

University of Colorado Law School

Colorado Law Scholarly Commons

External Development Affecting the National
Parks: Preserving "The Best Idea We Ever Had"
(September 14-16)

1986

9-16-1986

Panel: "Protecting Our National Parks: What Should Be Done," and William J. Lockhart, Outline: Problems and Issues that Must Be Addressed; and Some Preliminary Proposals for Solutions

William J. Lockhart

Follow this and additional works at: <https://scholar.law.colorado.edu/external-development-affecting-national-parks>



Part of the [Administrative Law Commons](#), [American Art and Architecture Commons](#), [Animal Law Commons](#), [Biodiversity Commons](#), [Dispute Resolution and Arbitration Commons](#), [Environmental Health and Protection Commons](#), [Environmental Law Commons](#), [Environmental Policy Commons](#), [Hydrology Commons](#), [International Law Commons](#), [Jurisdiction Commons](#), [Land Use Law Commons](#), [Legal History Commons](#), [Legislation Commons](#), [Literature in English](#), [North America Commons](#), [Natural Resources and Conservation Commons](#), [Natural Resources Law Commons](#), [Natural Resources Management and Policy Commons](#), [Property Law and Real Estate Commons](#), [Public Policy Commons](#), [Recreation, Parks and Tourism Administration Commons](#), [Science and Technology Policy Commons](#), [State and Local Government Law Commons](#), [Transnational Law Commons](#), [Water Law Commons](#), and the [Water Resource Management Commons](#)

Citation Information

Lockhart, William J., "Panel: "Protecting Our National Parks: What Should Be Done," and William J. Lockhart, Outline: Problems and Issues that Must Be Addressed; and Some Preliminary Proposals for Solutions" (1986). *External Development Affecting the National Parks: Preserving "The Best Idea We Ever Had" (September 14-16)*.

<https://scholar.law.colorado.edu/external-development-affecting-national-parks/7>

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.



Panel: "Protecting Our National Parks: What Should Be Done," and William J. Lockhart, Outline: Problems and Issues that Must Be Addressed; and Some Preliminary Proposals for Solutions, in EXTERNAL DEVELOPMENT AFFECTING THE NATIONAL PARKS: PRESERVING "THE BEST IDEA WE EVER HAD" (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1986).

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

September 14 - 16, 1986

UNIVERSITY OF COLORADO SCHOOL OF LAW CONFERENCE ON
"EXTERNAL DEVELOPMENT AFFECTING THE NATIONAL PARKS:
PRESERVING 'THE BEST IDEA WE EVER HAD'"

PANEL: "PROTECTING OUR NATIONAL PARKS -- WHAT SHOULD BE DONE"

Outline: Problems and Issues That Must Be Addressed;
and Some Preliminary Proposals for Solutions

Submitted by:
William J. Lockhart
Professor of Law
University of Utah
Salt Lake City, Utah 84112
(801) 581-8958

OUTLINE CONTENTS

[Page numbers follow headings in brackets.]

I. INTRODUCTION [1]

- A. ASSIGNMENT: [1]
- B. SUMMARY: [1]

II. A CHECKLIST OF PROBLEMS AND ISSUES TO BE ADDRESSED
IN GENERATING A VIABLE AND EFFECTIVE PROGRAM
FOR PARK PROTECTION [2]

A. PROBLEMS AND ISSUES THAT SOLUTIONS SHOULD ADDRESS:

1. Lack of reasonable consensus at every decision level on the appropriate degree of protection to be afforded park values and resources, or on the extent of potential interference with those values and resources that should be viewed as a "threat" to be prevented, avoided or minimized. [2]
2. Lack of (or uncertainty about) adequately specific and enforceable legal standards for park protection that can provide an authoritative basis for determining the unlawfulness of, or providing adequate remedies for, specific external park threats. [4]
3. Failure to deal effectively with threats arising from conflicting management policies or practices by other government land management agencies, particularly federal agencies. [6]
4. Lack of an adequate institutional arm for NPS enforcement of park protection policies, standards and procedures. [7]
5. Failure to take or contest early steps in the evolution of park threats frequently limits the availability of later solutions. [8]
6. Important legal and administrative steps already taken in many areas are likely to foreclose or limit the opportunity to protect park values and resources. [9]
7. Permanent or reliable solution of many park threats is difficult because of the continuing or recurring nature of the interests, rights or programs that give rise to those threats. [10]
8. Political interference with professional NPS judgment about threats and NPS response to threats. [10]

[Contents]

9. The over-commitment and financial limitations of allied environmental and public interest advocacy groups limits their capacity to address most park threats or systematically to pursue new remedies or enlarged concepts of park protection. [11]

B. SOME GENERAL PERSPECTIVES ON THE ADEQUACY OF PROPOSED SOLUTIONS [11]

III. SOME ROOTS OF THE PROBLEMS: A COMPOSITE SUMMARY OF TYPICAL STEPS IN THE EVOLUTION OF AN EXTERNAL PARK THREAT AND PARK SERVICE RESPONSE [12]

A. A "COMPOSITE SUMMARY" [12]

B. PRELIMINARY CONCLUSIONS ABOUT THE SOURCES OF PARK PROTECTION PROBLEMS THAT MUST BE ANSWERED BY PROPOSED SOLUTIONS [14]

