

NATIVE AMERICAN PLANT GATHERING IN THE NATIONAL
PARK SYSTEM

August 2010

Public Employees For Environmental Responsibility (PEER)
202 265-PEER

INTRODUCTION

In a July 2010 conference with the Eastern Band of the Cherokee Indians, National Park Service (NPS) Director Jonathan Jarvis publicly proclaimed that the NPS regulations that preclude Native Americans from gathering plants from parks are “wrong.” He vowed that one of his goals as Director was to revise the regulation and implement a complete about-face on Native Americans collecting in the national park system.

PEER asked the NPS spokesman, David Barna, to certify the accuracy of the report that Director Jarvis determined the current rule to be wrong. He confirmed, and included the following statement: “Director Jarvis has deep experience working in parks where the ties between First Americans and the lands that are now parks have never been broken. He believes that maintaining those ties can nourish our landscapes while supporting native cultural traditions and providing opportunities for all Americans to better understand the history of America's first peoples.”¹

This analysis examines the NPS regulations judged to be “wrong” by the NPS Director. The analysis reviews the current status of Native American plant gathering in the parks. Lastly, the analysis reviews pertinent authorities, including the American Indian Religious Freedom Act (AIRFA).

The team of NPS professionals who crafted the words of the current regulation did so in light of all applicable statutes, including AIRFA and the 1978 Amendment to the Redwood National Park Expansion Act. Their work was thoughtful and tightly-reasoned.²

There is no compelling evidence that the current regulation is “wrong” in any legal or constitutional sense. The regulation prohibits all persons, not only Native Americans, from gathering park plants, or other natural and cultural resources, for ceremonial or religious purposes. Nonetheless, Director Jarvis’ determination deserves careful consideration.

¹ It is unclear from the statement issued by David Barna if Director Jarvis’ belief that the NPS rule is wrong may also apply to park animals. Only the NPS Director can clarify that. This analysis assumes that Jarvis’ determination is, for now, limited only to plants, and perhaps to minerals.

² The 1983 regulations were first proposed in the Federal Register on March 17, 1982 (47 FR 11598). The rules have withstood the test of time. They remain substantially unchanged since their adoption. The team of NPS professionals, led by Ms. Maureen Finnerty, composed the rules. Though the process occurred during the tenure of James G. Watt as Secretary of the Interior, the rules were developed with a high degree of integrity, largely free of political considerations.

1. THE CURRENT REGULATION

NPS regulations at 36 CFR Part 2 generally prohibit the take of park resources EXCEPT as provided for in law. The NPS regulations at 36 CFR 2.1(a), prohibit the “possessing, destroying, injuring, defacing, removing, digging, or disturbing from its natural state:

- (i) Living or dead wildlife or fish, or the parts or products thereof, such as antlers or nests.
- (ii) Plants or their parts or products thereof.
- (iii) Nonfossilized and fossilized paleontological specimens, cultural or archeological resources, or the parts thereof.
- (iv) A mineral resource or cave formation or the parts thereof.” Emphasis added.

On June 30, 1983, the Department of the Interior (DOI) made this rule final in the Federal Register. The Preamble for the Final Rule discussed a few public comments that “...questioned the applicability of this regulation (36 CFR 2.1) to the taking, use or possession of fish, wildlife or plants for ceremonial or religious purposes.” The Preamble continued” [I]n response to these comments, the service has added a provision to this section (36 CFR 2.1(d)) prohibiting such activities except where authorized by Federal statutory law, treaty rights, or in accordance with sections 2.2 or 2.3. This section (36 CFR 2.1(d)) is also intended to cover activities undertaken by Native Americans.” Emphasis added. 48 FEDERAL REGISTER (FR) 30255.

The Preamble explained “[T]he Service recognizes that the American Indian Religious Freedom Act directs the exercise of discretion to accommodate Native religious practice consistent with statutory management obligations. The NPS intends to provide reasonable access to and use of, park lands and park resources by Native Americans for religious and traditional activities. However, the National Park Service is limited by law and regulation from authorizing the consumptive use of park resources.” Emphasis added. (Ibid.)

