

All Good Things Must End: Protected Areas and Pre-Existing Uses

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Abstract:

Using interview and archival data, this study examines the policies and practices utilized by the United States National Park Service (NPS) in the managing land acquired by the system that contains pre-existing uses that may not conform to system policies. The clarity and effectiveness of NPS policy making process associated with the acquisition and management of parcels and units with pre-existing non-park uses is illustrated through the review of several cases. This study is not complete, but available information points to areas of interest related to the implementation of NPS policy and nature of the type of problems presented.

National parks, as institutions designed to preserve exceptional areas of natural beauty or significance, are an American invention and significant contribution to conservation efforts throughout the world. The National Park Service (NPS) faces a range of challenges related to the management of these protected areas. In some cases, these challenges are tied to the control of the land itself. Most of the land managed by the NPS, particularly in the older iconic parks, has clear, unencumbered land ownership. However, many park units and land parcels acquired in over the past 50 years have come with the complication that they already host a range of established commercial, recreational or residential uses. Some of these uses conflict **with the agency's mission, as articulated in the "Organic Act" (16 U.S.C.)**, and pose significant policy and management challenges to the NPS. When previous owners hold real or perceived rights to the continued use of the land the stage is set for political and legal conflict.

This paper describes challenges resulting from the use of **the "reservation of use and occupancy"** mechanism that the Park Service employs to acquire and manage parcels containing ongoing non-park uses. This study does not attempt to examine the related situation involving the 4.3 million acres of in-holdings within parks where the NPS does not hold in interest in ownership (NPS, 2008). Granting reservations of use and occupancy is a practice that both facilitates many acquisitions while contributing to a host of problems, both in management

of the parkland and in dealing with parties as their agreements reach the end of their terms.

Background

Despite policy mandates, contractual language, and property deeds, this paper illustrates the challenges tied to the use a mechanism designed to ease the acquisition and transition of parkland between private and public management. Reservation of use and occupancy provisions can contribute to significant conflict between the NPS and prior land owners over interpretation, intent, and renegotiation of the terms of use. The cases in this paper highlight political, economic and personal interests which the NPS attempts to balance against its mission and enabling legislation for specific park units. The uses managed by the NPS under reservations of use and occupancy include private cabins and residences, hunting, and other extractive activities. While these uses occupy only a very small percentage of the more than 84 million acres managed by the NPS (NPS 2013), they can have significant impacts on surrounding parkland, as well as implications for broader NPS management efforts. When the NPS seeks to end, modify or remove pre-existing uses that do not conform to its conservation mandate, the stage is set for conflict.

To better understand the variety of conditions encountered when land containing non-park uses is added to parks, it is useful to briefly examine the experience of the NPS in several parks. These experiences illustrate challenges of

integrating these parcels with pre-existing uses into broader patterns of park management throughout the system.

Managing properties with pre-existing uses is compounded by conditions that accompany many of these acquisitions. In their analysis of park boundaries, Dilsaver and Wyckoff observe that,

the degree of development present when a park is established will affect its management and mission. a unit with superimposed boundaries will face constant challenges to its mission and regulations. (Dilsaver & Wyckoff 2005, 264)

The Organic Act offers the NPS guidance on a range of issues, including the incorporation and management of pre-existing into the **nation's system of parks**.

Section 3 of the Act offers the following direction to the Secretary of the Interior in the management of park lands and the structuring of relationships with private interests in the parks,

. . . He may also grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks, monuments, or other reservations herein provided for, but for periods not exceeding thirty years; and no natural curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public: Provided, however, That the Secretary of the Interior may, under such rules and regulations and on such terms as he may prescribe, grant the privilege to graze live stock within any national park, monument, or reservation herein referred to when in his judgment such use is not detrimental to the primary purpose for which such park, monument, or reservation was created, except that this provision shall not apply to the Yellowstone National Park. (16 U.S.C. 3)

However, the guidance contained in the Organic Act is not sufficiently clear to prevent conflicting interpretation. As Nie observed, **"Sometimes conflict is caused, or at least not resolved, due to what is in a law."** He also notes that,

despite a significant body of legal and administrative precedent, “various interests **have used the ‘recreation mandate’ as a way to challenge park decisions they do not like”** (Nie 2003, 529). The enabling legislation for individual parks also includes either general or specific direction to the NPS concerning land acquisition and the management of existing uses. Given that different members of Congress advocate and sponsor legislation for the creation of parks in their state or district, and that there is often variation in the political climate at the time enabling legislation is considered, Sax observed that,