1. Problems in the typical administrative handling of threats issues [14]

2. Broader or more basic and comprehensive problems: [15]

a. The challenging scope of the problem [15]

b. Conflict with other agencies' development policies [15]

c. Political interference [16]

d. Complexity and diversity of the issues [16]

IV. PRELIMINARY PROPOSALS FOR MORE EFFECTIVE RESPONSE TO PARK THREATS [16]

A. PREMISE: FUNDAMENTAL CHANGE OF THE STATUTORY FRAMEWORK FOR PARK PROTECTION IS UNLIKELY WITHIN AN ACCEPTABLE TIME FRAME [16]

B. PROPOSAL: THAT NPS SHOULD DEVELOP A FULLY-STAFFED COMPLIANCE AND ENFORCEMENT BRANCH [17]

C. PROPOSAL: EXPAND AND DEFINE THE AVAILABLE PROTECTIONS THROUGH THE FOLLOWING RULEMAKING PROPOSALS: [18]

1. Procedural rules to implement Park Organic Act nonimpairment requirements: Secretarial review of potentially impairing actions. [18]

2. Substantive rules to implement Park Organic Act nonimpairment requirements: establishment of more explicit protective standards [19]

[Contents]

3. Substantive and procedural rules to implement the Priority for "areas of critical environmental concern" required by the Federal Land Policy and Management Act [19]
4. Substantive and procedural rules for recognition of "Park protection ACECs" in BLM administration of rights-of-way [19]
5. Amend NEPA implementation rules to require consideration of any Park impairment as a significant impact [20]

APPENDIX: "ZION COAL" PROBLEM [21]

August 21, 1986

UNIVERSITY OF COLORADO SCHOOL OF LAW CONFERENCE ON
"EXTERNAL DEVELOPMENT AFFECTING THE NATIONAL PARKS:
PRESERVING 'THE BEST IDEA WE EVER HAD'"

PANEL: "PROTECTING OUR NATIONAL PARKS -- WHAT SHOULD BE DONE"

Outline: Problems and Issues That Must Be Addressed;
and Some Preliminary Proposals for Solutions

Submitted by:
William J. Lockhart
Professor of Law
University of Utah
Salt Lake City, Utah 84112
(801) 581-8958

I. INTRODUCTION

A. ASSIGNMENT:

To offer some perspectives from which to consider and critique proposals for solution of the problem of external threats to our National Parks; and to offer suggestions for possible solutions.

B. SUMMARY:

1. This paper begins with a "checklist" of problems and issues that need to be addressed in developing solutions for the problem of external threats to our national parks.

2. The basis for many of the concerns identified in the checklist is explored in a "composite" summary of typical steps in the evolution of an external threat and the National Park Service ["NPS"] response, highlighting the problems it reveals in the available structure for addressing those threats. The composite summary is followed by a brief analysis of some of the key problems it reveals.

[The checklist, as well as the "composite" picture of the "typical" evolution of a threats problem is based on experience in attempting to develop administrative and legal strategies to address a wide range of threat problems, primarily affecting Utah national parks.]

3. Preliminary suggestions for solutions are offered in conclusion.

II. A CHECKLIST OF PROBLEMS AND ISSUES TO BE ADDRESSED IN GENERATING A VIABLE AND EFFECTIVE PROGRAM FOR PARK PROTECTION

This section provides a checklist of problems and issues that must be confronted in attempting to generate practical and effective solutions for the wide range of external threats faced by our National Parks. The checklist is intended to provide a variety of perspectives as the basis for assessing and building upon suggestions for possible solutions.

The problems and issues outlined here reflect the fundamental conclusion that our current framework for addressing these threats and protecting our parks -- at least as presently administered -- is seriously inadequate. Some of reasons for that conclusion, developed through a composite summary of the evolution of a typical threats problem, are offered in the subsequent section of this outline captioned "A Composite Summary of Typical Steps In The Evolution of an External Park Threat and Park Service Response." [Page12, infra.]

This paper does not include reflections on the problems that result from inadequate data about park resources or the need for better scientific analyses of the threats and appropriate resource-management responses. It assumes, rather, that the substantial NPS effort to improve that data and analysis will continue, despite severe budgetary constraints. Thus, the focus here is upon improving the legal and administrative framework, in the hope that the data and those analyses can be more effectively applied to park protection.

A. PROBLEMS AND ISSUES THAT SOLUTIONS SHOULD ADDRESS:

1. Lack of reasonable concensus at every decision level on the appropriate degree of protection to be afforded park values and resources, or on the extent of potential interference with those values and resources that should be viewed as a "threat" to be prevented, avoided or minimized.

Development of adequately protective and enforceable standards and procedures to provide vigorous protection of our national parks is inhibited by lack of any reasonable concensus on basic policies at crucial levels of decision. Congress can't agree on minimal procedural improvements. The executive branch claims adequate legal authority but discourages efforts to translate that authority into meaningful park protection requirements. Administrative response to specific park protection issues is restrained by uncertainty about the Secretary's position and internal debates seeking the optimal level of rigor that can avoid political retribution. And all of that uncertainty, of course, inevitably transmits confusing and

conflicting signals to NPS professionals trying to set their course in responding to an increasing volume and complexity of park threats.

Assuming that the above is a substantially accurate summary, it would seem that solutions offered to improve our capacity to avert external threats to our parks must either (1) seek to improve upon the extent of consensus, or (2) propose remedies that can evade or are relatively immune to the consensus problem.

