Kerry Moss

LEGISLATION, POLICY, & LEGAL CHALLENGES

The legal and policy arenas have direct implications for sound management of natural resources in parks. Although the National Park Service has clear legal mandates, policies, and guidelines related to natural resource preservation, our ability to carry them out effectively also relates to timing and the political environment. Important park protection issues arose in 1996. How these issues played out in the legal and policy arenas often hinged on resource managers being effective advocates of National Park Service statutes, regulations, and policies coupled with sound scientific data. The most visible case was the buyout of the proposed New World Mine adjacent to Yellowstone National Park. National Park Service concern over resource impacts and the efficacy of mitigation measures compelled President Clinton to pursue a buyout deal with the owners of the mine to protect the park.

Deal making

New World Mine: policy and politics collide

by Kerry Moss

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Last August, the National Park Service was the beneficiary of one of the most significant natural resource protection decisions of the Clinton Administration. The President publicly announced in Yellowstone National Park, Montana, that the federal government had reached agreement with Crown Butte Mining, Inc., to stop construction of the proposed New World Mine.

The controversy began in 1990 when Crown Butte applied to the State of Montana for a hardrock mining permit that proposed the New World Mine—a 1,200 ton per day, underground gold, silver, and copper mine. Mine life would be 12–20 years and facilities would include a work camp, mill, and a 77-acre tailings impoundment for storage of 5.5 million tons of acid-generating tailings.

Citing numerous resource concerns, including surface and subsurface water quality, wetlands and wildlife impacts, and seismic instability, the National Park Service participated heavily in the permit review process. Staff from the park and the NPS Geologic, Water, and Air Resources divisions worked with other federal, state, and private entities in reviewing the 2,000-page permit application. Despite our stringent protests, Montana declared the application complete in 1993, and the environmental impact statement (EIS) process began immediately. The Montana Department of Environmental Quality and the Gallatin National Forest were designated lead agencies for the EIS process, and the National Park Service served a cooperating agency role.

The process to identify impacts proceeded slowly, and the National Park Service maintained that the lead agencies were not adequately analyzing impacts and long-term risks associated with mining the high sulfide (acid producing) ore bodies of the New World Mining District. In their frustration over the time consuming, embattled EIS, Crown Butte officials and their lobbyist, ex-Senator Birch Bayh, took their quest for mine approval to the press. The company consistently downplayed possible impacts to Yellowstone and chided the National Park Service for acting as the lightning

President Clinton *announces the land-swap deal at Yellowstone.*

Geologic Resources Division, Dave Steensen

After reviewing scientific data *on the risks posed by the New World Mine, a delegation from the World Hertitage Commission assembled near the mine and placed Yellowstone on its list of world heritage sites "in danger."*

rod for environmental concerns that were slowing the EIS process. Company officials even visited the office of NPS Director Kennedy on more than one occasion. The "trial" of the proposed mine in the press escalated as the war of words spread from the company, to the lead agencies, to local environmental coalitions, and even to the Park Service. Press coverage went national, eventually resulting in four Pulitzer prize winning editorials in the New York Times supporting resource protection.

What had started as a very localized battle to protect the northeast corner of Yellowstone from the hazards of large-scale mining in a high altitude, sensitive environment, took on national and worldwide significance. In 1995, a delegation from the World Heritage Commission visited the park to investigate the proposed mine. Yellowstone was designated a world heritage site in 1978, whereby the United States committed to use its existing laws to protect park resources for all people. The science and risk data presented by the Park Service and our partners convinced the commission to place Yellowstone on the list of world heritage sites "in danger." This listing, combined with national press coverage, played a key role in escalating the issue.

A nearly six-year battle to protect park resources from the potential harm of mining was won with a stroke of the President's pen. The government agreed to negotiate with Crown Butte the details of acquiring their properties and interests in the New World Mining District over the next 18 months. The all-important task of predicting environmental impacts through the EIS process was circumvented by politics and world opinion. Complaints about public and political pressure brought to bear on the permit applicant still resonate, particularly from the mining industry. However, the end result of this entire issue can best be summed up by a quote from President Clinton in his speech from a park meadow when he said, "Yellowstone is more precious than gold."