Political realities also create much variety. National parks are rarely thrust upon an unwilling community, and many of the laws establishing parks were carefully tailored to obtain the acquiescence of the host community and its congressional representatives. (Sax 1980, 712)

To satisfy various constituencies and make park creation acceptable to local interests enabling legislation is crafted with very specific provisions that may not be entirely consistent with larger NPS management objectives. This is not a new practice, as Dilsaver & Wyckoff described with the creation of Glacier National Park, were **“Legislative caveats meant to soften the impact only confused and impaired park management”** (Dilsaver & Wyckoff 2005, 255),

The Organic Act and other legislative sources are reflected in NPS policy documents which include “Key Principles” that guide decisions within the agency. In addition to its general Management Policies, guidance is provided to park superintendents and NPS staff through a series of orders from the director. Section 11.3 of **Director’s Order #25 on “Land Protection”** describes the practice described as “Reservation of Use and Occupancy” and notes,

This reservation will depend on the urgency of the park unit's need. A reservation for residential use only may be for a term of years (up to 25) or a life estate, on an area not exceeding 3 acres in size. Terms and conditions are standardized on a Service-wide basis. . . . Reservations of use and occupancy are a deeded interest in the real estate and cannot be extended beyond the expiration date. . . . *Special Use Permits are not to be used to allow continued occupancy at the end of the expiration date except in hardship instances.* (NPS 2001)

Unfortunately, consistent implementation of policy may be hampered by understanding of the issue within the NPS. As one NPS official observed,

And the other thing that is constantly changing is the leadership at the Park Service and DOI. There has been an incredible amount of turnover and with each new person they have to learn the issue, and each person brings a different perspective to the position.

As desirable as fee simple ownership may be, both the small size of the NPS land acquisition budget and the frequent necessity of accommodating the concerns of existing land uses constrains the outright purchase of land and use rights in many cases.

Santa Rosa Island – Channel Island National Park

The acquisition and management of Santa Rosa Island in Channel Islands National Park highlights issues facing the NPS when incorporating parkland containing potentially incompatible preexisting uses. In addition to endangered and endemic plant and animal species, the 53,364 acre island also was the location of a cattle ranch for nearly 100 years, including a commercial hunting operation focused on imported deer and elk. This island was owned by the Vail and Vickers partnership until 1986, when the Vail's accepted a purchase offer of

\$29.6 million. In other circumstances the acquisition of a significant parcel of would represent the start of a period of park service management of parkland, however in this case the mechanism used to obtain title to the island became the vehicle for decades of conflict.

The park's enabling legislation allowed for the NPS to grant of a 25 year reservation of use and occupancy to the prior owners. The legislation also contained a provision that

... at the request of the former owner, the Secretary may enter into a lease agreement with the former owner under which the former owner may continue any existing use of such property which is compatible with the administration of the park and with the preservation of the resources therein. (Public Law 96-199, 94 Stat 74, Section 202 (c).

These provisions were the basis for special use permits for continued ranching and hunting within the newly acquired parkland. Beginning with **the park's first** superintendent Bill Ehorn, park superintendents granted a series of five-year **special use permits to Vail and Vickers. Ehorn and the Vail's sought to maintain** the ranch atmosphere and operations on the island. Ehorn pointed to testimony and discussion in the Congressional Record as justification for this approach (Ehorn 2007). However, beyond Section 202 of the enabling legislation, there was no statutory authority or written policy to accompany the informal understandings between Ehorn **and the Vail's. After 1990, when Ehorn left to** become superintendent of Redwood National Park, the relationship with the NPS deteriorated as new park and NPS staff sought to assert Park Service control of

the island and implement new management policies. The second superintendent of the CINP reported,

My first major job when I got there was to renew the special use **permit for the Vail's operation, and the original special use permit read like a special use permit that the Vail's had written permitting the** Park Service to use the island. And I rewrote it to make it a Park Service document. (Shaver 2007)

In 1997, a lawsuit over the environmental impact of ranching on the island resulted in a settlement agreement that ended the cattle grazing operations and set December 2011 as the end of hunting operations on the island (Rea 1997). As part of the commercial hunting activities on Santa Rosa, hunters are charged between \$5,000 and \$16,000 to participate in hunts of deer and elk that were introduced to on **the island in the early 1900's** (Capps 2006). Commercial and recreational hunting has historically been outside of the range of recreational activities permitted in the national park system, except where it is specifically permitted by statute, such as in some Alaskan units. In the settlement agreement that set 2011 as the date for hunting to end the court prescribed specific annual goals for reductions in the island ungulate population. Even the methodology for counting the ungulate population was a contested issue between **the Vail's and park officials had substantially different understandings of the** number of animals remaining on the island. On January 1, 2009 the park issued a final special use permit on Santa Rosa Island to Vail & Vickers. The permit allowed hunting of deer and elk through the end of 2011 (NPS 2009). Ultimately

the NPS removed ungulates remaining on the island at the end of the use and occupancy period.