Related issues include:

a. Does the NPS have an adequately clear and unambiguous mandate to identify external threats to park values and resources and to take the necessary steps to avert those threats? From Congress? From the Executive? In its internal management programs, instructions and procedures?

b. To what extent does lack of consensus on the proper degree of protection involve differences over the general standards that should be applied in park protection? To what extent does it reflect failure to resolve conflicts between park values and competing land management values?

c. Where lack of consensus arises primarily from conflict among competing land management values, how is the conflict reflected in on-the-ground consequences resulting from decisions in particular cases? Is it feasible to develop procedures to limit or minimize the realm of concrete management conflicts?

d. Do present management programs or instructions adequately distinguish among the purposes or protected values of different types of parks in identifying appropriate degrees of protection and appropriate responses to threats? To what extent do practices appropriate for lesser degrees of protection affect NPS administrative action in identifying and responding to threats where higher levels of protection should prevail?

e. Is it feasible, from either a technical or practical standpoint, to develop a general standard defining the level of protection that should guide park protection efforts? Or should primary effort be directed to developing procedures that can assure full elaboration and consideration of particular park values and resources in the context of decision-making about specific threats to specific parks?

2. Lack of (or uncertainty about) adequately specific and enforceable legal standards for park protection that can provide an authoritative basis for determining the unlawfulness of, or providing adequate remedies for, specific external park threats.

This statement of the problem speaks in terms of the inadequacy of the legal "requirements" in order to suggest that the problem may not necessarily or primarily involve a defect of the statutory structure; and that it may involve failure of the administrative and judicial process to build a park protective framework upon that statutory structure.

Analysis of this problem is handicapped by the limited volume of authoritative judicial and administrative interpretation of the pertinent statutes. It is doubtful that available interpretations are sufficient to suggest authoritative answers to many of the key questions about the reach of park protection requirements that may be drawn from:

* The National Park Service Organic Act, 16 USC §1 and the 1978 "Redwoods Amendments" to that Act, 16 USC §1a-1.

* Those Acts as amplified by the substantive and procedural content of the other general land planning and management statutes, primarily the National Environmental Policy Act, the Federal Land Policy and Management Act, the Wilderness Act, the Forest Service Organic Act, Multiple-Use Sustained-Yield Act, and National Forest Management Act.

* Those Acts as amplified by the substantive and procedural content of specific resources protection statutes such as, e.g., the Endangered Species Act, 16 USC § 1531 et seq.

* Those Acts where their protective implications are contradicted by specific resource-development legislation such as, e.g., the Combined Hydrocarbon Leasing Act of 1981, 95 Stat 1070, amending various provisions of 30 USC in order to "facilitate and encourage the production of oil from tar sands." H. Rep. No. 174, 97th Cong., 1st Sess., at 1 (1981).

Specific inadequacies of existing legal requirements include at least the following:

a. Uncertainty about the authority or jurisdiction of the NPS, or of other agencies and courts applying park protection laws, to make determinations affecting lands and activities outside of park boundaries.

b. Uncertainty about the legal basis for claiming precedence for park protection laws and standards in relation to other state and federal statutory programs whose impacts may threaten park values and resources.

c. Lack of specific requirements (other than NEPA) compelling focussed consideration of park impacts and specific decision about the acceptability of those impacts prior to initiating external activities that threaten park values and resources.

d. Uncertainty about the authority of the NPS, or of the Secretary of the Interior at the instance of NPS, to adopt and enforce authoritative substantive or procedural rules for protection of our national parks. (See 16 USC §3.)

Related issues include:

a. To what extent does the lack of (or uncertainty about) effective park protection standards result from weaknesses or inadequacies in the existing statutory framework?

b. To what extent, and on what legal basis, will park protection standards based on the amplified Organic Act be given legal precedence over:

* Conflicting policies of Interior Department and other federal statutory programs which may support park-threatening development?

* Conflicting policies of state land management or development programs?

* Conflicting private property or development rights?

c. Is it feasible to draft legislation of general application which will provide standards for park protection that are significantly more specific and rigorous than existing laws?

d. What minimum elements that should be included in proposals to improve applicable legal requirements? What substantive standards? What procedural requirements?

e. To what extent is the lack of (or uncertainty about) adequate park protection standards the result of failure to develop needed standards through administrative and judicial elaboration of the existing statutory framework?

f. Is it feasible, under existing legal authorities, to establish adequate and enforceable standards for park protection through administrative decisions, rulemaking and precedent-seeking litigation? To establish procedures which focus park protection issues and responsibility for decision?

g. If the latter approach is feasible, what are the political, administrative or legal obstacles that have inhibited those developments?

3. Failure to deal effectively with threats arising from conflicting management policies or practices by other government land management agencies, particularly federal agencies.

A major portion of the external threats confronted by our national parks arise from activities sponsored, supported or significantly encouraged by other government agencies -- including the administration of other Interior Department programs. That problem is exacerbated by the general tendency of policy-implementing officials to avoid resolution of basic policy conflicts until major steps have been taken. It is also complicated by the usual lack of any effective forum in which to seek resolution of inter-agency conflicts.

Adequate solutions for external threats, therefore, may require mechanisms to assure early and effective opportunity to implement park protection standards where they come in conflict with the policies or practices of other agencies.

Related issues:

(a) To what extent does resolution of these conflicts require new legislation to establish the precedence of park protection standards? Or are current standards adequate if given legal effect at appropriate stages in the development of conflicting programs?