Legislation

International site designations and the American Land Sovereignty Protection Bill

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During 1995 and 1996, a widely scattered impression took hold that the federal government was giving the United Nations sovereignty over lands in the United States, particularly federal lands in the national park system. This impression arose from misinterpretation of informational signs in a number of national parks that identify those areas as world heritage sites or as members of the international network of biosphere reserves. This perception generated a volume of factually incorrect newspaper and other media articles, letters to the editor, and communications to Congressional representatives. In response, House Resources Committee Chairman Don Young introduced HR3752, a bill to preserve the sovereignty of the United States over public lands and acquired lands owned by the United States, and to preserve state sovereignty and private property rights in nonfederal lands surrounding those public and acquired lands. The public concern that led to introduction of this bill reveals a significant lack of understanding of the nature of the relationship between U.S. properties and international site recognitions.

A decision by the United States to request international recognition of the significant values of a site under its jurisdiction and designation of that site as a biosphere reserve or world heritage site is voluntary. Such sites designated in the United States do not undergo any change in legal status—existing private property rights remain intact, local land use and zoning rules continue, state laws and regulations persist, and federal laws and rules still pertain. In the case of its world heritage sites, by signing and ratifying the World Heritage Treaty, the United States accepted the obligation to respect the integrity of all sites that it voluntarily nominates and the World Heritage Committee subsequently designates. The United States exercises this treaty obligation by applying its own existing local, state, and federal laws and regulations, not by yielding sovereignty and becoming subject to United Nations laws or regulations.

Neither of these designations places U.S. properties in any kind of a United Nations land use program, nor do these designations create United Nations reserves in the United States. Administration testimony at the September 12, 1996, Congressional hearing on the proposed legislation pointed out that the United Nations does not have any authority to affect federal land management decisions within the United States. This testimony also stated that international agreements have not been used to exclude Congress from land management decisions, nor do they have the ability to do so.

The original intent of the proposed legislation—developing a more meaningful role for Congress in the domestic part of both programs—is very supportive of efforts in the United States to fully benefit from the resource conservation aspects of both programs. This intent also is supportive of the cooperative approach to sustainable development that is key to the Man and the Biosphere Program, and especially to the biosphere reserve concept. These two programs provide opportunities for the United States. One is to contribute internationally to the conservation and sustainable use of world-renowned natural and cultural resources. A second is to receive local economic benefits from the international tourists who come to the United States to visit its internationally recognized sites. A third is the local sustainable development and resource conservation benefit that derives from the increased cooperation that occurs locally when federal, state, and local agencies, private organizations, and private citizens voluntarily join together in biosphere reserve partnerships. The proposed legislation as redrafted and resubmitted (HR901) early in 1997 does not explicitly consider these beneficial opportunities that the international recognition programs offer to the United States.

New Parks Legislation

Passed last November, the Omnibus Parks and Public Land Management Act authorized two new additions to the national park system: Tallgrass Prairie National Preserve, Kansas, and Boston Harbor Islands National Recreation Area, Massachusetts.

Operating on a shoestring

by Mary Martin

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After years of debate, Congress passed the California Desert Protection Act in October 1994, and the National Park Service inherited a new jewel, Mojave National Preserve. Rich in cultural resources, this 1.4-million acre park is also home to the threatened desert tortoise, the endangered Mojave Tui chub, relict stands of white fir, and the largest and densest Joshua tree forest in the world.

Nine permanent employees comprised the original staff and came together in early 1995. Initially, they met almost every challenge they undertook. Then came news that the Department of the Interior appropriations bill emerged from conference committee in September with a $1 budget for park operations in fiscal year 1996. The possibility of a veto seemed unlikely and the future looked bleak. Over the next several months, four staff members transferred and uncertainty ran high. The impact the staff felt, family members included, was devastating.

Timing could not have been worse when the mandatory federal furloughs hit in November and December 1995. While most NPS employees were concerned about the furloughs, the staff was faced with losing their jobs along with the newest unit of the park system. In spite of everything, they knew they had to pull together and proudly carry out their mission.

So, how did this park protect its resources and operate on a proposed $1 budget? It came down to staff dedication. In late 1995 and throughout 1996, they organized an advisory commission; began planning the removal of a transcontinental communications cable while protecting the desert tortoise; incorporated research from two park science centers into

More than just a dump for old junk, *Mojave National Preserve is a diverse desert land where the Mojave, Great Basin, and Sonoran deserts all converge.*

Mojave National Preserve

operations; dealt with an illegal mining operation and wilderness and rights-of-way issues; repaired facilities and responded to visitor emergencies; and brought in volunteers and established a fee program. They also asked for park planning and operations support from Death Valley National Park, Lake Mead National Recreation Area, the Pacific-Great Basin Support Office, and the Geologic Resources Division, who shared their resources generously.

