

January 1997

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### Recommended Citation

George Cameron Coggins & Robert L. Glicksman, Concessions Law and Policy in the National Park System, 74 Denv. U. L. Rev. 729 (1997).

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## Concessions Law and Policy in the National Park System

# CONCESSIONS LAW AND POLICY IN THE NATIONAL PARK SYSTEM<sup>1</sup>

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About 270 million Americans and foreign guests visit the 368 units of the National Park System every year.<sup>2</sup> Catering to the visitor's needs for food, lodging, transportation, recreation, and other services is big business.<sup>3</sup> The National Park Service (NPS), the agency within the Department of the Interior that manages the national parks, contracts with private entities called concessionaires<sup>4</sup> to provide those services. In 1989, the NPS possessed about 1,000 long-term contracts and many more short-term licenses.<sup>5</sup> National Park concessionaires grossed about \$1.4 billion and paid fees to the government of \$35 million, a 2.4% return, in that year.<sup>6</sup> The National Tour Association estimates that the presence of national parks contributes over \$10 billion and 230,000 jobs to nearby communities.<sup>7</sup> Tourism in the United States generally generates about \$417 billion in gross receipts.<sup>8</sup>

Several aspects of Park Service concession policies have been highly controversial in recent years. Most complaints revolve around asserted overdevelopment of visitor facilities,<sup>9</sup> monopolistic concessionaire arrangements and practices,<sup>10</sup> artificial stimulation of visitor demand,<sup>11</sup> meager financial return

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1. Parts of this article were adapted from GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW ch. 17 (1990, supplemented) [hereinafter PNRL].

\* Tyler Professor of Law, University of Kansas. A.B. 1963, Central Michigan University; J.D. 1966, University of Michigan.

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2. James T. Yenckel, *Fearless Traveller: The Park System Squeeze, Visitors Will Feel the Pinch of Budget Cutbacks*, WASH. POST, May 19, 1996, at E01. The six federal agencies that grant concession contracts recorded 1.6 billion visits to federal lands in 1991. *Park Issues: Before the Subcomm. of National Parks, Forests, and Public Lands of the House Comm. on Natural Resources, Hearings on H.R. 1527 & 2028*, 104th Cong. (1995) (statement of David Unger, Forest Service).

3. See, e.g., Raymond Rasker, *A New Look at Old Vistas: The Economic Role of Environmental Quality in Western Public Lands*, 65 U. COLO. L. REV. 369 (1994).

4. The federal law refers to concession contractors as "concessioners," 16 U.S.C. §§ 20-20g (1994), but the dictionary and these writers prefer the original term, "concessionaires." See, e.g., WEBSTER'S DICTIONARY 376 (1977).

5. U.S. GEN. ACCOUNTING OFFICE, FEDERAL LANDS: IMPROVEMENTS NEEDED IN MANAGING CONCESSIONS 4 (June 1991) [hereinafter GAO, IMPROVEMENTS].

6. *Id.* at 2. In 1993, more than 9,000 concessionaires on federal lands grossed in excess of \$2 billion. H.R. REP. NO. 104-280, pt. 1, at 566 (1995).

7. *Hearing on Recreation Fees at Public Parks Before the Subcomm. on National Parks, Forests, and Lands of the House Comm. on Natural Resources.*, 104th Cong. (1995) (statement of James D. Santini, NTA Rep.).

8. *Id.*

9. See *infra* part IIA.

10. See *infra* part IIB.2.b.ii.

to the government,<sup>12</sup> inadequate facility maintenance, administrative secrecy in the contracting processes,<sup>13</sup> and general lack of competition.<sup>14</sup> A bill to reform NPS concessions law was passed overwhelmingly by both Houses of Congress in 1995 but died as the session expired.<sup>15</sup> Rival bills on the same subject were pending in 1996.<sup>16</sup>

This article explicates current law governing NPS concessions and assesses ideas and proposals for reform. Part I outlines the factual background concerning the National Park System, the NPS, and current concession operations, and compares the NPS situation with that of the other three major federal land management agencies. The second part investigates NPS concession law and policy in some detail. The National Parks System Concessions Policy Act of 1965<sup>17</sup> and related rules create a unique contractual milieu for the agency, the contractors, and the public. Part III catalogues the complaints that various parties have leveled against the current system. It also recounts and evaluates a wide spectrum of proposals for change.

## I. THE NATIONAL PARK SYSTEM AND ITS CONCESSIONAIRES

### A. *The National Park System*

America's national parks often have been characterized as the best idea the United States Congress ever had.<sup>18</sup> Since the creation of Yellowstone and Yosemite National Parks a century and a quarter ago, Congress has expanded the National Park System to 368 units encompassing over 83 million acres; a majority of the park acreage is in Alaska. The process is ongoing: 5.5 million acres in the California Desert Conservation area were designated as Mohave National Park in 1994,<sup>19</sup> and sentiment for park establishment in other areas is a political constant.<sup>20</sup> The rest of the world took notice and flattered the United States by emulation: virtually every country on the globe now has its own national parks.

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11. See *infra* part IIIC.1.

12. See *infra* part IIB.2.d.

13. See *infra* notes 198-200 and accompanying text.

14. See *infra* part IIID.1.

15. 141 CONG. REC. S1945 (daily ed. Feb. 1, 1995) (statement of Sen. Bennett).

16. H.R. 2028, 104th Cong. (1995) (introduced by Rep. Hansen); H.R. 773, 104th Cong. (1995) (introduced by Rep. Meyers); S. 309, 104th Cong. (1995) (introduced by Sen. Bennett); see also *Reform in Concessions Mgmt. in Fed. Agencies: Oversight Hearing Before the Subcomm. on National Parks, Forests, and Lands of the House Comm. on Resources*, 104th Cong. (1996); and *Concession Reform is Needed: Testimony of Victor S. Rezendes Before the Subcomm. on National Parks, Forests, and Lands of the House Comm. on Resources*, 104th Cong. (1996) (detailing several aspects of the debate over the issue of concessions reform).

17. National Park System Concession Policy Act of 1965, 16 U.S.C. §§ 20-20g (1994).

18. See, e.g., David J. Simon, *Preface to OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS* xii (David J. Simon ed., Island Press, 1988) (defending the national park concept); Paul C. Pritchard, *The Best Idea America Ever Had*, Nat'l Geographic, Aug. 1991, at 36 (supporting the establishment of national parks).

19. California Desert Protection Act of 1994, 16 U.S.C. §§ 410aaa - 410aaa-83 (1994); see 140 CONG. REC. S14961-03 (daily ed. Oct. 8, 1994).

20. E.g., H.R. 1449, 104th Cong. (1995) (establishing Tallgrass Prairie National Preserve); H.R. 2763, 104th Cong. (1995) (establishing Boston Harbor Islands National Recreation Area).

Establishment of national parks in the United States might not have been possible without the tourist industry. The Northern Pacific Railroad was an enthusiastic booster of the original Yellowstone bill because its owner correctly foresaw that a large number of people would need the railroad to visit this fabled, mysterious place.<sup>21</sup> The informal alliance between environmentalists and preservationists and tourist service providers has endured, with occasional strains, ever since.

By 1900, Congress had created five more national parks in addition to Yellowstone. The park unit creation process exploded in this century, and the expansion promises to continue into the 21st century. In 1906, Congress delegated to the President the power to designate areas as national monuments.<sup>22</sup> After 1916, when Congress formalized the National Park System,<sup>23</sup> the monuments were included within it. National park creation became politically popular, in part because local citizens realized that park designation usually resulted in increased economical activity near, as well as in, the park area.<sup>24</sup> In the early 1980s, Interior Secretary James Watt decried that popularity, stating that he would end "park barrel politics" and new "park-a-month" policies.<sup>25</sup>

Congress gradually added new zoning categories for park system units in addition to parks and monuments. The more important of the twenty current categories other than parks proper are national preserves, national recreation areas, wild and scenic river segments, national seashores, and national battlefield monuments. National preserves (e.g., Big Cypress<sup>26</sup>) are similar to national parks, but Congress differentiated the categories to allow more human uses, notably hunting, on the preserves than in the parks.<sup>27</sup> National recreation areas (NRAs) primarily are of two kinds: lands surrounding and including reservoirs, for example, Lake Mead<sup>28</sup> set aside for recreational pursuits; and excess federal holdings near urban areas (e.g., Golden Gate NRA<sup>29</sup>). National rivers (e.g., Buffalo NR<sup>30</sup>) and wild and scenic river segments<sup>31</sup> are ribbon-like parks along selected river corridors.<sup>32</sup> Battlefield monuments (e.g., Gettysburg<sup>33</sup>) are premised more on historical than ecological or recreational

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21. See ALFRED RUNTE, JR., TRAINS OF DISCOVERY, WESTERN RAILROADS AND THE NATIONAL PARKS 19 (rev. ed. 1990).

22. Antiquities Act of 1906, 16 U.S.C. §§ 431-433 (1994).

23. National Park Service Organic Act of 1916, 16 U.S.C. §§ 1-4 (1994).

24. See John L. Giesser, *The National Park Service and External Development: Addressing Park Boundary Area Threats Through Public Nuisance*, 20 B.C. ENVTL. AFF. L. REV. 761, 770-71 (1993).

25. George Cameron Coggins & Robert L. Glicksman, *Federal Recreational Land Policy: The Rise and Decline of the Land and Water Conservation Fund*, 9 COLUM. J. ENVTL. L. 125, 166 (1984); see also George Cameron Coggins & Doris K. Nagel, "Nothing Beside Remains": *The Legal Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473 (1990).

26. 16 U.S.C. §§ 698f - 698m-4 (1994).

27. See, e.g., 36 C.F.R. § 7.86(e) (1996) (hunting in Big Cypress National Preserve).

28. 16 U.S.C. §§ 460n - 460n-9 (1994).

29. 16 U.S.C. §§ 460bb - 460bb5.

30. 16 U.S.C. §§ 460m-8 - 460m14.

31. 16 U.S.C. §§ 1271-1287 (1994).

32. See generally PNRL, *supra* note 1, ch. 15.

33. 16 U.S.C. §§ 430g - 430g-10 (1994).

significance. Other categories of lands that Congress has added to the National Park System include lake shores, trails, historical sites, a cultural area, a train museum, and scenic highways.<sup>34</sup> Offshore parks, called national marine sanctuaries, are not included within the park system.<sup>35</sup>

In spite of its continuing growth, the National Park System is still the smallest federal land management system by acreage. National wildlife refuges (90 plus million acres), national forests (about 190 million acres), and Bureau of Land Management public lands (about 270 million acres) are all larger but less well known. Even the relative newcomer, the Wilderness Preservation System, created in 1964,<sup>36</sup> has more acreage (about 100 million acres),<sup>37</sup> but roughly forty million of its acres are within the park system.