In the Final Rule, the NPS added subsection (d) to 36 CFR 2.1. Title 36 CFR 2.1(d) states:

“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 laid out at length why AIRFA does not provide the specific statutory authorization to satisfy the test of 2.1(d). The Preamble states:

Paragraph (d) is intended to clarify the Service's policy on the taking, use or possession of fish, wildlife or plants for ceremonial or religious purposes. Such taking, use or possession is prohibited except where specifically authorized by Federal statutory law, treaty rights, or in accordance with section 2.2 or section 2.3. This section is also intended to cover activities undertaken by Native Americans.

The Service recognizes that the American Indian Religious Freedom Act states that:

[H]enceforth it shall be the policy of the United States to protect and preserve for American Indians, their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rights. 44 U.S.C. 1996.

This statute, however, does not create additional rights or change existing authorities. Rather it directs the exercise of discretion to accommodate Native religious practices consistent with statutory management obligations. Therefore, the Service will provide reasonable access to and use of park lands and park resources by Native Americans for religious and traditional activities. However, the National Park Service is limited by law and regulation from authorizing the consumptive use of park resources." (Emphasis added) 48 FR 30263-4.³

The words of the current regulation are unequivocal and clear. The regulation at 36 CFR 2.1(d) contains two main exceptions that this analysis examines later. But, the main thrust of the rule leaves no doubt as to its meaning.

2. NPS HISTORY OF INDIAN GATHERING AFTER THE 1983 RULE

After the NPS adopted the rule at 36 CFR 2.1, there has been sharp internal disagreement with the proscription on persons collecting park natural

³ Note that the current regulations at 36 CFR 2.1(d) prohibit the consumptive use of park resources for ceremonial or religious purposes by ALL persons. The Preamble makes clear subsection (d) is ALSO intended to cover activities undertaken by Native Americans, which means it governs a far broader class of persons than ONLY Native Americans.

resources for religious or ceremonial purposes. That disagreement led to a widespread and open non-compliance with the rule at many parks. Some of that defiance has been open, via written Memoranda of Understanding (MOUs with tribes) adopted by several parks. Some of the defiance has been carried out by written permits or provided for in the “ethnographic resources” sections of park General Management Plans (GMPs).⁴ As a result, Indian requests to take park natural resources are widespread. NPS consent to do so is nearly as widespread, even though it violates NPS regulations.

Evidence of this continuing practice comes from several sources. For example, at Joshua Tree National Park, California, the NPS responded to a 1997 public comment from the Morongo Band of Mission Indians on that park’s Environmental Impact Statement for the Revised GMP. The Band sought continued NPS approval to collect park plants for medicine and religious purposes. The NPS response in the GMP assured the Morongo Band that the NPS “will work with the tribes to establish a process to gather renewable materials for traditional ceremonial and religious purposes.”

At Walnut Canyon National Monument, Arizona, the NPS issued a permit to Navajo Indians for the collection of a plant known as rock mat (*Petrophyllum caespitosum*) that grows, as its name implies, on cliff faces.

At Sleeping Bear Dunes National Lakeshore, Michigan, the NPS received a preliminary request in 2000 from the Grand Traverse Band of Chippewa and Ottawa to cut mature black ash trees (*Fraxinus nigra*), 40-60 feet in height, 1-2’ in diameter, for basket making purposes. It is unknown if the NPS consented to this specific request.

It is difficult to quantify the nature and extent of park non-compliance of the rules at 36 CFR 2.1 because much of that non-compliance has been undocumented. Instead, park management may give verbal permission, or engage in the NPS’ own version of “Don’t Ask, Don’t Tell.” A most startling example of the latter is a report that an acting superintendent of Yosemite National Park told a meeting of Indians that they could collect whatever plant they wished, did not need a permit and did not need to file a report with the NPS as to what or how much they had gathered.⁵ This kind of conduct, if confirmed, is contrary to clear language of NPS regulations and would be actionable. There are no Endangered Species Act implications since Yosemite does not contain plants that are listed under that law.⁶

⁴ See, for example, the current GMPs for Sequoia-Kings Canyon or Olympic National Parks.