Through these efforts, in 1996 the park removed exotic species (tamarisk) from springs; inventoried the burro population (one of the most significant natural resource management issues); developed a grazing permit program (1.1 million acres are managed under grazing permits); began a mining program (more mines exist in the preserve than in all of the rest of the national park system combined); accomplished a myriad of maintenance projects including repair of water systems and road grading; and successfully prosecuted and exacted financial and criminal penalties for one of the most significant environmental crimes (hazardous materials dumping) in National Park Service history.

What a difference half a year can make. By April 1996, the park received its actual budget of $812,000 and has seen an increase for fiscal year 1997 to $1.9 million. With these funds, the park is busy building a first-class organization, which will include a natural resource management staff.

Legal challenges

Bison in greater Yellowstone: symbol and scourge?

by Sue Consolo-Murphy

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Brucellosis, a disease causing fetal abortions in cattle, is carried by some of the freeranging bison in Yellowstone National Park. For more than a decade, scientists, local citizens, and veterinarians have debated the risk posed when bison cross park boundaries onto lands grazed by cattle. After years of controversial bison removals while managers tried unsuccessfully to develop an acceptable interagency bison management plan, the State of Montana sued the federal government to speed resolution of the issue.

Yellowstone National Park

Each winter, *bison often leave the park near the Roosevelt Arch at Yellowstone's northern border in search of winter range; many are either shot or captured for slaughter.*

While under NPS policy of managing for natural processes Yellowstone bison herds have grown in size, apparently unaffected by the disease, a separate goal of the U.S. Department of Agriculture Animal and Plant Health Inspection Service (APHIS) has been to eradicate brucellosis. Somewhere in between are park neighbors: the U.S. Forest Service, custodians of multiple land uses, including permitted livestock grazing; the Montana Department of Fish, Wildlife, and Parks, managers of *game*—which by state definition does *not* include bison but does include the very huntable elk, who also carry brucellosis; the Montana Department of Livestock, who in 1996 attained lead responsibility over the control of bison leaving Yellowstone; and private ranchers concerned about the potential loss of their ability to sell cattle if Montana loses its APHIS-designated "brucellosis-free" status. Environmental groups and some researchers point out the lack of demonstrated brucellosis transmission from wild bison to cattle, and note the double standard in assessing risk of disease from the more abundant and widespread elk.

Despite the growing movement toward ecosystem management, an invisible fence exists in the minds of many who view Yellowstone as a mismanaged landscape due to our failure to control the bison and their diseases within the park. Continued debate about this

issue has prompted renewed scrutiny and a governmental audit of Yellowstone's management of large ungulates. Ten years after Congress requested an investigation into "whether Yellowstone's northern range was overgrazed," a compilation of scientific reports was finally completed, and a renewed round of public discourse on Yellowstone and NPS natural resource policies has begun.

Yellowstone is lauded as the place that saved wild American bison from extinction early in this century. It is also a focal point for discussions about how much (or how little) influence humans should exert in managing wildlife in wildlands. While the absence of specific goals for animal numbers and vegetative conditions are perennially lamented by critics of NPS policy, many scientists and conservationists value the emphasis on natural processes and see this large, relatively pristine landscape as a place for invaluable learning and appreciation. Park managers continue to seek some consensus among the conflicting social, economic, and political views, and hope to keep bison management from being legislated or adjudicated for expediency.

At the end of 1996, interim plans called for using various methods along park boundaries to maintain separation of bison and cattle. In December, the shooting or capture and slaughter of bison carrying brucellosis had begun, with signs of it being another long winter.

Court upholds NPS ability to regulate private oil and gas development

by Carol McCoy

In 1996, National Park Service staff assisted Department of Justice attorneys in holding the line against a pending appeal to overturn a federal district court ruling favorable to park protection. The ruling specifically upheld the legality of NPS authority to regulate private oil and gas development at Padre Island National Seashore in Texas. It also set a positive legal precedent for the ability of park resource managers to protect parks from adverse activities on private property throughout the national park system.