Resource management within the national park system has come under increasing attack in recent years. Some writers decry the wildlife management practices of the NPS.<sup>38</sup> Other critics are concerned about external threats to park amenities stemming from such causes as adjacent timber harvests,<sup>39</sup> power plant emissions,<sup>40</sup> water diversions,<sup>41</sup> ranching,<sup>42</sup> and commercial and residential development.<sup>43</sup> Controversy over facilities and concessions policy also has erupted in several instances in recent years, the most notable being the replacement of the Yosemite concessionaire.<sup>44</sup>

#### B. *The National Park Service (NPS)*

Congress chartered the NPS in 1916.<sup>45</sup> The NPS is a line agency within the Department of the Interior. Its structure, a hierarchy, runs from the lowliest temporary worker to the Interior Secretary. In 1994, the NPS had a budget of about \$972 million, which rose to about \$1.1 billion in fiscal year 1996.<sup>46</sup> The agency takes in about 33 cents per visit, but each visit costs the NPS about \$4.12.<sup>47</sup>

34. See generally WILLIAM EVERHARDT, *THE FAMILY TREE OF THE NATIONAL PARK SYSTEM* (1972).

35. Pursuant to the Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. §§ 1431-1447 (1994), marine sanctuaries are under the jurisdiction of the Department of Commerce.

36. Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1994).

37. See George Cameron Coggins & Robert L. Glicksman, *Power, Procedure, and Policy in Public Lands and Resources Law*, 10 NAT. RESOURCES & ENV'T 3, 82 (1995); William H. Rodgers, Jr., *The Seven Statutory Wonders of U.S. Environmental Law: Origins and Morphology*, 27 LOY. L.A. L. REV. 1009, 1010 (1994).

38. See ALSTON CHASE, *PLAYING GOD IN YELLOWSTONE* (1986).

39. See *Sierra Club v. Department of the Interior*, 398 F. Supp. 284 (N.D. Cal. 1975), *modified*, 424 F. Supp. 172 (N.D. Cal. 1976).

40. See *Central Ariz. Water Conserv. Dist. v. EPA*, 990 F.2d 1531 (9th Cir. 1993).

41. See *United States v. South Fla. Water Management Dist.*, 28 F.3d 1563 (11th Cir. 1994).

42. See *Defenders of Wildlife v. Lujan*, 792 F. Supp. 834, 835 (D.D.C. 1992).

43. See *United States v. County Bd. of Arlington County*, 487 F. Supp. 137 (E.D. Va. 1979) [hereinafter *Arlington County*]. See generally PNRL, *supra* note 1, § 14.03; JOHN L. FREEMUTH, *ISLANDS UNDER SIEGE* (1991); Giesser, *supra* note 24; Robert B. Keiter, *On Protecting the National Parks from the External Threats Dilemma*, 20 LAND & WATER L. REV. 355 (1987).

44. See *infra* Part II.B.2.b.

45. National Park Service Organic Act of 1916, 16 U.S.C. §§ 1-4 (1994).

46. GAO, *IMPROVEMENTS*, *supra* note 5, at 23, 30.

47. *Id.* at 30.

The NPS is headquartered in the nation's capital. The NPS headquarters staff develop NPS policies, programs, and regulations, and coordinate NPS activities with Congress, the Office of Management and Budget, and other government entities. The Headquarters Office consists of the Office of the Director and five Associate Directors. The Office of the Director includes the Director and Deputy Director, the Assistant Director for External Affairs, and the Chief of the Office of International Affairs.<sup>48</sup> The Associate Directors include Park Operations and Education,<sup>49</sup> Natural Resource Stewardship and Science,<sup>50</sup> Cultural Resource Stewardship and Partnerships,<sup>51</sup> Professional Services,<sup>52</sup> and Administration.<sup>53</sup>

The NPS field units (or parks) are organized into a maximum of 16 "ecological-cultural-geographical clusters of 10-35 units each."<sup>54</sup> Seven Field Director Offices supervise budgetary matters, media relations, and policy direction for the field units within their boundaries.<sup>55</sup> Sixteen System Support Offices, each headed by a Superintendent, provide professional, technical, and administrative services, serve as liaisons with other agencies and interests, and participate in ecosystem management for a specific cluster of field units.<sup>56</sup> The larger parks have staff members for law enforcement,<sup>57</sup> interpretation, and maintenance, as well as biologists, ecologists, and even landscape architects.<sup>58</sup>

The National Park System Act endows the NPS with the mission to pre-

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48. National Park Service Reorganization, 60 Fed. Reg. 40,601 (1995).

49. This Associate Director supervises the Statistical Unit and the Field Operations Technical Support Center in Denver, Colorado; the National Interagency Fire Center in Boise, Idaho; and the Interpretive Design Center in Harpers Ferry, West Virginia. *Id.* at 40,601-02.

50. This Associate Director is in charge of environmental quality in park system units and supervises the Chief Scientist for the NPS and the Natural Resources Program Center in Denver and Fort Collins, Colorado. *Id.* at 40,602.

51. This Associate Director supervises grants administration, rivers, trails, and conservation assistance, and state program review. He or she also oversees the Cultural Resources Program Support Center, the Partnership Programs Service Center, and the National Center for Preservation Technology and Training. *Id.*

52. This official is responsible for land resources and strategic planning and supervises Centers for Planning, Design and Construction (in Denver) and Information and Telecommunications (in Denver and Washington, D.C.). *Id.*

53. This Associate Director is the Chief Financial Officer for the NPS and supervises two Administrative Service Centers in Denver and the District of Columbia, as well as several National Program Centers for Accounting Operations and Employee Development. *Id.*

54. *Id.* "The cluster serves as a framework for cooperation and decision-making rather than a staffed organizational entity." *Id.*; see also Change in Organizational Title from Regional Director to Field Director, 61 Fed. Reg. 28,504 (1996).

55. The Seven Field Director Offices are for the Northwest (in Philadelphia), Southeast (in Atlanta), Midwest (in Omaha), Intermountain (in Denver), Pacific West (in San Francisco), Alaska (in Anchorage), and National Capital (in Washington, D.C.). National Park Service Reorganization, 60 Fed. Reg. at 40,602.

56. *Id.* Regulations governing management of each NPS unit are published at 36 C.F.R. §§ 7.1-7.100 (1996).

57. In 1994, the FBI began training park rangers to investigate crimes in or near the parks. Until recently, most criminal matters involving the parks were theft-related, but the focus of law enforcement in the parks has shifted to activities that result in resource degradation, including waste dumping, acid mine drainage, wetlands destruction, and oil spills. See 24 Env't Rep. (BNA) 2075 (1994).

58. See Audubon Wildlife Report — 1986 at 468.

serve the scenery, wildlife, and other attributes of "parks, monuments, and reservations" for the benefit of present and future generations.<sup>59</sup> That mission involves an inherent tension between recreation and preservation, a tension highlighted in the matter of concession facility development and promotion.<sup>60</sup> The 1965 Concessions Policy Act authorizes facility development but specifically subordinates development to the basic preservational purposes of national park establishment.<sup>61</sup>

The mission of the NPS has been diluted and fragmented by additional tasks and duties assigned to it by Congress over the years. The NPS acts as the overseer for federal areas in Washington, D.C.,<sup>62</sup> the landlord for spas and resorts,<sup>63</sup> the custodian of important (and some historically marginal) houses and sites,<sup>64</sup> the patrolman for two scenic highways,<sup>65</sup> the curator of a railroad museum,<sup>66</sup> and the administrator of a cultural area.<sup>67</sup> Twenty years ago, former Professor Futrell suggested that the agency and the nation would be better served if the NPS reverted to its earlier, purer mission.<sup>68</sup> A bill introduced in 1995 would have required a study to determine whether and to what extent the Park Service should divest itself of its less significant holdings.<sup>69</sup>

Congress gave the NPS ample regulatory authority and discretion, although the agency seldom possesses sufficient funds to carry out its mandate fully.<sup>70</sup> The agency is severely restricted in the fees it can charge for park admission,<sup>71</sup> and its appropriations have fallen drastically compared to visitor

59. 16 U.S.C. § 1 (1994).

60. See *infra* Part II.A.

61. National Park Systems Concessions Policy Act, 16 U.S.C. § 20 (1994).

62. 40 U.S.C. § 804 (1988).

63. 16 U.S.C. §§ 361-374 (1994).

64. See Weir Farm National Historic Site Establishment Act of 1990, Pub. L. No. 101-485, 104 Stat. 1171 (1990).

65. 16 U.S.C. §§ 460a-1 to 460a-11 (1994).

66. 16 U.S.C. §§ 410vv-8 (1994) (Marsh-Billings National Historic Park).

67. 16 U.S.C. §§ 284-284j (1994) (Wolf Trap Farm Park).

68. J. William Futrell, *Parks to the People: New Directions for the National Park System*, 25 EMORY L.J. 255, 269-71, 316 (1976).

69. H.R. 260, 104th Cong., 1st Sess. (1995). The proposed National Park System Reform Act is described at 141 CONG. REC. H9083-01 (1995). Congress evidently dropped the divestiture notion in the face of concerted public opposition.

70. See U.S. GEN. ACCOUNTING OFFICE, NATIONAL PARKS - DIFFICULT CHOICES NEED TO BE MADE ABOUT THE FUTURE OF THE PARKS (1995) [hereinafter GAO, DIFFICULT CHOICES]. The GAO reported in 1995 that:

[t]here is cause for concern about the health of national parks for both visitor services and resource management. The overall level of visitor services was deteriorating at most of the park units that GAO reviewed. Services were being cut back, and the condition of many trails, campgrounds, and other facilities was declining.

*Id.* Between 1988 and 1995, the dollar amount of the NPS maintenance backlog increased from \$1.9 billion to over \$4 billion. The GAO attributed this increase to a combination of additional operating requirements placed on parks by laws and administrative requirements and increased visitation, which drives up the parks' operating costs. The GAO concluded that the principal options for dealing with the problem are increasing the amount of financial resources going to the parks, limiting or reducing the number of units in the park system, and reducing the level of visitor services. *Id.*

71. 16 U.S.C. §§ 460l-6a, 460l-6c (1994). Cf. 16 U.S.C. § 460k-3 (1994) (Interior Secretary may establish reasonable charges and fees for public use of national wildlife refuges).



levels.<sup>72</sup>

Unlike the other federal land management agencies, the NPS is not required to defer to state law in wildlife management or similar matters.<sup>73</sup> The courts are virtually unanimous in their deference to NPS exercises of its discretionary authority in this area. Courts have deferred to the NPS in its efforts to remove wild horses,<sup>74</sup> enforce quotas on river rafting,<sup>75</sup> ban hunting,<sup>76</sup> trapping,<sup>77</sup> and fishing,<sup>78</sup> allow promotional advertising,<sup>79</sup> regulate<sup>80</sup> and terminate<sup>81</sup> concessionaires, allow snowmobile use,<sup>82</sup> and restrict biking.<sup>83</sup> The agency has complete authority over access.<sup>84</sup> The only instances located in which courts enjoined NPS proposals involved plans for a hotel<sup>85</sup> and for increased stock animals in park wilderness areas.<sup>86</sup>

The NPS enjoys a unique niche in the pantheon of federal land management agencies. Its mission is far more circumscribed than those of the Fish and Wildlife Service (FWS), the Bureau of Land Management (BLM), and the Forest Service (FS). These all have some responsibilities for production of commodities from the natural resources under their jurisdictions;<sup>87</sup> the NPS does not. Consequently, the NPS is relatively immune from the political pressures imposed by loggers and miners, although it has experienced difficulties caused by ranchers,<sup>88</sup> water diverters,<sup>89</sup> hunters,<sup>90</sup> developers,<sup>91</sup> and states.<sup>92</sup> Further, the NPS is far more visible (and politically protected) than the other agencies because it is the custodian of the nation's most beloved scenic treasures.