⁵ David Uberuaga served as acting Superintendent of Yosemite in 2009 and early 2010.

A. The Reason For the Great Smoky Mountain Meeting

The issue of Indian take of park resources came to a significant but inconclusive head in 1999 when several members of the Greasewood Clan of the Hopi Tribe sought to take golden eagle eaglets from Wupatki National Monument, Arizona for ritual religious sacrifice. The NPS superintendent, Regional Director and Director all denied the request, citing 36 CFR 2.1(d). On its last day in office (more accurately on the day after George Bush's inauguration), the Clinton Administration proposed a special rule mandating that the NPS superintendent "shall" allow the Hopi take of eagles at Wupatki. 66 FR 6516, January 22, 2001. The rule was never made final.

The Great Smoky Mountains meeting with the Cherokee served as a timely event for the Director's bold announcement. The Great Smoky Mountains National Park is the latest flash point for the issue of Native American take of park resources. The conflict at Great Smoky Mountains began after the NPS halted persons from collecting a plant, and its parts, known as a ramp (*Allium tricoccum*) for consumption. Many generations of Appalachian mountain residents as well as Cherokee collected this plant. Although the collection of this plant violated 36 CFR 2.1, the NPS allowed the conduct for decades. Finally, in March 2002, the NPS decided "it would begin enforcing the 36 CFR 2.1 prohibition on possessing, removing, digging or disturbing plants (including ramps)." ⁷ However, the NPS "informally allowed card-carrying tribal members to continue limited collection of ramps on Park lands" between 2002 and through 2007. ⁸

At Great Smoky Mountains the park manager decided to align the park with the applicable authorities that protect it, admittedly at great pain. However, the worst pain was to then apply this prohibition to the Cherokee. The NPS, acting upon February 13, 2004 advice of the DOI Field Solicitor in Atlanta, determined that "it can no longer allow the collection of ramps" by Cherokee tribal members. ⁹ The NPS informed the Tribe of the decision on February 7, 2008.

⁶ Yosemite does contain 4 State of California-listed plant species. They are not protected by the ESA, only by NPS Management Policies (2006) at 4.4.2.3. It is unknown to PEER if any of these plants are being collected.

⁷ Letter from NPS acting Regional Director Frederick to Eastern Band Cherokee Chief Hicks, May 30, 2008.

⁸ *Ibid.*

⁹ *Ibid.*

Why the four year hiatus? The NPS waited four years after the solicitor's opinion to end Cherokee plant collection activity. One reason for the delay was to see if the revision of the NPS Management Policies (finally adopted in 2006) would alter the Management Policies (2001) wording and allow collection of plants by Tribal members. When it was clear that the new Management Policies language did not adopt a new, more permissive approach, the NPS informed the Tribe that the collecting of ramps must end.¹⁰

On February 15, 2008, the Tribal Chairman, Michael Hicks wrote to ask the NPS to permit the Cherokee to continue the practice of ramp collecting. "On behalf of NPS Director Bomar," Acting Regional Director Frederick denied that request on May 30, 2008. It was in this context that her successor, Director Jarvis, travelled to the Great Smoky Mountains in July 2010 to promise relief for the Cherokee and, by extension, to all the Native peoples of America, from the allegedly wrongful burden imposed by the NPS rules.

In the decade of the 1990's, some officials within the Service who disagreed with the rule at 36 CFR 2.1(a) and (d) began to encourage practices and give advice that were contrary to the plain language of the rule. One notable NPS source was American Indian Liaison Office. The head of that office even today insists that the rule is unclear.¹¹ In February 2004, the DOI Field Solicitor in Atlanta found no such lack of clarity when he determined that, in the absence of law or treaty right, the NPS could not allow the Cherokee to collect plants in the park. The American Indian Liaison Office did not accept the finality of the Field Solicitor's determination.