The lawsuit commenced in March 1994 when the owners of the subsurface oil and gas rights at Padre Island filed a complaint in federal district court to prevent park resource managers from protecting park resources from private oil and gas development within park boundaries. The owners structured their complaint in two parts. First, they argued that the National Park Service lacked legal authority to regulate private oil and gas activities. If the court disagreed, then the plaintiffs argued that NPS use of that authority constituted a takings and they sought $750 million as compensation. Because of the magnitude of the money involved, the court lacked jurisdiction to deliberate on this aspect of the complaint.

While we were confident of NPS authority to regulate private oil and gas activities in the park and the reasonable use of that authority, we took the suit very seriously. This was the first time a lawsuit challenged the legal basis of the NPS nonfederal oil and gas regulations at 36 CFR Part 9, Subpart B. An adverse ruling would have sent shock waves through the resource management programs at Padre Island and the 12 other park units contending with private oil and gas development. It also could have adversely affected our ability to protect parks from nonmining related uses on private property within park boundaries. Finally, an adverse ruling would have significantly emboldened

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Wading birds *such as herons, egrets, and ibises are among the species protected at Padre Island National Seashore.*

Geologic Resources Division

other private oil and gas owners in parks to pursue their own takings challenges against the National Park Service.

We quickly assembled a team consisting of staff from the park, the region, and the Geologic Resources Division to assist the Department of Justice with the government's defense. We compiled an exhaustive legal and technical record that supported NPS regulatory authority and sound application of the regulations at Padre Island and the other parks with nonfederally owned oil and gas. Armed with this record, the Department of Justice attorneys prevailed in federal district court. Now they must prevail at the appellate level.

While no decision has yet been rendered by the United States Court of Appeals, a reversal is unlikely. The owners also are still considering pursuing their takings claim in the appropriate federal court. Such a claim must establish that the National Park Service was unreasonable in placing resource mitigation requirements on specific operations at the park. Neither the Justice Department attorneys nor the NPS team believes the administrative record supports such a finding. Rather, the record demonstrates that park resource managers have tightly fashioned mitigation measures to protect at-risk park resources, a critical defense to any takings challenge.

Policy and regulations

Progress toward natural quiet

By Rick Ernenwein and Wes Henry

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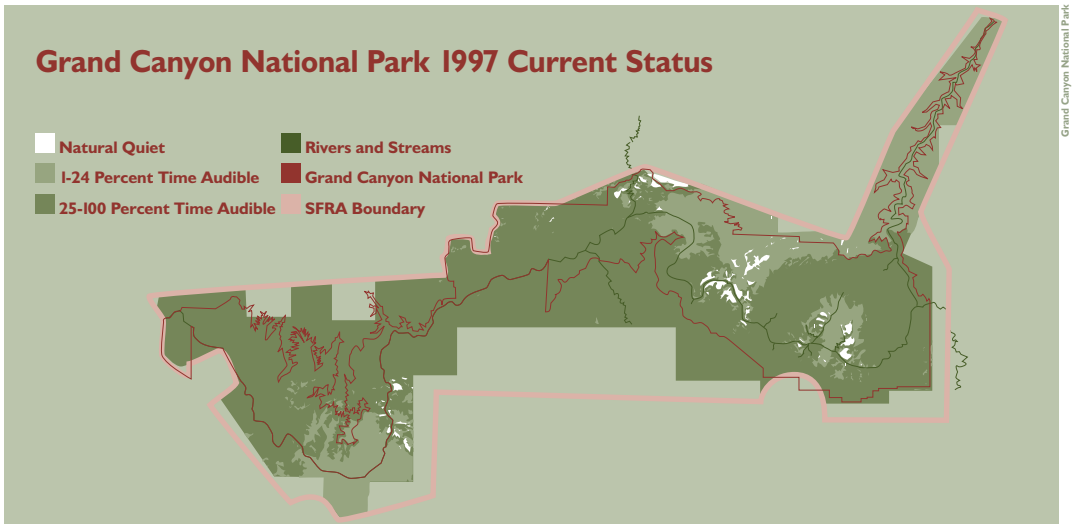
Hikers in Grand Canyon and Rocky Mountain national parks now have a better chance of experiencing the natural quiet without the intrusion of aircraft noise. Following many years of research, discussions, interagency negotiations, and national media attention, on April 22, 1996, President Clinton directed the Secretary of Transportation in consultation with the Secretary of the Interior to:

1. issue regulations that place appropriate limits on sightseeing aircraft over Grand Canyon National Park to reduce noise immediately and make further substantial progress toward restoration of natural quiet,
2. propose regulations to address the potential adverse impacts of sightseeing overflights on Rocky Mountain National Park,
3. propose regulations for managing sightseeing aircraft in those national parks where it is deemed necessary to reduce or prevent the adverse effects of such aircraft,
4. develop appropriate educational and other materials for the public and all aviation interests that describe the importance of natural quiet to park visitors and the need for cooperation from the aviation community.



This diagram shows *NPS computer model predictions of the percentage of the time that aircraft are expected to be noticeable under current conditions at Grand Canyon National Park.*

The President's directive led to Federal Aviation Administration (FAA) regulations for Grand Canyon and Rocky Mountain national parks. In Grand Canyon, the rule placed a cap on the number of tour aircraft and a curfew on overflights, and will lead to a complex modification of existing airspace structure. New air tour routes and a phase-out of noisier aircraft have been proposed, providing incentives for the use of quieter aircraft. In Rocky Mountain National Park, the rule temporarily banned sightseeing tour overflights.

Part of this success stems from interagency consultations. During 1996, the National Park Service successfully defended and advanced its aircraft management recommendations, definitions of "natural quiet" and "substantial restoration," and research (summarized in its 1994 report to Congress). Our assertions were intensely scrutinized by the public, scientific community, and other agencies, but prevailed, and an interagency work group helped resolve disputes between agencies.

Technical advances are also helping. Despite the lack of any full-time NPS staff devoted to overflight issues nationwide, a core team from the Washington Office, Intermountain Region, and Grand Canyon performed extensive computer modeling of aircraft noise for Grand Canyon air tour scenarios with GIS-based software developed under NPS contract. Out of necessity, we also worked with a contractor to develop a special monitoring system that can measure the extreme quiet found in many parks.

The FAA rules for the two western parks represent progress in protecting resources and the visitor experience from the adverse effects of aircraft overflights. However, over 100 national park system areas reported aircraft overflight concerns in 1996. In 1997, the NPS and FAA will develop the national rule and educational materials required by the President's directive.

Efforts to protect Cumberland Gap from coal mining hit pay dirt

by Carol McCoy

Park and Natural Resource Program Center staff scored a victory on September 17, 1996, when Secretary Babbitt announced the decision of the Department of the Interior (DOI) to protect Cumberland Gap National Historical Park and its surrounding watershed from adjacent surface coal mining in Tennessee. For over two years, NPS staff had been underscoring the importance of using provisions in the Surface Mining Control and Reclamation Act of 1977 to protect the park. Our efforts were significantly bolstered when citizens of the city of Middlesboro, Kentucky, including the local Coca-Cola bottling company, and the National Parks and Conservation Association petitioned the Department to deem lands adjacent to the park unsuitable for coal mining. This activity in the area would have marred an idyllic scenic overlook in the park, contaminated park water resources and the local drinking water supply, and impacted an endangered species in the area.

National Park Service staff worked closely with staff from the Office of Surface Mining during the deliberative process and articulated the park's resource management concerns and its economic contribution to the local economy. We also elevated these concerns to DOI decision makers. The efforts paid off. For now, the park is protected from coal mining along its Tennessee boundary.

However, Cumberland Gap also lies in Kentucky and Virginia, and the State of Kentucky is currently entertaining a proposal to mine coal in the vicinity of the area judged unsuitable for coal mining on the Tennessee side. While the local community filed to have lands in Kentucky (who is the decision maker in this state, not the federal government as in Tennessee) similarly declared unsuitable, the state rejected the petition based on what it characterized as the temporary nature of the anticipated impacts.

Nonetheless, under both the Surface Mining Control and Reclamation Act and Kentucky law, the state must obtain the approval of the Park Service before it can permit a coal mine that will adversely impact the park. Having authority to approve or disapprove the pending permit gives the National Park Service a pivotal role that it will exercise in keeping with its strong protection mandates.

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This scenic vista *of Fern Lake in Cumberland Gap National Historical Park was recently protected from potential coal mining disturbance.*

Cumberland Gap National Historical Park