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72. See 140 CONG. REC. S4102, S4106, S4108 (daily ed. Apr. 12, 1994) (statement of Sen. Wallop).

73. See PNRL, *supra* note 1, § 18.02[4][b][i].

74. *Wilkins v. Lujan*, 995 F.2d 850, 852-53 (8th Cir. 1993).

75. *Wilderness Pub. Rights Fund v. Kleppe*, 608 F.2d 1250, 1251, 1254 (9th Cir. 1979).

76. *United States v. Brown*, 552 F.2d 817, 819, 821-23 (8th Cir. 1977).

77. *NRA v. Potter*, 628 F. Supp. 903, 909-14 (D.D.C. 1986).

78. *Organized Fishermen of Fla. v. Hodel*, 775 F.2d 1544, 1546 (11th Cir. 1985).

79. *Friends of Yosemite v. Frizzell*, 420 F. Supp. 390, 395-96 (N.D. Cal. 1976).

80. See *Universal Interpretive Shuttle Corp. v. Washington Metro Area Transit Comm'n*, 393 U.S. 186, 188-89, 194 (1968).

81. See *YRT Servs. Corp. v. United States*, 28 Fed. Cl. 366, 417-18 (1993).

82. *Voyageurs Region Nat'l. Park Ass'n v. Lujan*, 966 F.2d 424, 426, 428 (8th Cir. 1992).

*But cf. Mausolf v. Babbitt*, 913 F. Supp. 1334, 1335-36, 1344 (D. Minn. 1996) (remanding closure of lakeshore area to snowmobiling for lack of adequate explanation from the lower court).

83. *Bicycle Trails Council v. Babbitt*, 82 F.3d 1445 (9th Cir. 1996).

84. See *Christianson v. Hauptman*, 991 F.2d 59, 61 (2d Cir. 1993); *Biderman v. Morton*, 507 F.2d 396, 398 (2d Cir. 1974).

85. *Sierra Club v. Lujan*, 716 F. Supp. 1289, 1291, 1293 (D. Ariz. 1989).

86. *High Sierra Hikers Ass'n v. Kennedy*, No. C-94-3570 CW, 1995 WL 382369 (N.D. Cal. June 14, 1995), *vacated pursuant to settlement*, 1996 WL 421435 (N.D. Cal. Apr. 5, 1996).

87. See generally PNRL, *supra* note 1, chs. 19-20, 22-25.

88. For example, ranchers bitterly opposed the reintroduction of wolves into the Yellowstone National Park ecosystem. See *id.* § 15C.04[3].

89. See *Cappaert v. United States*, 426 U.S. 128, 131-38, 143 (1976).

90. See *NRA v. Potter*, 628 F. Supp. 903, 910-11 (D.D.C. 1986).

91. See *Arlington County*, 487 F. Supp. at 141-44.

92. *United States v. Denver*, 656 P.2d 1, 4 (Colo. 1982).

### C. National Park Concessions

It is difficult to describe all of the concession contracts and licenses entered into by the NPS. The NPS uses the "contract" mechanism for larger, long-term agreements that often contemplate construction or maintenance of physical facilities.<sup>93</sup> Commercial use licenses, on the other hand, are used to authorize smaller scale services, usually without construction of fixtures or improvements.<sup>94</sup> The presence of a national park obviously benefits tourist businesses in nearby communities,<sup>95</sup> but this subsection discusses only the services delivered or facilities operated within the boundaries of park system units.

#### 1. Facilities

Most facilities within national parks were constructed by the NPS, but some concessionaires are required by their contracts to construct, repair, maintain, or improve physical facilities. Record title to such improvements remains in the United States, although the concessionaires, as beneficial owners, have certain statutory rights to compensation if the agreement is terminated.<sup>96</sup> Park roads, perhaps the most important facilities from the perspective of the average visitor, almost always are built and maintained by the agency.<sup>97</sup> Likewise, visitor centers and campgrounds tend to be constructed and operated by the NPS.<sup>98</sup> Still, the galaxy of products and services demanded or desired by visitors is vast, and concessionaires usually provide them. These include the basic human needs of food and shelter: private entrepreneurs commonly provide restaurants, hotels, motels, and permanent tent installations. In some park system units, concessionaires also operate ski areas, marinas, boat and snowmobile rentals, gift and souvenir shops, photo labs, and gas stations.<sup>99</sup>

#### 2. Services

Many facilities in parks exist to provide services. Nevertheless, certain service concessions are less dependent upon physical facilities. For example, some canoe renters are located outside parks and merely launch or pick up canoes within parks.<sup>100</sup> Similarly, float trips often travel through parks but depend on base facilities outside parks to store equipment and organize trips

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93. See *infra* Part I.C.1.

94. See *infra* Part I.C.2.

95. See Rhonda Bodfield, *New Funds Will Keep Canyon Open*, TUCSON CITIZEN, Jan. 3, 1996, at 1B (stating that Grand Canyon tourists add \$250 million to Arizona economy).

96. 16 U.S.C. § 20e (1994); see *infra* Part II.B.2.c.

97. See Marla E. Mansfield, *A Primer of Public Land Law*, 68 WASH. L. REV. 801, 843 (1993).

98. *Id.*

99. See *YRT Servs. Corp. v. United States*, 28 Fed. Cl. 366 (1993).

100. See *Free Enter. Canoe Renters Ass'n v. Watt*, 711 F.2d 852 (8th Cir. 1983); *United States v. Carter*, 339 F. Supp. 1394 (D. Ariz. 1972).

(as do air tours).<sup>101</sup> Guides and outfitters,<sup>102</sup> firewood merchants,<sup>103</sup> shuttle bus companies,<sup>104</sup> houseboat<sup>105</sup> and boat slip rentals,<sup>106</sup> camper and fishing goods suppliers,<sup>107</sup> marine fuel distributors,<sup>108</sup> hot shower providers,<sup>109</sup> trail ride and horse boarding services,<sup>110</sup> pack animal providers,<sup>111</sup> and sanitary napkin providers<sup>112</sup> all supply goods or services for use inside the parks.

#### D. Concessions in Other Federal Land Management Systems

Six federal land management agencies grant concession contracts to private entities; 80% of such contracts are let by the NPS, the FS, and the BLM.<sup>113</sup> The General Accounting Office (GAO) identified about 9,000 such agreements in 1991, but its information concededly was incomplete.<sup>114</sup> The 100 largest concessions generated about sixty-five percent of total revenues.<sup>115</sup> In fiscal year 1994, the GAO identified 10,427 concession agreements entered into by the six land management agencies, representing ninety-two percent of all such agreements with the federal government.<sup>116</sup> NPS and FS concession operations accounted for about ninety percent of these six agencies' reported concessionaires' gross revenues and fees paid to the government.<sup>117</sup>

Although eleven different federal statutes impact public land concessions,<sup>118</sup> no other agency is subject to a statute comparable to the NPS's Concessions Policy Act. This section briefly summarizes the concessions law and policy of the three other major land management agencies—the FS, the BLM, and the FWS. Special purpose policies of the Bureau of Reclamation<sup>119</sup> and of the Army Corps of Engineers<sup>120</sup> are not discussed except

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101. See *Grand Canyon Dorries, Inc. v. Walker*, 500 F.2d 588 (10th Cir. 1974); *Concession Permit*, 61 Fed. Reg. 1401 (1996).

102. See *United States v. Patzer*, 15 F.3d 934 (10th Cir. 1993).

103. See *Lewis v. Babbitt*, 998 F.2d 880 (10th Cir. 1993).

104. See *Yosemite Park & Curry Co. v. United States*, 582 F.2d 552 (Cl. Ct. 1978).

105. See *Roosevelt Recreation Enterprises*, 56 Fed. Reg. 55,685 (1991).

106. See *Lake Mohave Boat Owners Ass'n v. National Park Serv.*, 78 F.3d 1360 (9th Cir. 1995); *Lake Mead Nat'l Recreation Area Operation of a Marine at Willow Beach*, 61 Fed. Reg. 37,923 (1996).

107. See *Concession Permit*, 61 Fed. Reg. 1401 (1996); *Concession Contract Negotiations*, 54 Fed. Reg. 18,941 (1989).

108. *Concession Contract Negotiations*, 54 Fed. Reg. 18,941 (1989).

109. See *Proposal to Award Concession Permits*, 61 Fed. Reg. 30,637 (1996).

110. See 61 Fed. Reg. 37,077 (1996); *Notice of Intention to Extend Existing Concession Contracts*, 61 Fed. Reg. 26,204 (1996).

111. See *Notice of Intent to Issue a Prospectus for the Operation of Pack Station Servs. and Facilities within Sequoia Nat'l Park*, 61 Fed. Reg. 24,950 (1996).

112. See *Concession Permit Proposal*, 60 Fed. Reg. 52,411 (1995).

113. GAO, *IMPROVEMENTS*, *supra* note 5, at 4.

114. *Id.*

115. *Id.* at 5.

116. U.S. GEN. ACCOUNTING OFFICE, *CONCESSIONS CONTRACTING: GOVERNMENTWIDE RATES OF RETURN* (1996) [hereinafter GAO, *CONCESSIONS CONTRACTING*].

117. *Id.*

118. GAO, *IMPROVEMENTS*, *supra* note 5, at 3.

119. See, e.g., 138 CONG. REC. S11,006, S11,030 (daily ed. July 31, 1992) (proposing legislation concerning concession operation at Lake Berryessa).

120. See, e.g., 141 CONG. REC. H10,995, H11,073 (daily ed. Oct. 26, 1995) (proposing legis-

where they may intersect with or influence the other agencies.

### 1. Forest Service

Ski areas are the most important types of concessions in the national forests.<sup>121</sup> Before 1986, the FS typically granted ski area operators a term permit for the use of eighty acres for the main facilities and revocable special use permits for the area necessary for ski runs, lifts, and so forth.<sup>122</sup> The National Forest Ski Area Permit Act of 1986<sup>123</sup> gives the Agriculture Secretary authority to issue forty-year leases for the amount of acreage he "determines sufficient and appropriate."<sup>124</sup> Ski area developers must pay fair market value for the permit privilege.<sup>125</sup>

For other types of concessions, the FS has general authority to regulate occupancy and use of the national forests<sup>126</sup> and specific authority to permit visitor facility development.<sup>127</sup> Except for casual recreational use, uses of the national forests for profit require permits.<sup>128</sup>

### 2. BLM

The BLM lacks a specific concessions statute. BLM's power to authorize the provision of visitor services stems from its general authority under the Federal Land Policy and Management Act (FLPMA).<sup>129</sup> Therefore, BLM concession law is found in the agency's rather cursory regulations<sup>130</sup> and in decisions of the Interior Board of Land Appeals (IBLA).<sup>131</sup> Fair market value guides the permit fee for permits conveying a possessory interest in land,<sup>132</sup> but special recreation permits are available at administrative cost.<sup>133</sup> The authorized BLM officer possesses large discretion in the issuance of permits and land use authorizations.<sup>134</sup>

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lation concerning commercial concessions at Corps of Engineers Projects); *Park Issues Before the Subcomm. on Nat'l Parks, Forests, and Lands of the House Comm. on Resources* 1995 WL 446825 (F.D.C.H.) (July 25, 1995) (statement of Barry J. Frankell, Army Corps of Engineers).