B. The MOUs

Beginning in 1996 several NPS managers took their disagreement with NPS regulations a step farther and entered into formal written agreements (MOUs) or issued written permits that authorize Indians and Native Hawaiians to

¹⁰ During 2005 and 2006, NPS advocates struggled to relax the Management Policies language on Indian take of natural resources found in the 2001 Policies. The advocates were unable to surmount the simple hierarchical maxim that Management Policies cannot be used to overturn regulations at 36 CFR 2.1(a) and (d). See Management Policies (2006) at 8.5. Perhaps to placate the advocates of Indian resource take, the NPS included some aspirational words about a possible future evolution of the regulations. See section 5.3.5.3.1. A similar aspirational provision is found at section 8.9. Although all three passages cite the regulations at 36 CFR 2.1 as definitive, admittedly, the aspirational words injected an equivocation absent from the regulations.

¹¹ See e-mail of February 13, 2008 from Ms. Pat Parker to Superintendent Dale Ditmanson of Great Smoky Mountains National Park documenting an NPS meeting in Washington, D.C, with 13 ECBI officials re: Cherokee collection of plants in that Great Smoky Mountains.

gather and remove plants or other natural resources from at least eight areas of the national park system.

Congress specifically provided for Indian Tribes or Native Hawaiians to take plants or other resources from several parks. However, every park with an Indian resource gathering MOU lacked specific statutory authority to allow gathering. The authorization of natural resource collecting by MOU or permit thus violated NPS regulations at 36 CFR 2.1 that protect plants and other natural and cultural resources.

It is unclear, even to the NPS at the Washington Office, how many agreements were signed or how many remain in effect as of July 2010. Some MOUs have expired but have not been renewed. Others remain in effect. To the best of our knowledge, the list of park agreements or permits follows:

- Redwood National Park - The Yurok tribe may collect unspecified “natural resources for traditional Yurok activities.” (1996)
- Yosemite National Park - The American Indian Council of Mariposa County, Inc. may gather “traditionally-used plant resources.” (1997)
- Mount Rainier National Park – The Nisqually Tribe may gather “limited quantities of plants and plant material.” (1998)
- Zion National Park – The Kaibab Band of Paiute Indians, Moapa band of Paiute Indians and the Pauite Tribe of Utah may collect “traditionally appropriate amounts of plants for personal, family, or community use.” (1998-99)
- Cedar Breaks National Monument – part of the above agreement.
- Pipe Springs National Monument – part of the above agreement.
- Lassen Volcanic National Park - The Mooretown Rancheria may collect “limited quantities of plants and plant material...in appropriate amounts...for personal, family or community use.” (1999)
- Hawaii Volcanoes National Park - Persons of Native Hawaiian ancestry may collect “natural products...in keeping with the traditions that are rooted in the aboriginal religious practices of the Native Hawaiian people.” The list of natural products consists entirely of plants or their parts. Native Hawaiian residents of Kalapana, Puna, Island of Hawaii may “fish and gather sealife” in the Kalapana extension. (Undated policy statement – permit issued in 2000).

To address the conflict with the NPS rules, virtually all of the MOUs or other authorizations cite the American Indian Religious Freedom Act (AIRFA) of 1978 (42 U.S.C. 1996) as their legal authority.¹² The assumption of the MOU

¹² Pipe Springs National Monument superintendent John Hiscock wrote in a July 21, 2000 letter to the National Parks Conservation Association’s David Simon that “AIRFA was the principle (sic) Federal statute

authors is that AIRFA trumps the NPS regulations and waives the prohibitions in existing regulation (36 CFR 2.1) that protect park plants and other resources. Apparently the authors of the MOUs or permits never read the Preamble to the Final Rule of June 30, 1983.¹³

The MOUs or other written authorizations vary regarding both the natural resources that may be collected and the purposes of collecting. The variety among the MOUs and other written authorizations reveals an inconsistent understanding and application of the degree to which AIRFA presumably exempts Native Americans from the regulations that protect park natural resources.

The MOUs, and other authorizations, such as special use permits, are issued park-by-park. Thus, the MOUs resulted from an ad hoc process that was largely unguided and lacking in consistent, adequate internal legal review. Lastly, the NPS failed to subject any of the MOUs or permits to analysis or public scrutiny under the National Environmental Policy Act (NEPA).

The NPS managers who led the way with the MOUs may have acted illegally, but they did so with sincerity. Many of the requests by Native Americans to take park natural resources are religious or ceremonial. The perceived moral imperative of the situation led some managers to dispense with rigid adherence to the technicalities of NPS regulations, in answer to a higher call.