During their use and occupancy period Vail and Vickers, both directly and through its paid lobbyists, resisted the removal of deer and elk from Santa Rosa Island, arguing they were part of the “heritage” of the island (Vail and Vickers, undated). **The conflict between the Vail’s and the park intensified as the family** sought to retain control over activities on the island and the park service sought to increase its management of the island. The family retained the services of well-connected lobbying firms, including the Alpine Group, to advocate on its behalf in Washington. Documentary evidence indicates that several Republican members of Congress, including Congressman Don Young (R-AK), communicated with the National Park Service and Department of the Interior on behalf of Vail and Vickers (Young 1997).

Santa Rosa Island offers a situation where both personal and political issues were played out during its transition from private property to public parkland. **Despite the sale of the island, the Vail family’s long held connections to** the property were very difficult to relinquish. As one legislative staff person observed,

I think that the grandparents wanted to get the island sold before the Reagan tax plan of 1986 took effect, to get the best deal they could. **Now the grandchildren aren’t happy with a decision that their** grandparents made twenty five years ago and they want to hold on for as long as they can.

Jon Jarvis, who served as western regional director for the NPS before becoming its director in 2009, characterized the tense and, at times, contentious relationship between the Park Service and the prior island owners as

. . . a pretty intense period, they don't want to give it up. I don't blame them . . . they've got the island to themselves, they make a lot of money off this, they have an exclusive clientele. But we've got to remember Santa Rosa is a National Park and it was set aside by Congress with taxpayers' dollars for the American public . . . I think we have been, as an agency, extraordinarily fair to the Vail's that they've had a much longer run that policies shouldn't have allowed on the islands and our goal here is to bring it to an end in 2012 (Jarvis 2007).

Although it is not the case in all situations involving pre-existing uses in parks, Santa Rosa also was a stage where larger policy battles were played out. This situation offered opportunities for Congressional adversaries of NPS policies to advance other broader policy issues. Several individuals interviewed for this study echoed Jarvis' view that Congressman Young ". . . is interested in the bigger issue, hunting in general and hunting in parks". The story of Santa Rosa Island is one of intertwined conflict over interpretations of Congressional intent and NPS commitments, administrative discretion, economic interests, strongly held connections to the property, and larger political issues that extend well beyond park boundaries.

Point Reyes National Seashore

The situation in a second California park echoes some of the economic issues raised on Santa Rosa Island. At Point Reyes National Seashore a parcel acquired by the NPS in 1972 continues to host a commercial oyster farm within

the park under a 40 year reservation of use and occupancy provision. In 1976 **Congress designated Drake's Estero, where the farm is located, as a potential wilderness area** (Nylen et al 2012, 47). The farm was purchased by Kevin Lunny in 2005. Mr. Lunny was advised at the time he bought the property that his occupancy agreement would likely not be renewed when it expired in 2012. However, the farm proved to be highly successful and is one of the largest oyster farms in California (Fimrite 2007).

As on Santa Rosa Island, the relationship between Lunny and the NPS became contentious. Lunny engaged in a public effort that generated support from local leaders for continued operation of the oyster farm. He also found a powerful advocate in US Senator Diane Feinstein who pressed for legislative relief from Congress to allow his operations to continue past 2012, **when the farm's use and occupancy conditions expired**. In 2009 Senator Feinstein included language in the Interior appropriations bill allowing the Secretary to extend oyster farming operations until 2022 (Nylen et al 2012, 48). Subsequently the NPS conducted an environmental impact study as part of its process to review alternatives related to the future of the oyster farm. Mr. Lunny alleged of scientific misconduct by the NPS in its review. These allegations lead to a review of by the National Research Council at the request of US Senator Diane Feinstein (Fein 2011).

In 2012 Secretary of the Interior Ken Salazar completed his review of the request to extend **the oyster farm's permit**. **Salazar's decision** not to extend the special use permit Lunny filed suit in federal court to force the NPS to extend his

permission to operate. Lunny initially lost in federal court, but his case is pending with the Ninth Circuit Court of Appeals. **Lunny's currently employs a** shellfish industry lobbyist as a consultant and he gained support from a range of land rights organizations (Cart 2013).