121. In 1995, 143 ski areas occupied about 183,000 acres of national forestland. S. REP. NO. 104-183, at 3 (1995). This amounts to about 0.1 % of all FS lands. H.R. REP. NO. 104-280, pt. 1, at 566 (1995).

122. See *Wilson v. Block*, 708 F.2d 735, 756, 758 (D.C. Cir. 1983).

123. National Forest Ski Area Permit Act of 1986, 16 U.S.C. § 497b (1994).

124. *Id.* § 497b(b)(3).

125. *Id.* § 497b(b)(8). See generally PNRL, *supra* note 1, § 17.04[3][b].

126. 16 U.S.C. § 551 (1994).

127. *Id.* § 497.

128. See *United States v. Hells Canyon Guide Serv. Inc.*, 660 F.2d 735 (9th Cir. 1981). Cf. 36 C.F.R. § 251.53 (1996) (listing Forest Service authorities for issuance of special use permits).

129. 43 U.S.C. §§ 1732, 1733, 1740 (1994).

130. 43 C.F.R. §§ 2820, 2920, 8372 (1995).

131. See PNRL, *supra* note 1, § 17.04[4].

132. 43 C.F.R. § 2920.0-6 (1995).

133. *Id.* § 8372.4.

134. *Id.* §§ 2920.2-2, 2920.5-4, 8372.5(b).

### 3. FWS

The FWS regulations merely recite that concessions contracts may be granted "where there is a demonstrated justified need for services or facilities,"<sup>135</sup> that "a person granted economic use privileges" needs to observe the agreement conditions,<sup>136</sup> and that concessionaires cannot discriminate on racial or similar grounds.<sup>137</sup>

## II. THE LAW OF CONCESSIONS IN THE NATIONAL PARK SYSTEM

The law governing the granting of concessions contracts for facilities and services in the national parks is much more extensive than the parallel body of law applicable to the other federal land management agencies. The Concessions Policy Act grants broad authority to the NPS to contract with concessionaires located both within and outside the parks. Although the exercise of this authority creates the potential for conflict with the NPS's obligation to subordinate the provision of resources within its jurisdiction for recreational use to preservational needs, the courts have been loathe to interfere with the balance struck by the agency.

Concessions contracts with the NPS form a unique niche in the laws governing contractual relations. They differ from other contracts with the federal government in that the application of normal federal procurement rules is unclear. They depart from contracts between purely private entities because concessionaires may have rights typically not available to other contractors, such as protections against loss of investment and preferential renewal rights. Part II of this article describes the unique attributes of NPS concessions contracts, while Part III analyzes the policy implications of those attributes.

### A. *Propriety of Facility Development*

Concessionaire charters for recreational facilities and services raise two fundamental issues: first, when and where such facilities are permissible and appropriate; and, what the relative rights and responsibilities are of the concessionaire, the government, and the user public. The propriety of furnishing recreational facilities is partly a function of the law governing the particular land management system. Usually, it is also a function of land management agency discretion. The FS and the BLM must balance the recreational benefits against the environmental or resource costs of such facilities in the context of multiple use, sustained yield management of all surface resources. The NPS (and, to a lesser extent, the FWS) must insure that recreational development does not unduly detract from its preservational mission. The underlying policy considerations and conundrums are delineated in Professor Sax's excellent 1980 book, *Mountains Without Handrails*.<sup>138</sup> Groups challenging proposed

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135. 50 C.F.R. § 25.61 (1995).

136. *Id.* § 26.25.

137. *Id.* § 3.3(a).

138. JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS* (1980).

recreational facilities on federal lands because of asserted environmental problems have had little success.

The National Park System Act authorizes the Secretary of Interior to manage the parks and other units in the system for present enjoyment as well as preservation.<sup>139</sup> It also explicitly empowers the Secretary to contract for recreational services.<sup>140</sup> The NPS Concessions Policy Act (CPA)<sup>141</sup> subordinates facility development to the basic preservation mission:

Congress hereby finds that the preservation of park values requires that such public accommodations, facilities, and services as have to be provided . . . should be provided only under carefully controlled safeguards against unregulated and indiscriminate use . . . . It is the policy of the Congress that such development shall be limited to those that are necessary and appropriate for public use and enjoyment . . . and that are consistent to the highest practicable degree with the preservation and conservation of the areas.<sup>142</sup>

The judiciary has not defined the outer boundaries of the resulting discretion to encourage recreational use at the arguable expense of preservation.<sup>143</sup> Only one court has enjoined an NPS-approved facility or contract on grounds that approval would have exceeded the statutory limits or contravened the statutory purposes.<sup>144</sup>

Many environmentalists assert that some national parks and other federal areas have become festooned with restaurants, shops, campgrounds, ski areas, roads, lodges, and like facilities to an entirely inappropriate degree.<sup>145</sup> They argue that the preservation purpose of park establishment should outweigh visitor accommodation desires for development beyond bare necessities. Whatever the intrinsic merits of that argument, it must be made in a political or administrative forum to succeed because the courts appear emphatically disinclined to overturn NPS discretion in licensing recreational facilities.<sup>146</sup> Some of the allegedly more abusive situations, however, apparently have not been the subjects of litigation.<sup>147</sup>

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139. 16 U.S.C. § 1 (1994).

140. *Id.* §§ 3, 17b.

141. National Park System Concessions Policy Act of 1965, 16 U.S.C. §§ 20-20g (1994).

142. *Id.* § 20.

143. *Cf.* Conservation Law Found. v. Secretary of the Interior, 864 F.2d 954 (1st Cir. 1989) (upholding National Park Service plan that authorized off-road vehicle use on Cape Cod National Seashore); Sierra Club v. Watt, 566 F. Supp. 380 (D. Utah 1983) (upholding regulation allowing leasing of "locatable" minerals within national recreation area); Friends of Yosemite v. Frizzell, 420 F. Supp. 390 (N.D. Cal. 1976) (challenging construction of sanitation and housing facilities in national park).

144. Sierra Club v. Lujan, 716 F. Supp. 1289 (D. Ariz. 1989). *Cf.* High Sierra Hikers Ass'n, 1995 WL 382369 (enjoining increase in use of stock animals in wilderness area).

145. See Michael Mantell, *Preservation and Use: Concessions in the Nat'l Parks*, 8 *ECOLOGY L.Q.* 1 (1979); THE CONSERVATION FOUND., *NAT'L PARKS FOR A NEW GENERATION* (1985).

146. The political process is not a negligible factor in such disputes. Public pressure led to a new Yosemite National Park concessionaire contract that will raise the government's revenue share about 2500%. *U.S. Picks Concessionaire for Yosemite Park*, N.Y. TIMES, Dec. 18, 1992, at A22.

147. The influence of the concessionaire at Yosemite, and the intensive road and facility development at Yellowstone, are examples of arguable abuses of discretion. See ALFRED RUNTE,

Judicial opinions in several cases endorse NPS actions relating to recreational facilities and concessionaires. Park Service discretion to limit recreational activities and facilities by commercial enterprises has been upheld in every litigated instance located.<sup>148</sup> In the *Grand Canyon Access* case,<sup>149</sup> the reviewing court upheld an NPS allocation of most rafting rights to commercial outfitters, even though the general quota meant reduced rafting opportunities for individuals. Similarly, a court refused injunctive relief to a cruise ship operator to which the NPS denied permits to enter Glacier Bay because of a previous collision.<sup>150</sup> Conversely, environmentalists' efforts to force closure of a campground in Yellowstone to assist grizzly bear recovery were unavailing,<sup>151</sup> and a California court found no need for the NPS to restrict its concessionaire's advertising campaigns in the face of allegations linking advertising to overuse of Yosemite National Park.<sup>152</sup>

Research has disclosed only a single instance in which NPS discretion in allowing more intensive recreation through facility development has been judicially disturbed.<sup>153</sup> That instance should give the NPS pause, however. The agency entered into a contract for construction of a hotel without NEPA compliance and in seeming conflict with the policies of the master plan for the area. Its later environmental evaluation evidently was limited to where the hotel should be located, not whether it should be built.<sup>154</sup> The court preliminarily enjoined construction by the concessionaire because it thought that dual noncompliance was probably arbitrary and capricious.<sup>155</sup> This decision is only a blip on the screen of deference, but it illustrates that NPS discretion has some bounds.<sup>156</sup>

Despite the absence of a significant body of case law questioning the propriety of the NPS's exercise of its authority to grant concessions, the devel-

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NATIONAL PARKS: THE AMERICAN EXPERIENCE 169 (2d ed. 1987) (addressing Yosemite); CHASE, *supra* note 38 (addressing Yellowstone).

148. *E.g.*, *Free Enter. Canoe Renters Ass'n v. Watt*, 771 F.2d 852 (8th Cir. 1983); *United States v. Carter*, 339 F. Supp. 1394 (D. Ariz. 1972). *See also* *Seva Resorts, Inc. v. Hodel*, 876 F.2d 1394 (9th Cir. 1989).

149. *Wilderness Pub. Rights Fund v. Kleppe*, 608 F.2d 1250, 1254 (9th Cir. 1979); *see also* *United States v. Garren*, 893 F.2d 208 (9th Cir. 1989) (upholding procedures for allocating use of Rouge River between commercial and non-commercial uses).

150. *Clipper Cruise Line, Inc. v. United States*, 855 F. Supp. 1 (D.D.C. 1994).

151. *National Wildlife Fed'n v. National Park Serv.*, 699 F. Supp. 384 (D. Wyo. 1987). The court stressed that the Secretary's discretion in balancing "promotion" and "preservation" was "very broad." *Id.* at 391; *see also* *Grand Canyon Dorries, Inc. v. Walker*, 500 F.2d 588 (10th Cir. 1974) (disallowing an injunctive claim under implied contract to keep dam discharges steady).

152. *Friends of Yosemite*, 420 F. Supp. at 393.

153. *Sierra Club v. Lujan*, 716 F. Supp. 1289 (D. Ariz. 1989).

154. *Sierra Club*, 716 F. Supp. at 1291-92.

155. *Id.* at 1293.