(b) Could threats arising from conflicting Interior Department programs be ameliorated by development of procedures and standards to implement the Secretary's existing obligation to refuse authorization for activities which would result in "derogation of the value and purposes" of national parks? (16 USC §1a-1.)

(c) To what extent would current problems be relieved by administrative procedures which would compel the application of park protection standards at early stages in government agencies' consideration or implementation of conflicting programs?

4. Lack of an adequate institutional arm for NPS enforcement of park protection policies, standards and procedures.

Key aspects of this problem are:

* NPS lacks an enforcement branch with the training, mission, personnel and authority to build and implement a program to develop, assert and enforce park protection standards in the varied legal contexts in which threats to park resources arise.

* NPS personnel are frequently unable to pursue aggressively, or with adequate understanding, the range of legal or administrative initiatives needed to provide effective park protection. Responses to specific park threat issues, particularly at crucial early stages, are often inhibited, cautious and compromising; and they frequently fail to anticipate the full range or extent of threats likely to grow out of apparently innocuous proposals.

* Legal assistance is not available to NPS, as a practical matter, for day-to-day preparation of legal initiatives, or for development of park protection strategies in anticipation of or in response to potential threats. Representation by regional solicitors of the Department of Interior does not perform these functions meaningfully. Although usually expert and committed, the few attorneys in NPS staff positions are too overworked to develop a systematic and comprehensive legal program.

* Basic decisions on park protection litigation and development of litigation positions are under the control of the Department of Justice, subject to significant limitation or interference under the Department's claim of "prosecutorial discretion" -- which often masks unsympathetic response to specific issues or policies.

Related issues include:

a. Is it feasible for NPS to develop an adequately independent and vigorous enforcement branch without first obtaining independent agency status?

b. To what extent does the inadequacy of park protection standards (problem # 2, above) result from NPS inability to develop an aggressive and comprehensive park protection enforcement program?

c. What fundamental compliance and enforcement programs could be initiated by an adequately staffed enforcement branch? How effectively could those programs be

expected to contribute to park protection?

d. What types of authority to represent NPS would have to be negotiated with the Department of Justice in order to carry out needed park protection programs? What are the obstacles to successful negotiation of that authority?

5. Failure to take or contest early steps in the evolution of park threats frequently limits the availability of later solutions.

Examples:

* NPS is currently struggling to demonstrate to the Department of Energy that a site less than a mile from Canyonlands National Park should be "disqualified" from consideration under DOE's statutorily-required "Guidelines" for site selection. The Guideline in question calls for disqualification of a site in proximity to a park only --

if the presence of the restricted area or the repository support facilities would conflict irreconcilably with the previously designated resource preservation use of [the Park].

Although the unacceptability of DOE's "irreconcilability" standard for disqualification of a site was apparent early in DOE's formal process for its adoption, NPS did not undertake any vigorous challenge to the obvious incompatibility between that standard and the Organic Act requirement that national parks be preserved "unimpaired." As a result, it is now compelled to offer arguments addressed to a highly-questionable standard.

* Before DOE centered its repository search on the site adjacent to Canyonlands, it conducted a series of "screening" steps which purported to review a wide range of rock types and geophysical provinces before focussing on the area and site adjacent to the Park. In the course of those screening steps, conducted over several years, NPS wrote vigorous letters protesting continued consideration of the site. Although each successive screening stage completely ignored the severe potential impacts on the Park, no more aggressive steps were taken to resist the ultimate selection. As a result, the site became DOE's "preferred" site in the entire Paradox Basin (and one of nine "preferred" sites nationwide), assuring its inclusion in the final selections which led to its currently-continuing jeopardy as a "nominated" site. Yet at no point in that entire preliminary selection process did any responsible decision consider the serious consequences to the Park; and no further initiatives appear to have been open to or undertaken by NPS to challenge that failure.

* On the basis of a perfunctory EA which gave no consideration to mining impacts on Zion National Park, BLM recently proposed to approve old (1972-73) applications for coal exploration permits for an area of known coal deposits adjacent to the east boundary of the park. Although the Zion Superintendent had originally requested an EIS, that request was not reiterated or urged during processing of the new EA. Apparently, NPS did not then anticipate the possibility that the exploration permits could ripen automatically into "preference right" mining leases if "commercial quantities" were discovered; nor did it attempt to question the legal basis for BLM's initial conclusion that it was obligated to grant the permits. Thus, despite a serious prospect that approval of the exploration permits could result in both strip and underground coal mining adjacent to the Park and threaten key drainages, NPS made no move to demand full EIS review or to challenge the applicant's right to the exploration permits.

[If the matter had remained in that posture, there is little doubt that the exploration permits (and potential preference right leases) would have been approved. Fortunately, other interveners vigorously challenged BLM's failure to prepare an EIS on the Park impacts of mining as well as the applicant's right to the permit; and NPS then followed up with an effective demand for full EIS study. See Appendix entitled "Zion Coal" problem.]

6. Important legal and administrative steps already taken in many areas are likely to foreclose or limit the opportunity to protect park values and resources.