Because, generally, the MOUs involved only plants, other NPS employees and conservation groups have looked the other way, or their concerns were dismissed by NPS managers. Many in the NPS believe that the prohibition on taking of park resources for Indian religious or traditional purposes is "morally" wrong. Now, the Director's intrepid announcement seeks to extend this moral imperative to the entire national park system.

3. THE EXCEPTIONS TO 36 CFR 2.1(d)

contemplated (by NPS regulations at 36 CFR 2.1 as the basis for the exemption acknowledged in subsection (d) (of 36 CFR 2.1))." Mr. Hiscock was instrumental in drafting, negotiating and propagating the MOUs for Zion, Bryce and Pipe Springs. He was completely wrong about AIRFA and apparently did not know that his position was contrary to the official NPS position enunciated clearly in the Preamble to the Final Rule.

¹³ It does not require much thought to realize that if AIRFA is powerful enough to exempt Indians from the prohibition on taking park plants and minerals, then AIRFA may equally exempt Indians from the same regulation that also protects park wildlife, paleontological and archeological resources.

A. Treaty Rights

Subsection (d) provides two exceptions to the prohibition on the ceremonial or religious take of park resources. The first exception is where there is a treaty right. This analysis does not discuss parks where Indians may take park resources as provided for in a treaty, such as at Apostle Islands National Lakeshore, Wisconsin.¹⁴ Such conduct is legal. However, not a single known NPS MOU is based on treaty rights.¹⁵

B. Park Enabling Acts

Several park enabling acts or proclamations provide an exception to the religious or ceremonial take of park natural resources at 36 CFR 2.1(a) and (d). In these parks, such conduct conforms to 36 CFR 2.1(d) and is also legal.¹⁶

Authorities establishing several areas of the national park system provide for Native Americans to take a variety of natural resources from Federal lands and for a variety of reasons. Following is a list of such parks:

- National Park of American Samoa - “gathering uses shall be permitted in the park for subsistence purposes if such uses are generally prior existing uses...and if such uses are conducted in the traditional manner and by traditional means.” “Subsistence uses of the marine areas of the park shall also be permitted.” (16 U.S.C. 410qq-2).
- Bandelier National Monument - “The Secretary of the Interior shall allow enrolled members of the Pueblo of San Ildefonso and the Pueblo of Santa Clara to collect plants, including the parts or products thereof, and mineral resources within the Bandelier National Monument for traditional and cultural purposes.” (P.L. 106-246 - Section 2101, Military Construction Appropriations Act for FY 2001 - 114 STAT 592; July 13, 2000).
- Big Cypress National Preserve - Members of the Miccosukee and Seminole Tribes “shall be permitted...to continue their usual and

¹⁴ Treaty with the Chippewa of 1842 - the “Treaty of La Pointe.”

¹⁵ The Mount Rainier MOU with the Nisqually refers to the 1854 Treaty of Medicine Creek but the applicability of that treaty is questionable. The continued applicability of the “Stevens” treaties (of which Medicine Creek is one) to Federal park lands in Washington State was struck down by a Federal court in a case at Olympic National Park. U.S. v. Hicks, 587 F. Supp. 1162, W.D. Wa. (1984).

¹⁶ The list of parks does not include parks in Alaska open to subsistence by the Alaska National Interest Lands Conservation Act of 1980 (ANILCA) (16 U.S.C. 3111 *et seq.*). ANILCA subsistence is open to “rural residents of Alaska, including both Natives and non-Natives.” Alaska subsistence is not based upon affiliation with an Indian, Aleut or Eskimo group.

customary use of Federal...lands and waters within the preserve, including hunting, fishing, and trapping on a subsistence basis..." (16 U.S.C. 698j).