156. In *High Sierra Hikers Ass'n*, the district court enjoined the Park Service from increasing the number of stock animals allowed in wilderness areas of the Sequoia and Kings Canyon National Parks because the agency failed to comply with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (1994). The court acknowledged NPS findings that the increase would result in little or no change in use patterns and that the impact of any change on the environment would be sufficiently mitigated to be "badly flawed." *High Sierra Hikers Ass'n*, 1995 WL 382369, at \*9. In addition, the agency failed to address adequately the affect of the increase on a threatened species of bighorn sheep. *Id.* at \*13-\*14. The decision holds limited precedent value, however, since it is unpublished and was later vacated.

opment of the facilities and the provision of services covered by these contracts may conflict with the NPS's *raison d'être*, the preservation of America's unique national heritage. Incantations of judicial deference to agency balancing of objectives can easily substitute for meaningful analysis of the limits of agency discretion. The subordination of the NPS's recreational mandate to its preservational mission in the CPA, however, takes the form of a policy statement<sup>157</sup> rather than being an enforceable, non-discretionary decree. The courts are loathe to translate such precatory admonitions into "real law." Absent legislative reform, litigants probably will continue to have a better chance of successfully challenging the particular provisions of an NPS concessions contract as contrary to agency regulations and guidance than they have of blocking the issuance of the contract on the ground that it exceeds the agency's statutory authority.

## B. *The NPS Relationship with Concessionaires and Permittees*

### 1. Park Service Authority

The CPA of 1965<sup>158</sup> clarifies contractual rights and responsibilities of private entrepreneurs in national park system units.<sup>159</sup> Recognizing that the parks faced danger of irreparable damage from heavy visitation, Congress in the CPA reaffirmed conservation as the primary park management goal.<sup>160</sup> Facility developments must be consistent to the "highest practicable degree" with preservation goals.<sup>161</sup>

The CPA is not the exclusive authority for awarding park concessions. The National Park System Act of 1916 instructs the Secretary to "promote" as well as "regulate" park use and empowers the Secretary to make necessary rules,<sup>162</sup> "grant privileges, leases, and permits,"<sup>163</sup> and enter into contracts for visitor accommodation.<sup>164</sup> The NPS regularly granted monopolies and preference renewal rights to concessionaires before enactment of the CPA.<sup>165</sup> Legislation establishing individual park system units may provide additional

157. 16 U.S.C. § 20.

158. *Id.* §§ 20-20g.

159. Senate Comm. on Interior and Insular Affairs, *National Parks Concessions Policies*, S. REP. NO. 89-765 (1965), reprinted in 1965 U.S.C.C.A.N. 3489-3501. See generally *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976).

160. 16 U.S.C. § 20 (1994). NPS regulations reflect this priority:

[I]t is the policy of the Secretary of the Interior, as mandated by law, to permit concessions in park areas only under carefully controlled safeguards against unregulated and indiscriminate use so that heavy visitation will not unduly impair park values and resources. Concession activities in park areas shall be limited to those that are necessary and appropriate for public use and enjoyment of park areas in which they are located and that are consistent to the highest practicable degree with the preservation and conservation of the park areas.

36 C.F.R. § 51.2 (1996).

161. 16 U.S.C. § 20 (1994).

162. 16 U.S.C. §§ 1, 3 (1994).

163. *Id.* § 3.

164. *Id.* § 17b.

165. See *United States v. Gray Line Water Tours*, 311 F.2d 779 (4th Cir. 1962).



authority and guidance on concessions for those units.<sup>166</sup> The National Visitor Center Facility Act,<sup>167</sup> for instance, governs tours within Washington, D.C. and it preempts contrary local law.<sup>168</sup>

The United States Supreme Court has affirmed the Secretary's broad powers to contract with concessionaires.<sup>169</sup> That power extends not only to all lands and waters within the park system,<sup>170</sup> it also covers businesses that only enter the park to pick up canoes launched outside the park.<sup>171</sup> The Secretary may prohibit solicitation of tourist business on federal property.<sup>172</sup>

Whether or to what extent NPS concessionaire contracting is subject to general government contract and procurement law are issues that apparently have not been completely resolved. In a 1978 decision, the Court of Claims stated that it was "not convinced that the NPS . . . can avoid normal, legally mandated, procurement procedures, simply by characterizing the procurement of transportation services for the public as the granting of a 'concession' to a specific contractor."<sup>173</sup> The concession in that case differed from the norm in that the NPS had agreed to pay the concessionaire for providing shuttle bus services. Because the general procurement contract requirements applied, the contract was invalid for violation of those restrictions. Despite that invalidity, the contractor could recover in *quantum meruit* for the reasonable value of the services performed.<sup>174</sup> The same court, in 1982, opined that a Bureau of the Budget Circular on cost recovery applied to an NPS agreement to provide electricity to a concessionaire.<sup>175</sup> In 1989, the Interior Board of Contract Appeals ruled that NPS concessions agreements were procurement contracts and thus within the ambit of the federal Contract Disputes Act (CDA).<sup>176</sup>

Several developments cast doubt on whether the full panoply of federal procurement law applies to NPS concession contracts. First, the NPS altered its regulations to read that its concession contracts "are not Federal procurement contracts . . . within the meaning of statutory or regulatory requirements applicable to Federal procurement actions."<sup>177</sup> Administrative interpretations are ordinarily entitled to some judicial deference.<sup>178</sup> Second, the Court of Federal Claims thereafter ruled in *YRT* that the NPS was not subject to the

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166. See 16 U.S.C. § 22 (1994) (Yellowstone National Park).

167. National Visitor Center Facility Act of 1968, 40 U.S.C. §§ 801-831 (1994).

168. *United States v. District of Columbia*, 571 F.2d 651, 657 (D.C. Cir. 1977).

169. *Universal Interpretive Shuttle Corp.*, 393 U.S. at 188-90.

170. *Carter*, 339 F. Supp. at 1397.

171. *Free Enter. Canoe Renters Ass'n*, 711 F.2d at 856; cf. *Carter*, 339 F. Supp. at 1399 (holding that the NPS may regulate service contract for rental of boats on lake within national recreation area, even though contract may be entered into outside the area).

172. *Washington Tour Guides Ass'n v. National Park Serv.*, 808 F. Supp. 877, 881 (D.D.C. 1992).

173. *Yosemite Park & Curry Co.*, 582 F.2d at 558.

174. *Id.* at 560-61.

175. *Id.* at 928; see also Concessions Rate Administration Program, 58 Fed. Reg. 64,800, 64,800 (1993) (describing OMB Circular A-25, User Charges, which outlines the scope of user charges for government services such as utilities).

176. *Appeal of R & R Enters.*, 96 Interior Dec. 313 (1989). See generally PNRL, *supra* note 1, § 9.03 (discussing the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (1994)).

177. 36 C.F.R. § 51.1 (1996).

178. See *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

Competition in Contracting Act or the federal acquisition regulations.<sup>179</sup> Although the Board of Contract Appeals refused to follow *YRT* the following year, its ruling was limited to pre-regulation contacts; those concession agreements were subject to the CDA.<sup>180</sup> The Interior Department continues to insist that concessions contracts awarded pursuant to the CPA are not subject to the Federal Acquisition Regulations applicable in other procurement contexts.<sup>181</sup> Third, the Comptroller General has concluded that the procedures mandated by the Competition in Contracting Act<sup>182</sup> do not apply to NPS concessions agreements.<sup>183</sup>

No "better view" of this technical difficulty is readily apparent. The CPA preceded the CDA and neither mentions the other. NPS concessions agreements clearly are for "the procurement of services" (and often for "the procurement of construction . . . of real property"), terms defining the scope of the CDA.<sup>184</sup> On the other hand, the services are for third parties and the public, not for the agency itself. Contrary to the usual service contract, the contractor pays the landlord for the privilege of operating. Concessions agreements are more like leases and permits than ordinary bilateral contracts. On balance, the NPS should stick to the interpretation in its regulation unless Congress decides otherwise or a court definitively rules otherwise.

## 2. The Contractual Relationship

### a. *General*

The CPA grants or clarifies certain rights accruing to those contracting with the NPS. The Act, adopted in reaction to the disruption in park concessions experienced during World War II,<sup>185</sup> was intended to allow concessionaires a fair return on their investments (but not excessive profits), while insuring that NPS concessions facilities would be affordable and available to ordinary, middle class users.<sup>186</sup>

Concessionaires contracting with the NPS are better situated than many parties to private bilateral contracts. Concessionaires have a compensable possessory interest in improvements they make,<sup>187</sup> are protected against loss of investment,<sup>188</sup> are guaranteed a reasonable opportunity to make a profit,<sup>189</sup>

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179. *YRT Servs. Corp. v. United States*, 28 Fed. Cl. 366, 392-93 (1993).

180. *Appeal of National Park Concessions, Inc.*, 101 Interior Dec. 92, 106 (1994).

181. *See YRT Servs. Corp.* 28 Fed. Cl. at 392 (1993); *see also* Concessions Contracts and Permits, 57 Fed. Reg. 40,496, 40,498 (1992) (stating that "concessions contracts are not federal procurement contracts" and "statutory and regulatory requirements relating to federal procurement actions do not apply to concessions contracts or permits").

182. Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 (1984) (codified at scattered sections throughout titles 31 and 41 of the U.S.C.).

183. *YRT Servs. Corp.*, 28 Fed. Cl. at 392-93 (1993).

184. 41 U.S.C. § 602(a) (1994); *see* PNRL, *supra* note 1, § 9.03[2].

185. *Lake Mohave*, 78 F.3d at 1366. The *Lake Mohave* opinion contains a good description of the background and legislative history of the CPA. *Id.* at 1366-67.

186. *Id.* at 1366.

187. 16 U.S.C. § 20e.

188. *Id.* § 20b(a).

189. *Id.* § 20b(b).

have preferential renewal status,<sup>190</sup> and may receive preference rights to offer new services.<sup>191</sup> Congress in 1965 thought that these rights were necessary to induce concessionaires into providing adequate service in the adverse commercial conditions under which businesses in remote areas often operate.<sup>192</sup> To obtain these benefits, a business must enter into an actual written contract with the Park Service because a contractual relationship will not be implied circumstantially.<sup>193</sup> Nevertheless, when a written contract is held invalid, the concessionaire may be entitled to *quantum meruit* recovery.<sup>194</sup>

Concession agreements typically come in two varieties: contracts and permits called "commercial use licenses." The NPS regulations governing concession arrangements,<sup>195</sup> as revised in 1992,<sup>196</sup> use the single term "concession contract" to refer in most instances to both contracts and permits.<sup>197</sup> The agency has not published all of the rules governing the issuance and administration of these agreements. The NPS can operate in this somewhat cavalier fashion because the courts agree with the agency that the public property exemption from rulemaking in the Administrative Procedure Act (APA)<sup>198</sup> allows the NPS to operate informally.<sup>199</sup> Despite this judicial stamp of approval, the agency seems more inclined now than it has been previously to publish its concession arrangement rules. It continues to maintain, however, that nothing requires it to do so.<sup>200</sup>

The NPS concession contract regulations are silent on contract terms and requirements. Instead, the regulations briefly cover definitions,<sup>201</sup> contract solicitation where no right of preference exists,<sup>202</sup> solicitation when a right of preference exists,<sup>203</sup> preferential rights for new services,<sup>204</sup> assignment of

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190. *Id.* § 20d.

