PEER ANALYSIS OF EXISTING AND PROPOSED RULE 36 CFR 2.1
Preservation of Natural, Cultural and Archeological Resources
July 2011

The Organic Act Bans Consumptive Use

The General Authorities Act in 1970 and the Redwood Amendment in 1978 reminded the National Park Service (NPS) that the Act of August 25, 1916 (the Organic Act) protects all parks. In 1982, the NPS proposed to thoroughly revise the regulations that protect the parks. The NPS adopted the rules as final on June 30, 1983.

Recreational areas, including seashores, lakeshores and preserves had been subject to less restrictive rules on collection of natural resources under the prior regulations. The NPS professionals who composed the 1983 rulemaking achieved the objective of conferring equal protection on all areas of the national park system, no matter the title of the unit. This was all the more remarkable because it occurred under the supervision of Secretary James Watt.

A significant issue arose during the public comment period. That issue was whether the restrictions on taking natural resources also applied to Indian religious or traditional purposes. After thoughtful reflection and consultation with Departmental solicitors, the authors of the present regulations concluded that the prohibitions on taking park natural resources in 36 CFR 2.1(a) apply to Indian ceremonial or religious gathering. The final rule added a new subparagraph (d) that states:

> "(d) This section (2.1) shall not be construed as authorizing the taking, use or possession of fish, wildlife or plants for ceremonial or religious purposes, except where specifically authorized by Federal statutory law, treaty rights, or in accordance with sections 2.2 or 2.3."

The preamble to the Final Rulemaking provided the reason. "The NPS intends to provide reasonable access to and use of, park lands and park resources by Native Americans for religious and traditional activities. <u>However, the National Park Service is limited by **law** and regulation from authorizing the consumptive use of park resources</u>." Emphasis added (See the rulemaking here at 48 FR 30255; June 30, 1983). Note that the 1983 (and current) rule still permits Indians to gather resources in those parks where Congress provides for it, or in accordance with a treaty right.

Unjustified U-Turn Ahead

<u>The NPS is now about to make the OPPOSITE finding</u>. A draft rule states that the laws, in particular the Organic Act of the NPS (16 U.S.C. 1), rather than protecting park natural resources, actually authorize the NPS to permit Indian consumptive use of park resources. The proposed new rule would say:

> "(d) This section (2.1) shall not be construed as prohibiting the gathering for traditional purposes of plants, plant parts, or minerals

by members of Indian Tribes pursuant to an agreement in accordance with section 2.6 of this part…"

The draft rule evades the conservation mandate imposed by the Organic Act by shifting that mandate from the park's "natural and historic objects" and "wild life" to the conservation of Indian traditional practices on "ancestral lands." As socially worthy as such a mission may be, nowhere does the Organic Act, its scant legislative history, or subsequent law prescribe this as the fundamental purpose of the parks, monuments or other reservations.

For so abrupt a reversal, this radically new interpretation of the Organic Act is without substance. What substance exists favors resource preservation. In 1979 Associate Solicitor of the Department of the Interior James Webb wrote the following to the Directors of the NPS and the Fish and Wildlife Service. Shortly after the enactment of the American Indian Religious Freedom Act, Webb advised the NPS Director that, in evaluating any conflict between Indian religious practices and the Service's policies or regulations, ""...The National Park Service must in particular be guided by the injunction that "(t)he authorization of activities, and the administration of these areas shall be conducted in light of the high public value and integrity of the National Park System..." This provision of the Act of March 27, 1978, known as the Redwood Amendment "...elevates the decisionmaking and management standards of the National Park Service in favor of greater protection for park resources and values."" Solicitor Webb continued "As a consequence, the National Park Service should, ***more so than other agencies***, seek express congressional guidance and specific legislative solutions on identified conflicts." (Emphasis added). See the entire text of the Webb advisory here: http://www.peer.org/docs/nps/8_11_10_Legal_opinion.pdf

The NPS can point to no statute or court ruling that modifies or amends the NPS' 1983 interpretation of its authorities. Recent action by Congress for the national forests shows how essential such statutory expressions should be. The national forest system is subject to laws that mandate specified commercial, consumptive use of its resources, as well as recreation and wildlife propagation. Because of their largely utilitarian nature, the national forests lack the rigorous protection afforded by law to national parks. Yet, Congress still found it necessary to enact a provision that allows the Forest Service to provide Indian tribes *"…trees, portions of trees, or forest products from National Forest System land for traditional and cultural purposes*." Food, Conservation and Energy Act of 2008, Section 8105; P.L. 110-234, May 22, 2008. Emphasis added.