Key issues include:

a. Should proposals for solution of park threat problems attempt to address issues that have already been "lost," or that offer only limited remaining prospects for success?

b. To what extent do current issues still in dispute involve lost ground that cannot be regained under existing law? E.g., the Jackson Hole Airport?

c. Apart from specific legislative remedies, is it feasible to design general proposals for solution of park threat problems that would assist in regaining lost ground or in minimizing the damage to park values and resources?

d. To what extent should NPS or advocates "cut their losses" by redirecting efforts to more winnable issues?

7. Permanent or reliable solution of many park threats is difficult because of the continuing or recurring nature of the interests, rights or programs that give rise to those threats.

Proposals for solution of park threat problems must recognize and provide for solutions in a context where many of the most serious threats involve protracted and continuing or recurrent efforts to initiate the threatening activities. Solutions must provide for a capacity for sustained and focussed park protection efforts over substantial time periods and through an evolving series of administrative steps.

Examples:

* Investigations and analyses leading to the focus on sites adjacent to Canyonlands National Park for a high-level nuclear waste repository began in 1978 or before. Despite major efforts by the park service and other advocates, the issue remains unresolved at this writing.

* Portions of the Alton Coal Field adjacent to Bryce Canyon National Park were found "unsuitable for surface coal mining operations" by Secretary of the Interior Andrus on Dec. 16, 1980, because of the threatened impacts of proposed strip mining by Utah International, Inc. to serve the Allen-Warner Valley Energy System." That decision withstood judicial review which was completed by decisions of the United States District Court for the District of Utah on Dec. 28, 1982 and Feb. 12, 1985. Yet today, virtually all of the same threats to the Park are again implicit in current efforts by Utah International, Inc., to obtain approval of a mining plan for portions of its coal leases near the Park just outside the area designated as "unsuitable." It proposes to mine those leases to supply a new "Harry Allen" coal-burning power plant being developed by Nevada Power Co. within approximately 15 miles of Lake Mead National Recreation Area, and adjacent to Nevada's Valley of Fire State Park.

8. Political interference with professional NPS judgment about threats and NPS response to threats.

Political intervention to affect the outcome of decisions involving critical park protection judgments is rampant, and repeatedly produces unacceptable results.

Do the park protection proposals include suggestions for minimizing the consequences of political intervention? To what extent do existing standards barring ex parte and political intervention in administrative proceedings offer a solution to this persistent problem?

9. The over-commitment and financial limitations of allied environmental and public interest advocacy groups limits their capacity to address most park threats or systematically to pursue new remedies or enlarged concepts of park protection.

Self-evident.

B. SOME GENERAL PERSPECTIVES ON THE ADEQUACY OF PROPOSED SOLUTIONS

1. Does the proposal offer specific suggestions for solving one or more of the significant problems that handicap effective protection of our parks from external threats ?

2. To what extent does the effectiveness of a given proposal assume or depend upon concurrent solution of other key problems that inhibit effective park protection from external threats ? Are there certain basic problems whose solution is a precondition to effective implementation of other solutions ?

3. Assuming the feasibility of the proposal, would it contribute significantly to resolving the problem that it addresses ? Would it effectively address the key sources of that problem ? Would it deal effectively with the bulk of the circumstances presenting that problem ?

4. Is the proposal practical or feasible to implement ? Does it involve the minimum complication or difficulty consistent with effective solution of the problems it addresses; or does it strike an appropriate balance between feasibility and needed solutions ?

5. Is the proposal likely to offer a permanent or continuing solution for the problems it addresses ? Does it lend itself to continuing institutional or systematic application, or other means of assuring continuing viability of the solution proposed ?

III. SOME ROOTS OF THE PROBLEMS: A COMPOSITE SUMMARY OF TYPICAL STEPS IN THE EVOLUTION OF AN EXTERNAL PARK THREAT AND PARK SERVICE RESPONSE

A. A "COMPOSITE SUMMARY"

The following summary seeks to illustrate and highlight many of the difficulties typically involved in NPS response to an external threats problem by presenting a composite picture of the evolving steps in development of the problem, generalizing about the typical difficulties confronted by NPS in mounting an effective protective response at each stage. An attempt to identify some of the separate elements of those problems follows the summary.

(1) Typically, a threat to park values or resources arises from an initiative taken by a private developer under a public natural resource development program administered by another government agency -- most frequently, BLM. Or, alternatively, the threat may arise from an initiative taken directly by a government agency -- e.g., DOE's nuclear waste program, or the State of Utah's proposed paving of the "Burr Trail" through Capitol Reef National Park.

(2) The first steps in initiating the project may be so innocuous or tentative, or of such limited scope, that they stimulate little initial concern or response from NPS or from park advocates. Or because the initial steps are abstract and legalistic, they may seem to offer little apparent threat -- even though they constitute the administrative and legal foundations for potentially serious intrusions.

(3) NPS staff may not receive adequate notice of a proposed project, or may not at first realize the significance of administrative steps already taken to promote a project. Thus, by the time NPS is able to respond, it may often be too late to initiate the kind of informal intervention with the sponsoring agency that might avoid the problem.

(4) When NPS personnel do become aware of the proposed project, their initial response may be inhibited by many factors. E.g.:

- > continuing uncertainty about the significance or reality of the threat, or about the authority under which it arises;
- > uncertainty about NPS authority in responding to the threat;
- > anticipation of political intervention on behalf of the sponsoring agency or the interested private promoter;

- > unavailability of mechanisms for dealing with the sponsoring agencies, or limited access to those mechanisms; and
- > the financial and time pressure of other priorities.