191. *Id.* § 20c.

192. *See THE CONSERVATION FOUND.*, *supra* note 145, at 178.

193. *Yachts Am., Inc. v. United States*, 779 F.2d 656, 661 (Fed. Cir. 1985).

194. *Yosemite Park & Curry Co.*, 582 F.2d at 560. *See generally* PNRL, *supra* note 1, ch. 9 (describing the law of contract remedies).

195. 36 C.F.R. pt. 51 (1996).

196. Concession Contracts and Permits, 57 Fed. Reg. 40,496 (1992).

197. *Id.* at 40,498.

198. 5 U.S.C. § 553(a)(2) (1994).

199. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 776 n.1 (1969) (Douglas, J., dissenting); *Wilderness Pub. Rights Fund v. Kleppe*, 608 F.2d 1250, 1253 (9th Cir. 1979); *Clipper Cruise Line, Inc. v. United States*, 855 F. Supp. 1, 3 (D.D.C. 1994). A federal magistrate recommended in 1996, however, that the Park Service's concession contracting manual, NPS-48, be declared subject to the notice and comment rulemaking requirements of the APA and that its provisions not be applied to concessionaires pending lawful readoption of the manual. *National Park Concessions, Inc. v. Kennedy*, No. A-93-CA-628JN, 1996 WL 560310, at \*51 (W.D. Tex. Sept. 26, 1996). (The magistrate's decision did not mention the public property exemption or cite to the cases construing it.)

200. *See Revision of Certain Concession Policies*, 60 Fed. Reg. 37,469 (1995); *Concessions Rate Administration Program*, 58 Fed. Reg. 64,800 (1993).

201. 36 C.F.R. § 51.3 (1996).

202. *Id.* § 51.4.

203. *Id.* § 51.5.

204. *Id.* § 51.6.

concession contracts,<sup>205</sup> and information collection<sup>206</sup> and availability.<sup>207</sup> For new contracts, an NPS prospectus defines the contractual terms and conditions.<sup>208</sup> The three principal factors used in judging applications are less than definitive:

- (1) The experience and related background of the offeror;
- (2) The offeror's financial capability; and
- (3) Conformance to the terms and conditions of the prospectus in relation to quality of service to the visitor.<sup>209</sup>

#### b. *Solicitation and Award of Concession Contracts*

##### i. In the Absence of Preference Renewal Rights

The NPS published a standard form concession contract to guide its officers in drafting large concession contracts. Each individual contract contains unique provisions and the agency frequently alters the standard provisions.<sup>210</sup> The regulations specify in some detail how the agency must solicit and award contracts. The procedures differ in some respects depending upon whether an existing concessionaire holds a right of preference to renew its contract.<sup>211</sup>

Where no preference right exists, the agency must advertise through various publications, and must issue a prospectus describing the concession operations sought and the material provisions of the contract.<sup>212</sup> If exceptional circumstances exist, the agency may negotiate a concession contract with any qualified party without public notice or advertising.<sup>213</sup> The principal factors for selecting the best offer in response to the solicitation include: "[t]he experience and related background of the offeror, the offeror's financial capability, and conformance to the terms . . . of the prospectus in relation to quality of service to the visitor."<sup>214</sup>

The NPS reserves the right to reject all offers and resolicit or cancel a solicitation at any time.<sup>215</sup> Failure of the selected contractor to execute a final

205. *Id.* § 51.7.

206. *Id.* § 51.9.

207. *Id.* § 51.8.

208. *Id.* § 51.4(a).

209. *Id.* § 51.4(b).

210. Final Revision of National Park Service Standard Concession Contract, 58 Fed. Reg. 3140 (1993).

211. See 36 C.F.R. 51.4 and 51.5. The regulations define a right of preference as:

the right of an existing satisfactory concessioner to a preference in the extension or renewal of its contract or a new contract concerning all or part of substantially the same accommodations, facilities and services as provided by concessioner under the terms of its existing contract if the [NPS] Director chooses to continue to authorize all or part of such accommodations, facilities and services in an extended, renewed or new contract as necessary and appropriate concession activities.

36 C.F.R. § 51.3(b) (1996).

212. *Id.* § 51.4(a).

213. *Id.* § 51.4(f).

214. *Id.* § 51.4(b).

215. *Id.* § 51.4(c).

contract within the time specified by the NPS results in cancellation and resolicitation.<sup>216</sup> The NPS must forward concession contracts with anticipated annual gross receipts of \$100,000 or more or for a five-year term or more to the Senate Committee on Energy and Natural Resources and the House Committee on Natural Resources before execution.<sup>217</sup>

The NPS may terminate the award of a concession contract before execution by the government and either resolicit or cancel the solicitation. No offer or obtains compensable or other legal rights if a contract that has been solicited is subsequently resolicited or canceled.<sup>218</sup> In *Seva Resorts*,<sup>219</sup> the Ninth Circuit held that the Secretary acted within the scope of the CPA when a contract signed by the concessionaire but not the government, due to fears relating to the concessionaire's ability to perform, was canceled.<sup>220</sup>

The most comprehensive treatment of the NPS concession contracting process, the 1993 *YRT Services Corporation* concessions case,<sup>221</sup> occurred in the absence of a preference renewal right. The Yosemite concessionaire, MCA, received much criticism after it became known that in 1992 MCA paid the government only three-fourths of one percent of its gross revenues of over ninety-two million dollars.<sup>222</sup> The long-time concessionaire, now under foreign ownership, bowed to public pressure and agreed to relinquish the profitable concession.<sup>223</sup>

With preference renewal no longer in the picture, the contracting process was opened to all. The NPS conducted the search in two phases. It first required applicants to show that they were managerially competent and had equity capital of at least twelve million dollars.<sup>224</sup> Thereafter, the applicants responded in writing to the NPS Statement of Requirements (SOR), a long invitation to bid containing sixteen evaluation criteria.<sup>225</sup> Some of the criteria were quite broad and vague, for example, "the extent to which the [bidding] entity reflects an understanding of the [NPS] mission and a concessioner's role in carrying out that mission."<sup>226</sup> The process of evaluating submissions is outlined in an agency manual, NPS-48.<sup>227</sup> Evaluation panels determine whether bidders meet each criterion, prepare a matrix, and, based on an assessment of the benefits to the public and the impact on the park of each pro-

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216. *Id.* § 51.4(d).

217. 16 U.S.C. § 1a-7(c) (1994); 36 C.F.R. § 51.4(d).

218. 36 C.F.R. § 51.4(d).

219. *Seva Resorts, Inc. v. Hodel*, 876 F.2d 1394, 1399-1400 (9th Cir. 1989).

220. *Seva Resorts, Inc.*, 876 F.2d at 1400-01.

221. *YRT Servs. Corp. v. United States*, 28 Fed. Cl. 366 (1993).

222. See Carl Nolte, *New Firm Replaces Curry Co. as Yosemite Concessionaire*, L.A. DAILY NEWS, Oct. 1, 1993, at N7.

223. See Frank Clifford, *Curry Co. Turns Over Yosemite Concessions Parks*, L.A. TIMES, Oct. 2, 1993, at A18.

224. *YRT Servs. Corp.*, 28 Fed. Cl. at 372.

225. *Id.* at 374-76 (listing evaluation criteria).

226. *Id.* at 376.

227. *Id.* at 372. "NPS-48 is a 900-page concession management manual containing detailed instructions for how to judge comparability" of concessionaire proposals, including rates. *Lake Mohave*, 78 F.3d at 1363 n.3. The NPS has published in the Federal Register the chapter of NPS-48 that governs the establishment of rates charged by concessionaires. Concessions Rate Administration Program, 58 Fed. Reg. 64,800 (1993). See *infra* Part II.B.2.d.

posal, recommend to the executing official which bid to accept.<sup>228</sup> The NPS contracting process is relatively flexible, with criteria other than fees likely to be determinative in the semi-subjective evaluations.<sup>229</sup>

The NPS decided that only one bidder, Delaware North, met all sixteen criteria and awarded it the concession.<sup>230</sup> YRT, a disappointed bidder, brought suit for an injunction, claiming that the process was flawed and the decision arbitrary.<sup>231</sup> In a lengthy opinion, Judge Horn of the Court of Federal Claims rejected those allegations. Characterizing CPA agreements as "unique,"<sup>232</sup> the judge opined that "because the criteria for determining bidder responsibility are not readily susceptible to reasoned judicial review and essentially involve a matter of business judgment, . . . affirmative determinations of responsibility generally will not be overturned absent allegations of fraud or bad faith."<sup>233</sup> In the end, the decision was relatively easy since the losing bidder did not demonstrate the requisite capital and sought to change the proposal terms. YRT also did not prove any of the four factors set forth in the earlier *Keco*<sup>234</sup> decision for overturning a contract award on the ground that the government treated the bidder arbitrarily: "(1) whether the government procuring officials acted in bad faith. . . ;<sup>235</sup> (2) whether there was a reasonable basis for the government's decision; (3) the degree of discretion given to the procurement officials by applicable statutes and regulations; and (4) whether government officials violated pertinent statutes or regulations . . . ."<sup>236</sup>

The *YRT* decision demonstrates that, at least when an existing concessionaire is not entitled to preferential treatment in the contract renewal process, the NPS has discretion to choose among prospective concessionaires analogous to the freedom a private business has in selecting its contractors. Absent proof of a violation of agency regulations, unsuccessful bidders will have a difficult time foisting themselves upon an unwilling NPS.

## ii. Monopolies and Preference Renewal Rights

Concessionaires, at the Secretary's option, may be given monopolies and preferential contract renewal rights.<sup>237</sup> The Secretary appears to have virtual carte blanche to grant long-term monopolies of public services in national parks.<sup>238</sup> In *Lake Berryessa*,<sup>239</sup> for example, the Ninth Circuit upheld the

228. *YRT Servs. Corp.*, 28 Fed. Cl. at 372.

229. See Concession Contracts and Permits, 57 Fed. Reg. 40,496, 40,500 (1992) (stating "franchise fees will continue to be only a secondary factor in the evaluation of offers.").

230. *YRT Servs. Corp.*, 28 Fed. Cl. at 380-81.

231. *Id.* at 369.

232. *Id.* at 393.

233. *Id.* at 394.

234. *Keco Indus., Inc. v. United States*, 492 F.2d 1200, 1203-04 (1974).

235. Cf. *National Park Concessions, Inc. v. Kennedy*, No. A-93-CA-628JN, 1996 WL 560310, at \*15 (W.D. Tex. Sept. 26, 1996).

236. *YRT Servs. Corp.*, 28 Fed. Cl. at 387.

237. 16 U.S.C. §§ 20c, 20d.