If national forests require such authorization, how can the national parks, much more rigorously protected by law, provide these resources to Indians in the absence of law? The NPS proposed rule does not examine or mention what Congress enacted for a sister agency. It stretches credulity that the NPS believes that such a statute is necessary for the national forests but not the national parks.

Why Plants and Minerals and Not Animals?
The traditions of Indian Tribes predate the nation's parks. Indian Tribes gathered plants, minerals and animals from what are now the parks. If the Organic Act authorizes the NPS (through a park superintendent) to allow Tribal removal of plants and minerals from parks because it is traditional, why does it not also authorize the taking of animals? What distinguishes one from the other? The proposed rule ignores this critical issue.

The Organic Act directs the Secretary of the Interior to give the highest level of protection to the resources of the parks "which purpose is to conserve the scenery and the national 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." 16 U.S.C. 1 Note that the Act protects park "wild life" not "wildlife." This distinction applies the conservation mandate to more than only park animals but also to park flora.

The NPS is about to argue that the Organic Act mandates that the NPS conserve the traditional cultural practices of Indians. If this implicit mandate lies there, it is so deeply buried in the Organic Act, that the NPS has just now uncovered it. Further, if such a mandate exists, as the NPS is about to allege, then the authority applies to more than plants. It also applies to animals.

The NPS draft rule will argue that the conservation mandate is not harmed by gathering of some plants or minerals, as long as the park ecosystem or its functions are not damaged. This is an argument analogous to one by the National Rifle Association in NRA v. Potter (1986) that the NPS can allow the harvest of some park animals under scientifically managed principles without violating the Organic Act. The NPS argued that it had no such discretion, a position endorsed by the Federal Courts.

In fairness, the proposed rule does NOT authorize Indian traditional or cultural take of park animals. But it establishes a rational basis for it in the future. If "tribal sovereignty," "government-to-government relations," "Indian traditional practices" support the removal of plants and minerals from parks, as the proposed rule alleges, then why do these principles NOT support the taking of animals? The draft rule will allege that the Organic Act mission supports the fostering of Indian traditional take of park plants. Why does it not then support the taking of animals?

This new rationale of the Organic Act that supports the taking of plants has unmistakable implications for park animals. Yet, the draft proposed rule says nothing except a single cryptic sentence that "NPS management of fish and wildlife would not be affected by the proposed rule." First, what does that phrase mean? Second, this draft rule is not about NPS resource management but consumptive take of resources. It is as if the rule drafters are aware of the implications of their nascent proposal for animals but dare not discuss it in depth. Perhaps, the NPS is saving that for a subsequent rule. Nonetheless, the agency has planted a legal roadside bomb that will inevitably explode.

PEER challenges the Director to state openly and unequivocally whether the Organic Act authorizes the NPS to adopt a rule that allows Indian take of park animals for traditional

or cultural purposes, just as he believes it does for plants and minerals. If not, why not? This central question cannot be ignored but the draft rule ignores it.

Specific Enabling Act Provisions

In the 1978 Redwood Amendments, Congress directed that "the high public value and integrity of the National Park System…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 U.S.C. 1a-1 The proposed rule cites the Redwood Amendment as supporting the Indian removal of park natural resources; a startling about-face from the NPS understanding of its laws.

Park enabling acts supplement and modify the Organic Act mandate. For example, park-specific enabling acts "directly and specifically" provide for sport hunting in 62 park areas, commercial livestock grazing in a score of parks, even leasing of Federal minerals in 2 parks. The NPS has consistently argued, in court and out, that park-specific authorizations such as these, apply within ONLY that park.

One of the most troubling aspects of the draft rule is the determination that specific enabling acts that authorize Indian gathering of park resources instead proves congressional recognition of a broad agency authority to allow Indian natural resource removal in the entire national park system. The proposed rule states that, by enacting Indian gathering provisions in park specific acts, *"Congress has also endorsed the principle that traditional Indian tribal uses can be consistent with the mission of the NPS as set forth in the NPS Organic Act, as amended."* (This is a direct quote from the draft rule preamble).

The proposed rule cites as authority several park enabling acts that "directly and specifically" provide for Indian resource removal, e.g. at Bandelier, El Malpais, Death Valley. Unfortunately for the proposed rule authors, the specific enabling acts (there are about a dozen) prove just the opposite. Congress specifically authorizes Indian gathering in a handful of parks, precisely because the NPS, unlike the Forest Service, lacks a broad and explicit authority to do so system-wide.