- Canyon De Chelly National Monument - The monument is comprised entirely of Navajo Tribal lands, established with the consent of the Tribal Council. The authorizing law provides "[T]hat nothing herein shall be construed as in any way impairing the right, title, and interest of the Navajo Tribe of Indians which they now have and hold to all lands and minerals, including oil and gas; and the surface use of such lands for agriculture, grazing, and other uses, except as hereinafter defined." 16 U.S.C. 445a.¹⁷
- Death Valley National Park - "The areas described in this subsection shall be the nonexclusive special use areas...(in which) the Secretary shall permit the (Timbisha Shoshone) Tribe's continued use of Park resources for traditional tribal purposes, practices, and activities." "(A)ny use of Park resources by the Tribe for traditional purposes, practices and activities shall not include the taking of wildlife." (P.L. 106-423 - 114 STAT 1880; November 1, 2000).
- El Malpais National Monument - "the Secretary shall assure nonexclusive access to the...monument by Indian people for traditional cultural and religious purposes, including the harvesting of pine nuts." (16 U.S.C. 460uu-47).
- Grand Canyon National Park - "The Secretary...shall permit the (Havasupai) tribe to use lands within the Grand Canyon National Park which are designated as "Havasupai Use Lands" on the Grand Canyon National Park boundary map described in section 3 of this Act...for grazing and other traditional purposes." (16 U.S.C. 228i(e)).¹⁸
- Kaloko-Honokohau National Historical Park - "...subsistence fishing and shoreline food gathering activities...shall be permitted..." under certain circumstances, presumably by Native Hawaiians. (16 U.S.C. 396d(d)(3)).
- Organ Pipe Cactus National Monument - "the administration of the monument shall be subject to: "(1) Right of the Indians of the Papago Reservation to pick the fruits of the organ pipe cactus and other cacti, under such regulations as may be prescribed..." (Proclamation 2232, April 13, 1937)

¹⁷ Only a few parks, besides Canyon De Chelly, contain within their external boundaries reservation lands held in trust by the Secretary of the Interior, e.g. the South Unit of Badlands National Park (Ogalala Sioux), Lake Mead National Recreation Area (Hualapai). In addition, a park like Chaco Culture National Historic Park contains some Indian Trust lands held as Indian Allotments. Because these are Indian Trust Lands, the 36 CFR Part 2 prohibition on take and use of natural resources does not generally apply to the Indian beneficial owners.

¹⁸ The NPS developed an MOU with the Havasupai for implementing this provision of law and the MOU is not listed among the MOUs above because the Grand Canyon-Havasupai MOU is legally authorized.

- Pipestone National Monument - “The quarrying of the red pipestone in the lands described in section (a) of this section is expressly reserved to Indians of all tribes, under regulations to be prescribed by the Secretary of the Interior.” (16 U.S.C. 45(c)).

Congress has explicitly provided for gathering of certain park natural resources by named Native American groups in a handful of parks. If the Organic Act of 1916, or other law, gave to the NPS a broad authority to allow the taking of park natural resources by Native Americans, then the above enactments would be superfluous language.

This conclusion would violate two key principles of statutory interpretation. First is that acts of Congress are never deemed to be superfluous. The second cardinal rule is that when Congress explicitly authorizes a specific activity, in this case within a named park, then it is assumed that such an activity is not authorized in parks where Congress has not explicitly provided for it.¹⁹ Every instance where Congress allows Native American (or, for that matter, any Americans) to take plants, minerals or animals from parks, creates and reinforces the compelling case that such taking requires authorization in law.

The most recent congressional authorizations for Indians to take park resources occurred ten years ago, in 2000, at Bandelier National Monument and specified portions of Death Valley National Park. In Bandelier Congress limited the taking of plants and minerals to members of the San Ildefonso and Santa Clara Pueblos. In Death Valley Congress limited the traditional use of park resources to the Timbisha Tribe. Did Congress believe that the NPS already possessed the power to allow members of any Tribe to take natural resources in Bandelier or Death Valley? If so, neither law would be necessary.

The two laws, like others, speak so specifically to NPS authority that the NPS would dare not permit members of other Pueblos or Tribes to take park resources from Bandelier and Death Valley, or even to permit members of the specified groups to take resources that are not listed. Were the NPS to act otherwise it would be not only contrary to law but would incorrectly infer that the statutes for Bandelier and Death Valley lack real meaning and are merely advisory. That would be wrong.²⁰

¹⁹ This principle is known as “expressio unius est exclusio alterius, i.e. that omissions from enumerated specifics are generally presumed to be deliberate exclusions from the general unless otherwise indicated.” NRA v. Potter, 628 F. Supp. 903 (D.D.C. 1986).