238. *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 676 (D.C. Cir. 1976) (citing 16 U.S.C. § 20c). But see *Willow Beach Resort, Inc. v. United States*, 5 Cl. Ct. 241, 245 (1984) (rejecting the argument that preference renewal right gave existing contract holder a mo-

government's action requiring the removal of all docks and structures from a federal lake except those of the licensed concessionaires.<sup>240</sup> NPS regulations limit the circumstances in which concession contracts may be assigned.<sup>241</sup>

The CPA requires the Interior Secretary to "encourage continuity of operation and facilities and services by giving preference in the renewal of contracts or permits . . . to the concessioners who have performed their obligations under prior contracts or permits to the satisfaction of the Secretary."<sup>242</sup> The Secretary, "in his discretion," may extend or renew a contract or permit or grant a new contract or permit to the same concessionaire upon termination of a previous contract or permit.<sup>243</sup> This opportunity to provide additional services usually takes the form of a right of first refusal.<sup>244</sup> One court has interpreted these provisions as making the grant of a right of preference for new or renewal contracts mandatory, while the decision whether to renew is discretionary.<sup>245</sup> In other words, the government has the discretion not to renew at all, but if it does, it must afford a right of preference to a concessionaire who has performed satisfactorily. The regulations track the statute by distinguishing between a "right of preference"<sup>246</sup> and a "preferential right."<sup>247</sup> The former applies to renewal of existing concessions and the latter refers to "new or additional services."<sup>248</sup>

When the agency considers renewal of an existing concession, the Secretary must publish a notice of intent to grant or renew concession contracts and invite bids.<sup>249</sup> The preference renewal right runs only to concessionaires who have performed "to the satisfaction of the Secretary."<sup>250</sup> Thus, before issuing a prospectus, the NPS must determine, based on annual evaluations during the term of the contract, whether the existing concessionaire has performed in a satisfactory, marginal, or unsatisfactory manner. If the agency rates the concessionaire's performance as unsatisfactory in the year preceding issuance of the prospectus, or marginal during the two preceding years, the

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nopoly on the performance of marine services on portion of the Colorado River).

239. *Lake Berryessa Tenants' Council v. United States*, 588 F.2d 267 (9th Cir. 1978).

240. *Id.* at 270 (holding that the action did not amount to a taking).

241. 36 C.F.R. § 51.7 (1996); *see also* Final Revision of National Park Service Standard Concession Contract, 58 Fed. Reg. 3140, 3147 (1993) (explaining that "there is no inherent right to assign or sell to a third party the rights and obligations of a government contract").

242. 16 U.S.C. § 20d.

243. *Id.*

244. *See* S. REP. NO. 89-765, at 5 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3489, 3492-93 (The security of tenure provided by preference renewal rights "permit[s] both the government and the concessionaire to know where they will stand in the future and thus to assure continuity of park operations.").

245. *Current-Jacks Fork Canoe Rental Ass'n v. Clark*, 603 F. Supp. 421, 425 (E.D. Mo. 1985). The court disavowed dicta to the contrary in *Free Enter. Canoe Renters Ass'n v. Watt*, 711 F.2d 852, 858 n.8 (8th Cir. 1983). *See Current-Jacks*, 603 F. Supp. at 426-27.

246. 36 C.F.R. § 51.3(b).

247. *Id.* § 51.3(c).

248. *Id.*

249. 16 U.S.C. § 20d (1994). The NPS invites bids only from those within a "zone of active consideration" for award of a contract. *See Washington Tour Guides Ass'n v. NPS*, 808 F. Supp. 877, 882 (D.D.C. 1992).

250. 16 U.S.C. § 20d.

concessionaire's overall performance is unsatisfactory.<sup>251</sup> If the concessionaire's overall performance over the term of the contract was satisfactory, it is entitled to preference in the renewal of its contract.<sup>252</sup> "[I]f, after a prospectus which recognizes a right of preference is issued," a concessionaire receives an unsatisfactory rating in an annual evaluation, the NPS "shall cancel the solicitation or contract award and reissue the solicitation without a right of preference."<sup>253</sup> A concessionaire with an overall performance rating that is less than satisfactory is not entitled to a right of preference.<sup>254</sup>

Concessionaires must keep detailed records documenting contractual performance.<sup>255</sup> Some of these records are available to the public,<sup>256</sup> although information concerning profits, salaries, or expenses of existing concessionaires need not be disclosed.<sup>257</sup> NPS regulations additionally mandate continuous, complex reporting on all phases of concessionaire operations and authorize periodic audits.<sup>258</sup>

Satisfactory performance does not automatically entitle the existing concessionaire to the contract. The incumbent must meet the Secretary's contract bid criteria; it has no right to renewal on terms identical with the original contract, but is limited to an opportunity to meet the terms of competing proposals.<sup>259</sup> More specifically, a concessionaire with a right of preference must submit a timely offer which meets the terms and conditions of the prospectus. If the concessionaire fails to do so, its right of preference is waived, and the agency must award the contract to the party submitting the best responsive offer.<sup>260</sup> If the agency received no other responsive offer, it may resolicit without affording any right of preference, unless the resolicitation consists of terms and conditions that differ substantially from the terms of the initial prospectus.<sup>261</sup> The same procedures apply where a concessionaire with a right of preference receives a contract but fails to execute it within the time period established by the NPS.<sup>262</sup>

The regulations require equal evaluation of all responsive offers received where a right of preference applies.<sup>263</sup> If a person other than the holder of

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251. 36 C.F.R. § 51.5(a).

252. *National Park Concessions, Inc.*, 1996 WL 560310, at \*11-\*12 (ruling by a federal magistrate that issuance of a marginal rating was arbitrary given the concessionaire's minor transgressions).

253. 36 C.F.R. § 51.5(a).

254. *Id.*

255. 16 U.S.C. § 20g.

256. 36 C.F.R. § 51.8.

257. *Concession Contracts and Permits*, 57 Fed. Reg. 40,496, 40,502 (1992).

258. 36 C.F.R. § 51.9.

259. *Canyoneers, Inc. v. Hodel*, 756 F.2d 754, 759 (9th Cir. 1985); *see also Lewis v. Babbitt*, 998 F.2d 880, 882 (10th Cir. 1993) (declining to decide whether the concessionaire with a preference right must match an unresponsive proposal). Requiring the concessionaire to match an unresponsive proposal would make little sense. A non-responsive proposal should be treated as no proposal at all.

260. 36 C.F.R. § 51.5(c).

261. *Id.*

262. *Id.*

263. *Id.* § 51.5(d).



the right of preference submits the best offer, that party gains entitlement to the contract, provided the agency provides the existing concessionaire an opportunity to amend its offer to meet the terms and conditions of the best offer.<sup>264</sup> In *Hotcaveg*,<sup>265</sup> the disappointed incumbent bidder argued that this regulation conflicted with Congress's desire to encourage the continuity of concessionaires. The district court, however, upheld the Secretary's decision to cut off the incumbent's preference renewal right due to the unresponsive nature of its bid, stating that "[a]lthough continuity is a goal, it cannot be sought recklessly."<sup>266</sup> If the existing concessionaire submits on a timely basis an amended offer that is at least substantially equal to the best offer and the existing concessionaire is capable of carrying out its terms, it is entitled to the contract.<sup>267</sup>

Preferential rights are governed by different rules. Those rights apply when the NPS decides to contract for new or additional accommodations, facilities, and services of generally the same character as provided by an existing concessions contract, and the existing concessionaire by contract has a right to provide those additional services.<sup>268</sup> In those circumstances, the agency must describe the new or additional services and the terms and conditions upon which they are to be provided, and give the existing concessionaire a reasonable opportunity to offer to provide the services.<sup>269</sup> If the existing concessionaire makes such an offer, the procedures that apply to contracts not subject to preference rights apply.<sup>270</sup> In *Willow Beach Resort*,<sup>271</sup> the court held that the NPS did not violate a concessionaire's preferential rights by rejecting its "non-responsive" proposal and awarding a contract for new services to another company.<sup>272</sup>

The dividing line between a right of preference applicable to renewal of existing concessions and a preferential right applicable to new or additional services is not always clear. In *Hamilton Stores*,<sup>273</sup> two operators held concession contracts within Yellowstone National Park. The performance of one operator was deemed unsatisfactory, and the NPS assigned its operations to a new concessionaire.<sup>274</sup> When the new concessionaire began expanding its services, the remaining old concessionaire objected, claiming that its right of preference had not been observed in the original assignment. The Tenth Circuit in 1991 affirmed a judgment dismissing the claim because the expanded services were not new or additional, but rather a continuation of existing concessions, and the claimant's contract limited the preference to renewal of the

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264. *Id.*

265. *Hotcaveg v. Kennedy*, 883 F. Supp. 428 (E.D. Mo. 1995), *aff'd*, 72 F.3d 133 (unpublished table decision), 1995 WL 739991 (8th Cir. Dec. 15, 1995).

266. *Hotcaveg*, 883 F. Supp. at 430.

267. 36 C.F.R. § 51.5(d).

268. *Id.* § 51.6.

269. *Id.*

270. *Id.*

271. *Willow Beach Resort, Inc. v. United States*, 5 Cl. Ct. 241 (1984).

272. *Willow Beach*, 5 Cl. Ct. at 245.

273. *Hamilton Stores, Inc. v. Hodel*, 925 F.2d 1272 (10th Cir. 1991).

274. *Hamilton Stores*, 925 F.2d at 1274-75.

same concessions.<sup>275</sup>

The CPA does not provide disappointed bidders with a private right of action, but they can seek judicial review pursuant to the APA.<sup>276</sup> Failure to follow solicitation and award procedures requires remand for reconsideration.<sup>277</sup> Reversal on substantive grounds creates more difficulties. In the 1977 *Fort Sumter Tours* case,<sup>278</sup> the court enjoined the Secretary from awarding a contract to a competitor of the incumbent on the basis that the procedures used raised a substantial question whether the NPS adequately observed the incumbent's preference rights.<sup>279</sup> *Fort Sumter Tours* notwithstanding, judicial review of contractor selection tends to be deferential.<sup>280</sup> The disappointed bidder bears the burden of showing that the agency's selection was irrational or involved statutory or regulatory violations, and therefore that the agency breached its duty to consider the proposal fairly and honestly.<sup>281</sup> Proof that the procuring officials acted in bad faith or that no reasonable basis for the award existed satisfies that burden.<sup>282</sup>

### c. Possessory Interests

Under the CPA, a concessionaire has "all incidents of title" to structures, fixtures, or similar improvements constructed or acquired by it "except legal title," which is retained in the United States.<sup>283</sup> Equitable title vests in the concessionaire even if not recognized in the contract.<sup>284</sup> Legislation adopted in 1986 requires that all concession contracts provide that termination for cause extinguishes all possessory interests beyond depreciated book value.<sup>285</sup> If the government otherwise terminates the contract, the concessionaire receives entitlement either to an agreed amount or to "sound value . . . not to

275. *Id.* at 1281-82.

276. *Glacier Park Found. v. Watt*, 663 F.2d 882 (9th Cir. 1981); *cf.* *National Parks & Conservation Ass'n v. Hodel*, 679 F. Supp. 49, 54 (D.D.C. 1987) (asserting that there is no private right of action for the public to challenge concession contracts).

277. *See* *Glacier Park Found. v. Watt*, 663 F.2d 882 (9th Cir. 1981).

