee allocations.
- The installation of a boardwalk and maintenance facilities affecting critical resources in Effigy Mounds National Monument without undertaking appropriate environmental and cultural compliance.
- Undertaking management and development actions at Lyndon B. Johnson National Historical Park that were not in compliance with the General Management Plan; followed by the release of an Amended GMP that attempted to justify the actions previously taken.
- Holding a Vietnam battle re-enactment at Lyndon B. Johnson NHP (not only are battlefield re-enactments prohibited by the NPS Management Policies, but this event is even more puzzling, since no Vietnam battles were fought on American soil, much less at or near this NPS unit in Texas).

Several possible answers exist:

- *Political intervention* – There is no question that some decisions are made by park managers under pressure of political influence.
- *Complexity of requirements* – Understanding all the applicable laws, policies, executive orders and other directives is a daunting situation. However, given the compilation of these requirements as part of the NPS Directives System, particularly the Management Policies, it is not difficult to conduct research into what is allowed and what is not.
- *Insufficient emphasis on law and policy* – It might be shocking to learn how many park and program managers lack appropriate familiarity with the laws governing the NPS and the NPS Management Policies; or who feel that they intuitively know “what is the right thing to do” and feel they don’t need to refer to available guidance. This is a failure of the employee and leadership development and training program of the NPS.
- *Lack of accountability* – In many circumstances where laws and policies are disregarded by park or program managers, there is no significant consequence for their omissions or negligence. Absent that, the disincentive for other managers to make decisions that don’t comply with law or policy is inconsequential.

Many of us are hopeful that the current emphasis on “principled decision-making” by NPS Director Jon Jarvis and his science advisor Gary Machlis will help avoid bad decisions affecting park resources and the experiences of visitors in the future. Jarvis and Machlis have said that decisions should be made based on:

- Accurate fidelity to law and policy.
- The best available sound science (or, we assume in those cases not involving science, the best available sound scholastic/academic research and review).
- The best interests of the broad American public.

Adherence to these decision-making principles would not only require park and program managers to pay more attention to policies and law, but would require them to pay more attention to good science (Machlis says good science is science that will stand up in court). And, it would require more attention to the statements expressed during public comment periods; perhaps reducing the tendency of some managers to discount public preferences (some saying, “Decision-making in the NPS is not subject to vote by the public”).

Summary

Park and program managers have all the tools needed to manage parks and programs and to carry out operations to meet the mission of the National Park Service as intended by Congress and the American people. It is their responsibility to use those tools. Constantly ringing in their ears should be the following statement:

If we are going to succeed in preserving the greatness of the national parks, they must be held inviolate. They represent the last stands of primitive

America. If we are going to whittle away at them we should recognize, at the very beginning, that all such whittlings are cumulative, and that the end result will be mediocrity. —Newton B. Drury, Director, National Park Service, 1940–1951

References

U.S. Constitution

United States Code, Title 16 - Conservation; Chapter 1

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