As a result, initial NPS consideration may be confined to an internal, informal and somewhat sketchy preliminary assessment of the potential impacts to the affected park, with accompanying hope that the problem will go away.

(5) Even if NPS gets timely notice of the threat, the policies, structure or procedures of the sponsoring agency may make it difficult for NPS staff to initiate serious consideration of the park issues, particularly at early stages of the process. The procedures of the sponsoring agency seldom provide a clear-cut opportunity or occasion for focussing, confronting and resolving the park protection issues. Authority over the decisions, at least at the crucial primary stages, is likely to have been committed, by statute, regulation or established practice, to an agency whose policy bias and procedures are designed to promote or facilitate the threatening project.

(6) Concerns about the outcome of interagency conflicts, as well as the ever-present prospect of political intervention, may cause NPS to defer any aggressive or definitive response, hoping that a politically-acceptable balance can be struck as the project ripens. It may be risky to seek higher-level support, or to heighten the intensity of the interagency debate, until the full scope of the threat becomes clear and evidence can be fully developed demonstrating the consequences to the park. As a result, even where interagency consultation procedures are available, the NPS comments may tend to be somewhat innocuous, often emphasizing narrow technical criticisms, while mentioning potential or long-term threats to park values in understated, essentially conciliatory or abstract comments.

(7) At the basic decision-making level, the response of the sponsoring agency is likely to be formalistic, often giving little or no substantive weight to the Park Service concerns. Typically the response will defer or minimize the park protection issues, placing the burden on NPS or its allies to find a more promising administrative, legal or political forum in which to address the park-protection concerns.

(8) Even where NPS decides to seek solution at a higher level, the only "neutral" forum available, as a practical matter, may be high-level negotiation within or between executive departments. Because the stakes are high and political considerations rampant at that level, NPS may reasonably hesitate to take that step.

B. PRELIMINARY CONCLUSIONS ABOUT THE SOURCES OF PARK PROTECTION PROBLEMS THAT MUST BE ANSWERED BY PROPOSED SOLUTIONS

1. Problems in the typical administrative handling of threats issues

Some of the sources of or reasons for the problems reflected in the above scenario, though fairly obvious, may severely affect the effectiveness of NPS or other park advocates in addressing potential threats:

(1) It seems often to be true that appropriate park personnel are only belatedly notified of potential development projects that may affect the parks, and often without adequate detail. Notice may frequently be too late to permit effective intervention with the sponsoring government agency before it becomes committed to a conflicting course.

(2) The administrative, procedural and legal context of other agencies' programs may not be well-understood by NPS personnel, with the result that they may not understand the implications or long-term threat implicit in some proposed actions.

(3) While some NPS managers are extremely sophisticated, the NPS institutional response to external threats has tended to pin too much hope on developing more extensive and scientifically reliable resource data rather than directly confronting NPS's weak institutional position.

(4) Within the federal establishment, there are few established procedures and remedies directly available to NPS for addressing and challenging potentially-destructive projects. Neither informal contacts nor participation in available, semi-formal proceedings (e.g., comments in rulemaking or NEPA proceedings) offer effective solutions in the absence of political legal clout. And traditional executive branch policies severely discourage an active role in administrative or judicial litigation with other government agencies.

(5) It is likely to be even more difficult for NPS or other park advocates to find effective procedures and remedies where they must address unsympathetic land management institutions and policies of state and local entities.

(6) Reliance upon cooperation with outside advocates -- i.e. "building the record" in support of future litigation by private advocacy organizations -- is often helpful. But the strategy involves an uncomfortable level of conniving, as well as early and well-focussed record-building that is probably not well understood by most NPS staff. In addition, the strategy is not

only unreliable, but success cannot be hoped for until long after the first rounds of an important battle have been lost.

(7) In the absence of established and effective remedies, NPS is compelled to rely on negotiation with the governmental and private advocates of park-threatening projects. Without credible access to effective remedies, however, negotiations are likely to be resolved with incremental compromises whose cumulative consequences to the parks are unacceptable.

(8) The policies protecting national parks have not, as yet, assumed a stature or legal authority in relation to other agencies that gives NPS a strong hand in negotiation. Although the NPS Organic Act and its "Redwoods Amendment" could fairly be interpreted to provide a stronger legal basis for park protection, that case law has barely begun its evolution.

(9) The frequency and severity of political intervention in park issues, and NPS's own emphasis on developing good political relations with local interests, often discourages NPS officials from taking an aggressive stance at early stages of these issues in the hope they can be negotiated and resolved without confrontation.

2. Broader or more basic and comprehensive problems:

In trying to generalize about these problems, it quickly becomes apparent that the issues are not different in kind from those applicable to any significant government agency that must pursue its program within the complex web that makes up our administrative state.

a. The challenging scope of the problem

The difficulty of park protection problems is compounded by their sheer scope: their extensiveness, variety and ubiquitousness of park threats. Any reasonably complete summary of park system-wide threats would make clear that the mechanisms necessary to address these problems effectively must have substantial resources and must be of comprehensive reach.

b. Conflict with other agencies' development policies

Any solution to the problem of park threats must deal in some fundamental way with the conflict between policies and programs for the protection of park values and the development orientation that dominates most other agencies' functions and programs.