If the NPS Director may allow Indian gathering in any park, by any member of any Tribe, all of the individual park specific acts and their terms would be superfluous. The specific enactments for Bandelier, El Malpais, Death Valley would be pointless. The NPS draft rule would allow gathering at a Chaco Culture or Great Smoky Mountains though their laws do not so provide. Why? According to the draft rule, because Congress provided for Indian gathering in a dozen specific parks, the NPS may provide for it by rule in ALL parks. This is both absurd and improper.

The basic statutory rule is that when Congress specifically provides for an activity in a given park, it is implied that the NPS is not free to authorize that activity in ALL parks. In violation of statutory canons, the proposed rule argues that the congressional authorization of Indian resource removal in some parks therefore authorizes it in ALL

parks. The novel interpretation of park specific exceptions is more than incorrect. It is dangerous. Imagine if we applied this premise to "hunting" which Congress has authorized in 62 units. This bizarre interpretation of how park specific exceptions become universal is another roadside bomb that will someday explode, striking at the integrity of the national park system.

The Agreement Mechanism

The draft rule will propose a new section for 36 CFR Part 2; a section 2.6 entitled "Gathering of plants, plant parts and minerals by federally recognized Indian tribes." The new section authorizes Tribes to request, and each park superintendent to sign, an agreement governing the collection of park natural resources. The Tribe would designate the enrolled members who could collect. Before signing an agreement, the park manager must determine that the gathering "will not result in damage to other natural or cultural resources or adversely affect environmental or scenic values." Emphasis added.

Thus, the agreements section of the draft rule contemplates damage will occur to the park resources that have been collected. The collection activities will be permitted to affect environmental or scenic values as long as such effects are not "adverse." The standards that will govern the agreements are nowhere to be found in the Organic Act or subsequent laws that protect the parks. Nor are they defined in regulation or NPS Management Policies.

Reasonable people recognize that both visitors and administrators always impact park resources to some degree. Such impacts are permissible insofar as they foster public enjoyment of the park's features and do not rise to the level of impairment. Impacts to park resources, adverse or not, that serve some other, non-statutory, purpose are not compatible with the Organic Act mission. This is so even for the purpose articulated of fostering Indian traditional and cultural practices on their ancestral lands.

Listed Plant Species and Critical Habitat

The draft rule would not allow the NPS to enter into an agreement that authorizes Indian collection of plants federally listed as threatened or endangered. However, the draft does not safeguard plants that are located in habitat designated as critical to listed animals.

The science of ecology is firmly established enough that the NPS should understand that allowing the collecting of plants may cause harm to listed animal species. It is conceivable, for example, that a listed species of animal may depend at critical junctures upon certain plants; plants that may also be the object of collection activities. Thus, authorizing plant collection may "harm" listed animal species. "Harm" is one form of "take." Section 9 of the Endangered Species Act proscribes "take."

This draft rule has significant implications both for listed plant species, and for listed animals that may depend upon plants. But the NPS does not intend to consult with the U.S. Fish and Wildlife Service under section 7 of the Endangered Species Act about the rule. The NPS cannot assume that the nobility of its intent suspends all laws.

The Rule is Unsupported by Science

In the Omnibus National Park and Management Act of 1998 (NPOMA), under the title of "Research Mandate," Congress directs the Secretary of the Interior "to assure that management of units of the National Park System is enhanced by the availability and utilization of a broad program of the highest quality science and information." (16 U.S.C. 5932) Yet, the NPS cites no scientific research to support some rather specious claims in the draft rule.

The draft rule does not require that the NPS continually monitor the health of plant communities subjected to collection pressure. Instead, the draft offers the unsupported romantic notion that "traditional gathering, when done with traditional methods and in traditionally established quantities, helps to conserve plant communities." The rule does not explain how gathering "conserves" plant communities.

Real evidence indicates that gathering may significantly alter plant communities and their dynamics by the selective removal of certain plants, their parts or seeds. In some case, scientific reports from parks show large scale reductions of plant species under the pressure of so-called traditional gathering, e.g. ramps at Great Smoky Mountains. Anecdotal reports from Walnut Canyon National Monument, Arizona, show great reductions in plants, like rockmat, collected by Navajo medicine men, while the NPS managers looked the other way.

The draft rule lays the groundwork for Indian collectors to become Indian cultivators. Perhaps it is in this way that Indian traditional collecting may "conserve" plant communities. The Indian collectors will seek (indeed, already have in at least one park) to actively intervene in plant succession to create managed landscapes in park natural zones, more favorable to producing larger crops of desired plants. In such favored areas, Indian collectors, with or without NPS aid, may create "gardens" by the application of horticultural techniques, including the use of fire. This model of manipulation may have its place in a historic zone, or a cultural park but it is antithetical to large areas where the NPS goal is the perpetuation of natural processes, including plant succession and the tolerance of disturbance events.