In the case of the Point Reyes oyster farm what was essentially an effort to extend the contractual period specified in the reservation of use and occupancy took on a political life of its own as it became a public conflict. **"This thing has been hijacked by people with different agendas and manufactured narratives"** said Tom Strickland, former assistant secretary of the Interior (Cart 2013). While **Mr. Lunny's objective appears to be simply to continue a profitable commercial** activity beyond the date when it was slated to end, in the course of waging his fight it became a platform for other interests seeking to advance policy objectives primarily related to expanding private property rights. This case also highlights the difficulty that the NPS encounters, even when (as in this case) it extends financially favorable conditions to those using public parkland for private purposes.

Other Cases

Many preexisting uses are neither large in scale nor do they all represent significant economic interests. There are a significant number of personal uses, such as residences located within park units. While many parks contain residential in-holdings, there are also personal uses where the property is owned

by the NPS. In addition to the reservation of use and occupancy provisions described previously, some parcels with personal uses come to the Park Service, either through purchase or donation, accompanied by a deed containing life estate provisions. These provisions permit the prior owner to retain use for themselves and, in some cases, members of their families, for the duration of their lives, at which time full control of the asset passes to the NPS. Sax noted that this approach permits,

“... existing residents of new parks to retain their residences and a few acres of surrounding land for their lifetimes or a period of years, as **long as they do not significantly change their present use of the land.**”
(Sax 1980, 715)

As illustrated in the earlier cases, the primary challenge for the NPS manifests itself when prior owners have no interest in permitting a change in the use of the land, even when their agreed upon term of use has ended.

In addition to the Santa Rosa Island and Point Reyes cases there are a host of other instances where the NPS has struggled to manage land it acquired but accommodated prior owners through continued use. The Lyndon B. Johnson National Historical Park was established in 1972 and was based on a life estate that provided for opening the house and grounds of the Johnson Ranch to the public after the death of Lady Bird Johnson. **In 2007, after Mrs. Johnson's death,** control of the ranch passed to the NPS but there was public disagreement about the expansion of access to the park between the NPS and daughters of the former President. Other locations where life estates and reservations of use and occupancy proved to be problematic include Indiana Dunes National Lakeshore,

Cape Cod National Seashore and Cumberland Island National Seashore where **“seashore managers soon realized that what these terse legal contracts state and what the Carnegie and Chandler heirs claim they were promised are two very different things.** (Dilsaver 2004, 135). In Rocky Mountain National Park, the NPS faced a public controversy when it declined to issue a new lease for a cabin after the end of a 25 year reservation of use and occupancy period. Following national publicity about the eviction of the 83 year old widow of the original owner Congress passed a **private bill, the “Betty Dick Residence Protection Act”**. Although the level of controversy over **Betty Dick’s cabin is not the norm,** the Deputy Director of the Park Service acknowledged in testimony before a Senate subcommittee on National Parks that the Park Service anticipated the likelihood of future conflicts and recognized

. . . the need for a broader solution in light of the several hundred reservations of use and occupancy that will expire over the next 10 years. (Martin 2005)

These cases highlight the challenges of managing relationships with individuals who have gone from land owners to tenants.

Although they provide a convenient tool to induce the willing sale of property at the time a park is created or expanded, sales containing reservation of use and occupancy provisions proved to be a time bomb for the Park Service. A number of Park Service officials expressed a **sense of being “stung” by such** provisions and a sense that the agency would avoid using this mechanism whenever possible in the future.

Management and Policy Challenges

At the park level, many conflicts related to land use are fought over conflicting interpretations of legislative intent and the use of NPS administrative discretion to interpret and implement its charge. As Levy and Freidman explain, the use of legislative history and even legislation itself,

. . . is always subject to uncertainty. No statute clearly defines natural resource property rights. In litigation contexts, support for a variety of positions will inevitably be found. Legislative history analysis is equally uncertain. The record of a bill's creation rarely provides unambiguous support for a specific legal interpretation. (Levy & Freidman 1994, 518)

Given the political challenges associated with gaining approval for the creation or expansion of national parks, compromises are often made to address the needs of various interests in the process of crafting enabling legislation. This approach is useful in winning approval for individual pieces of park legislation, but it produces an inconsistent body of legislative guidance. The assessment more **than a quarter century ago that "Congress has yet to articulate a comprehensive national scheme to meet the problems of incompatible private land uses"** (Sax 1980, 711) remains an accurate description of the situation facing the Park Service today. Although its own management policies attempt to provide a systematic approach to dealing with non-park uses the NPS must also respond to idiosyncratic provisions of enabling legislation, complicated relationships with prior owners, and title provisions that can confound its larger management objectives.