²⁰ PEER speculates that at Bandelier the NPS may be allowing members of other Indian Tribes besides San Ildefonso and Santa Clara Pueblos to gather park resources. This would be a particularly egregious

C. Gathering Under 36 CFR 2.1(c)

This analysis does not list collection of natural resources that occurs legally by Native Americans, or equally, by non-Natives, under another provision of 36 CFR Part 2, found at subsection 2.1(c). Under 36 CFR 2.1(c), a park superintendent may designate certain “fruits, berries and nuts” that persons may gather “by hand for personal use or consumption....”

Some within and outside the Service argue that this provision creates an inequity because it allows gathering for some persons but proscribes gathering by Indians. That assertion is incorrect. Indians, equal to all others, may gather fruits, nuts and berries in a park where the park superintendent has designated it. Such designation is not done lightly but only under the tests spelled out in regulation. Such gathering is to be done to afford a park visitor the privilege of eating a blueberry at Denali, or a pinyon nut at the Grand Canyon without being subject to criminal penalty. It is intended to be a “de minimis” gathering, for use inside a park. It is legal for a Native American to gather designated fruit, nuts or berries in a park and use it for a ceremonial purpose in the park. Ceremonial or religious use is arguably a “personal use.”²¹

4. AMERICAN INDIAN RELIGIOUS FREEDOM ACT (42 U.S.C. 1996)

President Jimmy Carter signed the American Indian Religious Freedom Act into law on August 11, 1978. The intent of AIRFA is “to insure that the policies and procedures of various Federal agencies, as they may impact upon the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the free exercise of religion.”²²

As mandated by section 2 of AIRFA, President Carter appointed a task force of nine Federal agencies, of which the NPS was one.²³ The task force submitted

violation of law. The managers at Bandelier alone can provide a response or clarification here.

²¹ A similar antecedent to this rule existed in the first NPS general regulations, published in the Federal Register on June 27, 1936. The rule provided “[T]hat flowers may be gathered in small quantities, when, in the judgment of the superintendent or custodian, their removal will not impair the beauty of the park or monument.” 1 FR 673. The NPS did not include this provision in any of its subsequent major rulemakings (1941, 1967 or 1983).

²² House Report No. 95-1308 for P.L. 95-341 (AIRFA), page 1.

²³ “Sec. 2 The President shall direct the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation

a report to Congress in August 1979. The report concluded, among other things, that "...no specific recommendation is made at this time regarding any conservation law the Congress may consider in the future."²⁴

Even before AIRFA (and the 1983 NPS rule) there is written evidence that the NPS allowed Indians to collect plant resources in parks. In a July 10, 1979 supplement to the Report to Congress mandated by AIRFA, the NPS Office of Management Policy stated that "Many park areas have permitted Native Americans to gather certain plants for ceremonial purposes." The 1983 rule at 36 CFR 2.1(a) and (d) highlighted the issue by precluding this practice.

Still, the Department of the Interior, at its highest levels, has never interpreted AIRFA as waiving the NPS prohibitions on the take of natural resources, including plants. In addition to the official rulemaking of 1983, other sources support this conclusion. Three, in particular, interpret the applicability and reach of AIRFA, discussed in the following passages in terms of their relative weight.

A. Lyng v. Northwest Indian Cemetery Protective Association (1988)

The Supreme Court adopted the most restrictive interpretation of AIRFA in a case that pitted an Indian sacred site against the Forest Service plans to build a road in Northern California. The Court held that AIRFA represents a policy statement by Congress directing the executive branch to review its procedures and regulations. The Court quoted AIRFA's author, Representative Morris Udall, who "emphasized that the bill (AIRFA) would not "confer special religious rights on Indians," would "not change any existing State or Federal law," and in fact "has no teeth in it."