Wilderness?

Cultivated landscapes are especially inimical to the congressionally-described purpose of designated wilderness. When Congress designates lands as wilderness it is to preserve "land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to *preserve its natural conditions*." 16 U.S.C. 1131(c) Emphasis added. Man-made and artificially-managed areas do not preserve a natural condition, even when the manipulation is by Indians.

PEER assumes that plant or mineral collecting be allowed in the designated wilderness that comprises nearly half of the national park system. (Note that in some Alaska park designated wilderness, Congress already authorizes subsistence by rural residents [Native and non-Native alike] including gathering plants.) Can natural resources gathered in wilderness then be sold commercially? Will the traditional Indian gatherers be required to gain access in wilderness only by the traditional means of foot or horseback? Will

they be allowed to use chain saws to coppice pinyon trees for example for greater yield? These are valid questions, and if anyone doubts they are real, just contact the wilderness managers at some parks where such questions have already arisen. The draft rule ignores the Wilderness Act, just as it ignores the Endangered Species Act and the National Environmental Policy Act, among other laws.

The Rule is Loosely Written

The term "plants" is not defined in 36 CFR 1.4. The lack of a definition is of little consequence when the words of 36 CFR 2.1(d) prohibit the gathering of "plants" for Indian traditional or ceremonial purposes. The proposed rule now would replace that prohibition with the following:

> "(d) This section (2.1) shall not be construed as prohibiting the gathering for traditional purposes of plants, plant parts, or minerals by members of Indian Tribes pursuant to an agreement in accordance with section 2.6 of this part…"

Because an NPS official may now agree to allow Indian collection of plants, it would be essential to define "plants." The proposed rule does not. Under the draft rule plants include trees. Could a superintendent allow the cutting of a tree for a canoe or lumber? Yes.

The 1983 authors of the existing rule handled a similar question when they adopted a rule at 36 CFR 2.1(c) that allows a park superintendent to authorize the gathering in a park of certain natural products for personal consumption. They limited this *de minimis* collection to fruits, nuts, berries and unoccupied seashells. These narrow categories, though subject to some gray area, are more specific than "plants." "Plants" is a far broader category. The draft rule will enable the collection and removal of entire plants, their leaves, twigs, stems, roots, and could include felling whole trees. It would allow the collection and removal of mosses, fungi, herbs, forbs, woody plants and trees.

What Are Traditional Uses?

What is traditional use? A traditional use is whatever the Indian Tribe or its members tell the NPS. Otherwise, the NPS and its managers would have to dispute with a Tribe or its members whether the uses for which plants/minerals are gathered are "traditional." No manager should be put in so impossible a situation. A park manager's inevitable reaction will be to accept ALL assertions that the plants/minerals gathering are for "traditional" and "cultural" uses.

The existing and narrowly constructed 36 CFR 2.1(c) places the park manager in control of the limited personal use of fruits, nuts, berries. (Incidentally, Indians and Tribal members, like all others who visit the parks, may also avail themselves of 2.1(c). PEER has no objection to this.) The draft rule has no such safeguards. It would be very difficult for a proposed rule on Indian gathering to define "traditional," and, therefore, limit the purposes for which the Indians may gather by plants/minerals. <u>It is far more dangerous not to define it</u>. Without such a definition, the sky is the limit.

The rule allows the collection of natural resources from parks that may then be sold for profit. "Traditional uses" will certainly include commercial uses. Under this draft rule, Indian Tribal gatherers will be able to collect park plants and minerals and sell them, as either raw products or as handicrafts. The NPS can be expected to show little spine in enforcing any "no-commerce" provisions of gathering agreements with Tribes.

Whose Traditions Deserve Protection?

Indians are not the only people in the United States who engaged in traditional activities on lands that pre-date park designation. For example, people have collected ramps (a member of the lily family) in what is now Great Smoky Mountains National Park long before it was a park. That is true for Cherokee and Scots-Irish settlers alike. Is not the collection of ramps a traditional practice of the early white settlers? Is not their traditional practice also protected by the Organic Act?

Ethnographers will make identical arguments, and already have, that the NPS needs to foster the collection and subsistence activities in parks of non-Indians as well. They call these "traditionally-associated peoples." Opening parks to "traditional" and "cultural" take of resources by Indians, will inevitably not be limited to Indians.

PEER calls upon the NPS to clearly state why the Organic Act and other authorities provide only for gathering of park plants and minerals for the traditional purposes of Indians and of no one else.