c. Political interference

Closely related to the internal politics of conflicting agency functions and programs is the broader and especially difficult problem of external political intervention. Virtually every major issue of park protection and external threat is exacerbated, and not infrequently caused, by some politicians' responsiveness to the short-term interests of groups that see a particular park as either an asset for personal exploitation, or an obstacle to be overcome. The consequences of that sort of political short-sightedness can be especially devastating, both to specific park resources and to the morale and effectiveness of NPS professionals whose principled resistance may jeopardize their careers.

d. Complexity and diversity of the issues

Another major dimension of the park protection problem, that also defines a critical elements of its solution, is the extreme diversity and institutional complexity that characterize both the origins of the problems and the legal/administrative tools that may be available or should be considered in addressing them. Some of that diversity and complexity is reflected in the range of resource expertise increasingly being developed and relied on by the Park Service, handicapped as it is by funding limitations. But there are no comparable developments designed to facilitate NPS (or other park advocates') access to procedures or remedies that could assist in focussing and resolving the widely-varied threats to our parks.

IV. PRELIMINARY PROPOSALS FOR MORE EFFECTIVE RESPONSE TO PARK THREATS

A. PREMISE: FUNDAMENTAL CHANGE OF THE STATUTORY FRAMEWORK FOR PARK PROTECTION IS UNLIKELY WITHIN AN ACCEPTABLE TIME FRAME

My suggestions assume some key premises: that the ambivalence of our political policy-makers regarding protection of our National Parks is likely to continue, at least into the relevant near future. As a result, it is unlikely that we will achieve any fundamental change in the basic statutory framework for Park protection within a time-frame adequate to avert serious consequences to our Parks from external threats.

Therefore, these premises also compel the judgment that severe degradation of our Parks can be avoided only by aggressive development and application of administrative, legal and political strategies to maximize park protection within the current statutory framework. My suggestions also reflect a

belief that effective strategies are feasible within that framework. The basic objective of the strategies would be to strengthen the institutional capability of NPS to take the initiative in developing and asserting park protection standards and procedures.

Obviously, the assumptions and approach suggested here do not contest the desirability of molding public opinion and political commitment toward enactment of more rigorous park protection legislation. Rather, they assume that efforts to implement protections under the existing framework can play a major role in longer-term strategies for improving that framework.

B. PROPOSAL: THAT NPS SHOULD DEVELOP A FULLY-STAFFED COMPLIANCE AND ENFORCEMENT BRANCH

This proposal, though undeveloped at this writing, is offered because of the obvious need for an administrative arm by which the NPS can more effectively take early and comprehensive steps in laying the foundation for park protection and participate aggressively in the wide range of administrative and judicial proceedings which require some capacity for advocacy.

Thus, it is proposed that NPS administratively establish an adequately-staffed Compliance and Enforcement Branch. Among its early missions would be mandates to:

1. Negotiate with the Department of Justice to obtain necessary authority to represent NPS in a variety of types of administrative and judicial proceedings.

2. Initiate proceedings for formal establishment of forums, or otherwise to seek formal participation by NPS in proceedings before other agencies, including Interior Department agencies, to address policies, programs and proposals that conflict with park protection requirements.

3. Through a variety of administrative and judicial proceedings, including rulemaking wherever feasible, seek to establish more effective standards and procedures for park protection.

C. PROPOSAL: EXPAND AND DEFINE THE AVAILABLE PROTECTIONS THROUGH THE FOLLOWING RULEMAKING PROPOSALS:

The rule-making process is a key administrative mechanism that has seldom been used by the National Park Service. While the following proposals would undoubtedly present some questions about the extent of the authority of the Secretary of the Interior and of the NPS, there is substantial basis for authority that remains largely unexercised and untested. Certainly in the realm of procedural and interpretive regulations, there is considerable room to refine present statutory and procedural requirements. While there are also some current political constraints upon exercise of rule-making authority, careful development of the following proposals, or of similar proposals, may overcome those constraints and could contribute significantly to strengthening park protection.

Suggestions:

1. Procedural rules to implement Park Organic Act nonimpairment requirements: Secretarial review of potentially impairing actions.

It is proposed that the Secretary of the Interior implement the nonimpairment requirements of the National Parks Organic Act and its "Redwoods Amendments" by adopting procedures to provide for Secretarial review of all proposals for actions on Interior Department lands that present any reasonable probability of impairing National Park values. The proposed rule would include a requirement that the Secretary's findings specifically analyze all potential impairments under appropriate protective standards. The rule would rely upon and elaborate the requirements of the 1978 ("Redwoods") amendments to the National Park System Organic Act [16 U.S.Code section 1a-1], which mandate the Secretary of the Interior to assure that -

authorization of activities shall be construed and the protection, management and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established
[16 U.S.C. § 1a-1.]

2. Substantive rules to implement Park Organic Act nonimpairment requirements: establishment of more explicit protective standards

It is proposed that the Secretary of the Interior initiate rulemaking proceedings to adopt appropriate protective standards for implementation of the statutory nonimpairment requirement of the National Park Service Organic Act and its "Redwoods Amendments." The proposal would seek to develop basic standards of general application. At a minimum, the rule would require that the nonimpairment standard be construed and applied to protect the values and resources identified for protection in each park's resource management plans and in legislation establishing the individual parks.