B. The Webb Memo

Ten years before Lyng, on September 21, 1978, only five weeks after AIRFA's enactment, Associate Interior Department Solicitor for Conservation and Wildlife James Webb advised the NPS Director about evaluating any conflict between Indian religious practices and the Service's policies/regulations. Solicitor Webb advised that "In making its evaluation the National Park Service must in particular be guided by the injunction that "(t)he 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

with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices. Twelve months after approval of this resolution, the President shall report back to the Congress the results of his evaluation, including any changes which were made in administrative policies and procedures, and any recommendations he may have for legislative action." 92 STAT. 470.

²⁴ Task Force Report, p. 72.

and integrity of the National Park System...".²⁵ This provision "...elevates the decisionmaking and management standards of the National Park Service in favor of greater protection for park resources and values."

Associate Solicitor Webb advised that "In this context, this special provision reiterates an overriding governmental interest in the protection of park resources and values and reinforces the limitations on the Secretary's discretion and flexibility in making those administrative changes to accommodate religious activities that would have adverse effect on park resources and values. 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.²⁶

The highest legal advisor to the NPS in the Department of the Interior did not believe that AIRFA suspended laws or regulations protecting park resources. His views are the contemporaneous agency interpretation of AIRFA and its relationship with the laws governing the national park system.

C. The NPS Assessment of Compliance with AIRFA

On April 2, 1979, NPS Director William Whelan submitted to the Secretary of the Interior an internal review of NPS compliance with the requirements of AIRFA, dated March 23, 1979. The review recommended that the Department "seek legislation to provide a blanket amendment to all National Park System statutes to give the Secretary of the Interior discretionary authority, providing it will not compromise the basic values for which an area was established nor significantly alter established strategies for resource management - to allow, under special circumstances...the taking of surplus animals and plants except endangered or threatened species. Such taking would be judged on a case by case basis and would be, so far as management could determine for bona fide endeavors." (Emphasis in original).

From this report, it is clear that NPS Director Whelan did not believe that AIRFA, at the time of its enactment, modified existing NPS regulations that

²⁵ The Redwood Amendment, Act of March 27, 1978, 92 Stat. 163.

²⁶ A recent example of a legislative solution was applied to the national forest system, administered by the Secretary of Agriculture. The national forest system is subject to a variety of laws that mandate specified commercial, consumptive use of its resources, as well as recreation and wildlife propagation. Despite their largely commercial nature, in sharp contrast with national park lands, Congress enacted 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. If the 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 a law?

protect plants (or animals). Nor did the NPS believe that it possessed sufficient authority, absent direction from Congress, to permit the take of park resources for Indian ceremonial or religious needs. The NPS did not, however, initiate a legislative environmental impact statement to implement a request for legislation to give the Secretary discretionary authority to authorize plant gathering by Indians.

CONCLUSION

The sentiments expressed by Director Jarvis are heartfelt. But the parks cannot be governed by sentiment. The notion that the “first peoples” have an unbroken connection or claim to the land reduces the last five centuries of history to a footnote. During that half a millennium, our land has witnessed migration, displacement, dispossession and imposition of statutory constructs of many kinds. The system of national parks is but one. It was 114 years ago, in 1896, when the Supreme Court effectively ended the Bannock Shoshone hunting rights in Yellowstone National Park. Reversing so many years of history is not easily done.

The world has become complex. The parks belong to all – aboriginal and new residents equally. Not all Indians practice traditional faiths. Some are Christians. Not all of the descendants of Old World arrivals are Christians or Jews. Some have adopted Native American religious beliefs, as they are free to do. Not only Indians have traditional ties to the lands that are now within our parks. Appalachian mountain folk, high country ranchers, loggers of Redwoods also have such historical ties. How can we accommodate traditional ties and preserve the integrity of our national parks?

PEER hopes that Director Jarvis will temper his zeal with reason as he proceeds. We look forward to commenting on any Environmental Impact Statement that would accompany so complete a reversal of regulations, and an action contrary to longstanding legal advice.

Preserving our parks as special places requires tough decisions, and the wisdom to know when such a decision must be referred to a higher authority. The advice of Solicitor Webb to the NPS Director in 1979 remains as valid today as then.