No Compliance with NEPA

The NPS says that the effects of opening the entire national park system to Indian plant and mineral gathering is so uncertain that preparing a National Environmental Policy Act (NEPA) document would be impossible. If only Federal agencies could so easily evade the responsibility to assess the effects of their acts.

The Bush Administration in 2008 attempted the same ruse when they adopted a rule to weaken the firearms regulations at 36 CFR 2.4 to allow the carrying of concealed, loaded and operable firearms in the parks (36 CFR 2.4(h).) They also said that the environmental effects of its action were too uncertain and speculative. Therefore, the NPS could not possibly prepare a NEPA document.

On March 19, 2009 the Federal District Court in Washington, D.C. issued an injunction against 36 CFR 2.4(h) calling the process that led to the rule change "astoundingly flawed." As it is doing now, the NPS then contended that it could not know, nor therefore assess, the effect of the new gun rule, and thus could not prepare a NEPA document for it. Despite the rebuke of Federal courts just over two years ago, the NPS again insists on short-circuiting its procedural obligations under NEPA.

The draft Indian gathering rule provides that an individual agreement in each park must undergo NEPA review. But it does not specify the form of that review, for example, preparation of an environmental assessment. Thus, at the park level we could likely

expect a cascade of documented categorical exclusions, with little or no public knowledge or involvement. Though the rule is silent, the NPS will likely shield the existence or terms of agreements from public disclosure, if it could get away with it.

The NPS knows four basic things about the draft new rule:

1. The effect of the rule change will be broad, affecting nearly all natural and many cultural areas of the national park system. Virtually every park in the Continental U.S and Alaska is the former "ancestral" land (as the draft rule calls it) of one or several Federally-recognized Tribes;

2. The draft new rule is a complete reversal of the current rule. In July 2010 at a meeting with Cherokee officials, NPS Director Jon Jarvis publicly denounced the current rules as "wrong;"

3. The draft rule, if proposed and adopted, will lead to widespread gathering and removal of plants and minerals from areas of the national park system, and

4. The rule will be controversial.

For these reasons, the Interior Departmental Manual does not permit the NPS Director to categorically exclude the proposed rule from NEPA and its procedural obligations.

Materials Disposal Act

The Organic Act is not the only law that governs and protects the national park system. Congress has enacted several other laws that collectively raise a high protective barricade around the parks. The parks are not like any other Federally-owned lands in the nation. The laws safeguard them from a host of consumptive and/or commercial uses, unless Congress speaks otherwise.

A little known law restricts the authority of the Secretary of the Interior, and therefore of the NPS Director, to dispose of vegetative materials in the national park system. The law, adopted in 1947, is the Materials Disposal Act (30 U.S.C. 601). The law allows the Secretary to dispose of "vegetative materials (including but not limited to yucca, manzanita, mesquite, cactus, and timber or other forest products)" on the lands that he administers. But the law specifically states that this authority "shall not be construed to apply to lands in any national park, or national monument…." Section 2 of the General Authorities Act of 1970 makes the protective provisions of law such as this, applicable to all areas of the national park system, not limited to formally-titled "parks" or "monuments."

In short, the Secretary and the Director are not authorized to provide for the disposal of vegetative materials in the national park system. That includes disposal by agreements with Tribes, unless Congress specifically provides for it. <u>The "lowly" plants in the national park system are statutorily protected against disposal by this unlikely act of Congress.</u>

It is thus not a far-fetched to argue that plants on Federal lands have statutory protection. In 2008, Congress enacted a statute to waive that protection on national forests and allow the Secretary of Agriculture to dispose of trees, plants and forest products for Indian traditional purposes. The Secretary and the NPS have no equivalent statutory authority, except in a dozen specific park enabling acts.

Summary

The Organic Act protects "wild life" in the national parks. This includes plants. Plants are essential in the ecological processes that sustain park ecosystems. Removing native plants, even common ones like sagebrush at Sand Creek and willow at Zion, adversely affect park ecosystems. The Organic Act does not preserve Indian traditional or cultural consumptive use of park natural resources – plant or animal.

PEER does not generally oppose congressional acts that allow Indians to collect plants or mineral resources in specific parks. We urge the NPS to heed the thoughtful advice of Associate Solicitor Webb and seek a remedy for this issue in Congress, as the Forest Service recently did. We urge the NPS to produce a legislative environmental impact statement for such a solution.

PEER will oppose this poorly-crafted rule when it is proposed. In his zeal to reverse what he has denounced as a "wrong" rule adopted by the NPS in 1983, Director Jarvis may do lasting harm to the principles that protect the national park system.

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