The management of pre-existing uses on parkland presents additional challenges to park managers whose primary focus and interests lie in conservation or recreation rather than the role of landlord. While many parks have developed programs aimed at outreach to visitors and other stakeholders with interests in the parks, managing relationships with individuals who have personal, economic and legal interests in parkland is not the primary focus of the NPS. As Webb argues,

. . . another perspective has been thrust on the NPS. New parks in Alaska, Lowell, Cuyahoga, and rural areas elsewhere came with people - residents who did not want to leave their homes. . . . While the NPS had managed people as park visitors, it now had to manage people as residents on the land. Managing people as part of a landscape is difficult, and most managers would rather avoid it." (Webb 1987, 77)

While the NPS has successfully managed many relationships in many parks, the nature of those relationships also contribute to conflict between park managers and permit holders or former land owners who take on **"tenant" status within a** new or expanded park, but who retain a sense of ownership.

It important to consider the problems these situations present to policy makers. **Nie's analysis** of the nature of political conflict over natural resource issues is particularly helpful in understanding the conditions described in this paper. In describing the conflict that often occurs over a variety of land uses on federal lands, Nie argues that they are often

'wicked' in that they go beyond scientific, economic and techno-rational analysis and methods of problem solving. They are often value-based political conflicts grounded in competing deep-core human values. Unlike 'tame' policy/planning problems, these issues are often

extremely controversial, acrimonious, symbolic, intractable, divisive, and expensive. (Nie, 307)

As the brief cases outlined in this paper indicate, when conflict arises over the management decisions or end of a period of continued use, the problem can be framed in a variety of ways. This can be seen in this summary of use and occupancy conflicts offered by a Jon Jarvis who observed that,

... you cut a deal at the beginning of the park establishment and now they come to term. And we just happened to be so lucky to be at the time the terms **come to end. And so we've got the Vail's on Santa Rosa, we've got cabins at Lake Roosevelt, oysters at Point Reyes. . . . And you can't blame them, the people don't want to go. . . . So they** put up a fight and they put up every possible way that they fight it. Public forums, in the media, they fight it with lobbyists, they fight it politically with members (of Congress) that they have. They attack us on our science, they attack us on our policies. They use every possible way to keep the Park going. And as a public servant in this role, these unique pieces of the public estate, these units of the National Park **system are for everybody. They're not for individuals to continue on** these special little uses that we at some point have acquired from them (Jarvis 2007).

While the NPS has a body of statutory language and agency policy to guide its administrative behavior, application of these policies becomes problematic in 'wicked' situations because they each present different challenges that confound efforts to respond in a consistent manner across the system. It may be, in part, **because these involve "special use" permits** and enabling language that deviates from the overarching conservation mission, and time limited exceptions to system-wide practice, that these issues can **become so 'wicked' to resolve.**

Perhaps the most difficult of these 'other' problems encountered involves the use of these problems as surrogates for bigger political issues. This can

result in what might otherwise be less complicated issues such as interpreting the terms of a lease becoming 'wicked', "when they are used by political actors as a surrogate to debate larger and more controversial problems" (Nie 2003, 314). A number of respondents interviewed, from both within the NPS and from positions outside the agency, indicated that members of Congress and other policy entrepreneurs appear to have taken positions on matters related to park land use because they offer an opportunity to advance larger policy agendas on matters such as hunting, grazing, private property rights, and other resource management issues.

Given that multiple pieces of enabling legislation either allow for or require the persistence of non-park uses within parks it is likely that the idiosyncratic approach to these activities will persist. After reviewing a number of high profile conflicts involving pre-existing uses that continue on land owned by the NPS, Schelhas argues that these are not simply aberrations or special cases, in fact he states that

While it is tempting to view these as temporary in the 'real' USA national park model, the fact that these concessions are both widespread and more common today argues otherwise." (Schelhas 2001, 302)

Budgetary constraints that limit the ability of the Park Service to purchase additional property with fee simple title and political constraints associated with establishing or expanding parks, which necessitate compromises over park land use and the accommodation of pre-existing uses, suggest that the NPS will continue to struggle with this issue for the foreseeable future. With an uneven

history of legislative direction and administrative practice, coupled with the combination of personal, economic and political interests that are at stake, implementing the various legal and administrative agreements pertaining to pre-existing is likely to continue to be a complicated and contentious undertaking.

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