3. Substantive and procedural rules to implement the Priority for "areas of critical environmental concern" required by the Federal Land Policy and Management Act

It is proposed that the Secretary of the Interior adopt a rule or group of rules to give procedural and substantive protection to National Parks under the statutory requirement that the Secretary "give priority to the designation and protection of areas of critical environmental concern" [ACECs] in implementing the inventory of public land resource values and land use plans required by the Federal Land Policy and Management Act. [FLPMA § 201(a), 43 USC § 1711(a).] These rules would seek to establish standards and procedures to require demarcation and more sensitive management of ACECs whose integral relation to the boundaries or resources of Parks makes them important to preservation of Park resources and values.

4. Substantive and procedural rules for recognition of "Park protection ACECs" in BLM administration of rights-of-way

It is proposed that the Secretary of the Interior adopt rules to require application of ACEC park protection standards in the administration by BLM of rights-of-way on the public lands by treating those ACECs as an inventoried "resource value" required to be protected, particularly under --

(i) the Secretary's obligation to consider national land use policies and environmental quality in determining whether to issue rights-of-way or rights-of-way corridors; and

(ii) the criteria which the Secretary is mandated to prescribe in establishing right-of-way corridors; and

(iii) the regulations the Secretary is mandated to issue to establish the terms and conditions of rights of way.

[See FLPMA sections 501(b)(1), 503, 504(a), 504(c) and 504(e) and 505, 43 U.S.Code sections 1761(b)(1), 1763, 1764(a), 1764(c), 1764(e) and 1765.]

5. Amend NEPA implementation rules to require consideration of any Park impairment as a significant impact

It is proposed that the Secretary of the Interior adopt a rule, or proposed a rule for adoption by the Council on Environmental Quality, which would implement the National Environmental Policy Act by expressly requiring full consideration of nonimpairment standards and potential impairments of Park values in all environmental assessments or environmental impact statements on proposed federal actions. The proposed rule would include an express requirement that any federal action resulting in identified types of impairments of identified Park resource values would be recognized as having the kind of "significant impact" that requires a comprehensive environmental impact statement.

The Cedar City District, Utah BLM, is currently working on an EIS which will consider whether BLM should approve a coal company's application for a coal exploration permit on watershed and viewshed lands along the east border of Zion National Park.

The imminent decision is of concern because it arises under circumstances which reincarnate the old and discredited "preference right" leasing process as a result of a court order requiring BLM to consider the application under the rules and practices applicable prior to repeal of that system. Thus, although the immediate applications under consideration involve only a right to explore for coal, if the exploration permits are approved by BLM, any discovery of commercially-valuable coal in the area will automatically entitle the company to a lease authorizing full development. It is anticipated that any development would include both surface (strip) mining and deep mining.

Background

In 1972 and 1973, the holders of coal exploration permits applied for extension of those permits. The permits, and the extension applications, covered major portions of sensitive higher lands immediately east of Zion National Park, on tributaries of the Virgin River which, downstream, traverse the Park.

Because of the moratorium on its coal-leasing program, BLM held the extension applications without decision until after enactment of the 1977 coal leasing amendments. When the applications were under earlier consideration, NPS (the Zion superintendent) submitted comments calling for an EIS because of the potentially-serious impacts of coal mining on the Park. Subsequently, the permits were denied on the ground that exploration permits under the preference-right leasing program were no longer authorized by the amended coal leasing laws.

The applicants then sought judicial review, claiming that BLM's belated action had unlawfully denied them their exploration permits. They obtained a ruling from U.S. District Judge Aldon Anderson (Utah) remanding the matter to BLM with instructions that it should rule on the extension applications under the standards and practices that prevailed prior to enactment of the coal leasing amendments. The Judge's opinion strongly suggested, but did not directly hold, that BLM's prior practices usually would have resulted in virtually "automatic" approval of such applications. The Judge's opinion, however, gave no consideration to the effect of NEPA, enacted shortly before the extension applications, nor to standards under the Park Service

Organic Act that might have been applied in these special circumstances.

[The latter issues, of course, had not been argued by BLM; NPS did not participate in the court proceedings; and BLM took no appeal from Judge Anderson's decision.]

Current developments

In response to the District Court decision, the BLM district office initially prepared an extremely sloppy environmental assessment and draft decision which generally supported approval of the old exploration permit applications. The EA, however, completely failed to recognize that, particularly in view of the acknowledged coal formations, extension of the exploration permits virtually guaranteed a preference right lease for full development. As a result, the EA failed to offer any environmental review of the impacts of mining operations, including the inevitable and serious impacts on the Park that would result from the surface and underground mining anticipated at this site.

The EA strongly implied that BLM felt obligated by the earlier court order to approve the exploration permits; and it offered no serious analysis of whether that would necessarily have been the result under the standards applicable prior to the coal leasing amendments. No consideration was given to the intervening effect of NEPA requirements, nor to park protection concerns or standards.

NPCA intervened in the EA review process and made repeated demands for full EIS treatment of Park impacts based on a full mining scenario, and for full recognition of park protection standards. NPCA also urged grounds for avoiding any automatic conclusion that the court's order required approval of the applications. Criticism of the EA resulted in preparation of a second and equally deficient EA, which appeared likely to reach similar results. NPCA responded with a further and more detailed demand that BLM comply with its NEPA obligation to analyze the environmental consequences of the full mining development that could result from extension of the exploration permits.

At that point, NPS joined in with a strong and effective request that BLM prepare an EIS on the full development scenario. BLM then determined that a full EIS analysis of potential mining and its consequences would be required, and the first draft is currently nearing completion.