278. *Fort Sumter Tours, Inc. v. Andrus*, 564 F.2d 1119 (4th Cir. 1977).

279. *Fort Sumter Tours*, 564 F.2d at 1125. The NPS apparently must provide a copy of a competing applicant's proposal to an incumbent seeking to exercise its preference rights, although the agency may delete confidential financial information and trade secrets. *Lewis v. Lujan*, 826 F. Supp. 1302, 1308 (D. Wyo. 1992), *aff'd*, 998 F.2d 880 (10th Cir. 1993).

280. *Piscataway Co. v. United States*, 861 F.2d 265 (unpublished table decision), 1988 WL 109267 (4th Cir. 1988) (holding that a statute authorizing the NPS to cooperate with the State of Maryland to promote preservation of the Piscataway National Park authorized the agency to enter into a cooperative agreement with the State to renovate and manage a marina instead of renewing a contract with a former concessionaire). Judicial review of a preaward NPS procurement decision is particularly limited in scope. *YRT Servs. Corp.*, 28 Fed. Cl. at 386-87 (citing *RADVA Corp. v. United States*, 17 Cl. Ct. 812, 818 (1989), *aff'd*, 914 F.2d 271 (Fed. Cir. 1990)).

281. *YRT Servs. Corp.*, 28 Fed. Cl. at 387 (citing *Quality Transp. Servs., Inc. v. United States*, 12 Cl. Ct. 276, 281 (1987)).

282. *YRT Servs. Corp.*, 28 Fed. Cl. at 387 (citing *Keco Indus., Inc. v. United States*, 492 F.2d 1200, 1203-04 (Ct. Cl. 1974)).

283. 16 U.S.C. § 20e.

284. *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 676 (D.C. Cir. 1976).

285. Act of Oct. 18, 1986, Pub. L. No. 99-500, 100 Stat. 1783-247 (1986); Act of Oct. 30, 1986, Pub. L. No. 99-591, 100 Stat. 3341-247 (1986).

exceed fair market value."<sup>286</sup> A 1981 Court of Claims decision confirmed that "sound value" is not book value.<sup>287</sup>

A pre-CPA decision illustrated the meaning of "book value."<sup>288</sup> The plaintiff's concession agreement terminated in 1958; it provided that the plaintiff had a possessory interest (not legal title) and that upon termination, the Secretary would compensate the concessionaire "for its possessory interest in such improvements in an amount not less than their book value."<sup>289</sup> Plaintiff claimed that he was entitled to replacement cost as compensation. The court rejected this claim, holding that the concessionaire was due only the depreciated value of his original investment, roughly 1/40 of what he sought.<sup>290</sup> Contract principles, not statutory provisions, determined the outcome.<sup>291</sup>

After enactment of the CPA, the Court of Claims reached a different result in *Fordyce*,<sup>292</sup> where the contract also specified that compensation for extinguishment of the possessory interest would be "not less than book value."<sup>293</sup> The government argued for book value as the standard, but the court determined instead that book value set only the minimum, and that the "sound value" rule of the CPA established the appropriate standard.<sup>294</sup> The court refused to speculate on how to calculate "sound value," except that the statute specifies that it cannot exceed fair market value. Because book value is subject to accounting manipulation, sound value is undefined, and market value is an empty abstraction in the absence of a market, the interaction of contractual and statutory provisions is unnecessarily confused and confusing.

On remand, the lower court determined "sound value."<sup>295</sup> The statute says that sound value shall be "determined upon the basis of reconstruction cost less depreciation evidenced by [the improvement's] condition and prospective serviceability in comparison with a new unit of like kind, but not to exceed fair market value."<sup>296</sup> This standard differs drastically from "book value" since it ignores depreciation of the asset claimed for tax purposes and instead deducts from reconstruction (or replacement) cost *physical* depreciation of the improvement. In *Fordyce*, reconstruction cost would have been high, and deduction of physical depreciation of the massive bathhouse at issue would still leave a substantial sum, an amount far in excess of what the government's experts testified was fair market value.<sup>297</sup> Plaintiff argued that fair market value did not apply in this instance because there was no market. The court disagreed, holding that a bathhouse was not a "special-use property" lacking a clear market such as a sewer or a church, because "market

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286. 16 U.S.C. § 20e.

287. *Fordyce v. United States*, 650 F.2d 1191 (Ct. Cl. 1981).

288. *Bishop v. United States*, 164 Ct. Cl. 717 (1964).

289. *Bishop*, 164 Ct. Cl. at 722.

290. *Id.* at 737-38.

291. *See also* *Schoeffel v. United States*, 193 Ct. Cl. 923 (1971).

292. *Fordyce*, 650 F.2d at 1195.

293. *Id.* at 1194. Most pre-CPA contracts specified book value as the standard.

294. 16 U.S.C. § 20e.

295. *Fordyce v. United States*, 7 Cl. Ct. 591, 600 (1985).

296. 16 U.S.C. § 20e.

297. *Fordyce*, 7 Cl. Ct. at 594-96.

comparables" existed in the area.<sup>298</sup> "Highest and best use" determines market value.<sup>299</sup> Holding that the highest use for a bathhouse was as an office building (although the NPS intended to convert it to a visitor center), the court accepted the government's valuation and awarded \$152,000.<sup>300</sup>

When the NPS amended its standard form concession contract in 1993,<sup>301</sup> it altered the method for measuring the compensation due a concessionaire for its possessory interest by replacing sound value with a redefined "fair value."<sup>302</sup> Instead of basing compensation on the appreciated value of the improvements, the new standard contract authorizes a calculation based on the actual cost of constructing an improvement, less straight line depreciation over the estimated useful life of the improvement according to Generally Accepted Accounting Principles. According to the NPS, sound value compensation likely provides higher compensation to the concessionaire than the new fair value measure, although the latter continues to ensure that the concession holder will be able to recover the investment it makes in a concession building. The NPS explained its jettisoning of the sound value compensation provision contained in the old contract form because sound value compensation imposes unnecessary financial liability on the government, inhibits fair competition in the award of concession contracts, and impairs the NPS's ability to undertake changes in the location and uses of concession facilities required for preservation of park resources and their enjoyment by park visitors.<sup>303</sup> The latter adverse effect occurred because if the NPS sought relocation of a concession facility, it had to pay compensation in the amount of the sound value of the structures removed.<sup>304</sup>

#### d. *Opportunity to Profit and Franchise Fees*

Loss-of-investment protection is more tenuous than protection of possessory interests. At the Secretary's discretion, the contract may include a clause providing for protection against loss of investment in structures, fixtures, improvements, supplies, and other tangible property. However, protection is afforded only against subsequent discretionary secretarial actions or policies.<sup>305</sup> Additionally, the CPA requires the Secretary to exercise his authority in a manner consistent with a reasonable opportunity for the concessionaire to realize a profit commensurate with the capital invested and the obligations assumed.<sup>306</sup> While this provision prevents the Secretary from sabotaging or

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298. *Id.* at 598-99.

299. *Id.* at 599.

300. *Id.* at 600-01.

301. Final Revision of National Park Service Standard Concession Contract, 58 Fed. Reg. 3140 (1993).

302. The new calculation methodology has been challenged as inconsistent with the CPA in a suit brought by the National Park Hospitality Association. GAO, CONCESSIONS CONTRACTING, *supra* note 116.

303. Final Revision of National Park Service Standard Concession Contract, 58 Fed. Reg. at 3142-43.

304. *Id.* at 3145.

305. 16 U.S.C. § 20b(a).

306. *Id.* § 20b(b).

undermining the concessionaire's operation, it does not guarantee a profit, only an opportunity to realize a profit.<sup>307</sup>

The CPA also governs the establishment and adjustment of franchise fees. Franchise fees must be determined based on consideration of the "probable value" of the contract to the concessionaire.<sup>308</sup> Probable value "is the opportunity for net profit in relation to both gross receipts and capital invested."<sup>309</sup> The government must subordinate consideration of its revenue to the objectives of protecting the area related to the contract and providing adequate services for visitors at reasonable rates.<sup>310</sup> Contracts must provide for reconsideration of franchise fees at least once every five years.<sup>311</sup>

The Concession Guidelines contained in NPS-48<sup>312</sup> establish a methodology for calculating concessionaire franchise fees.<sup>313</sup> Chapter eighteen of NPS-48, which governs the approval of concessionaire rates, has been published in full in the Federal Register.<sup>314</sup> The manual describes the objective of rate approval as "assur[ing] that concessioner rates and charges to the public are commensurate with the level of services and facilities provided, as well as reasonable and comparable with similar services and facilities provided by the private sector."<sup>315</sup>

Rates are established pursuant to one of seven methods. The preferred method is a "review of similar services." This method applies where comparable businesses exist in a competitive market and focuses on the quality of service and amenities in establishing prices.<sup>316</sup> Its purpose is to offset the possibility of monopoly pricing by concessionaires.<sup>317</sup> The second method, "simplified review of similar services," is a quick, relatively cost-efficient method of review which is available for low volume sales when a service is not covered by the full review method.<sup>318</sup> Simplified review of similar services entails a comparison of the concessionaire's prices with those of selected private businesses located, if possible, on non-federal lands.<sup>319</sup> Third,

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307. *Yachts Am., Inc. v. United States*, 779 F.2d 656, 662 (Fed. Cir. 1985); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir. 1976); *cf. National Park Concessions, Inc. v. Kennedy*, Civ. No. A-93-CA-628 JN, 1996 WL 560310 (W.D. Tex. Sept. 26, 1996) (determining that NPS denied concessionaire reasonable opportunity to earn a profit by refusing to allow it to use Special Account Fee fund to pay for improvements and by failing to approve its food rates).

308. 16 U.S.C. § 20b(d).

309. *Id.*

310. *Id.*

311. *Id.*

312. *See supra* note 227 and accompanying text.

313. *Lake Mojave*, 78 F.3d at 1363 n.3. The manual assesses the comparability of a concessionaire's rates with those of other facilities under similar conditions.

314. Concessions Rate Administration Program, 58 Fed. Reg. 64,800 (1993). But a federal magistrate found that the Park Service did not comply with the APA's notice and comment rulemaking procedures in issuing NPS-48 and recommended that the agency be enjoined from applying its provisions to a concessionaire until that defect was cured. *Kennedy*, 1996 WL 560310, at \*50.

315. Concessions Rate Administration Program, 58 Fed. Reg. at 64,800.

316. *Id.* at 64,802.

317. *Id.* at 64,803.

318. *Id.* at 64,802-03.

319. *Id.* at 64,811.

"specified rate on authorization" is used when the business involves a limited number of unique items or services (such as seaplane excursions, horseback rides and mountain-climbing), a simple rate structure, and no comparable businesses are readily available.<sup>320</sup>

"Merchandise pricing" is the preferred method for establishing retail prices for goods (e.g., curios and groceries) in which there exists the industry practice of setting prices according to the desired margin for a product line by a percent markup.<sup>321</sup> Merchandise pricing is not permitted for service-related businesses in which quality of service and amenities are important factors (e.g., restaurants, hotels, transportation, marina operations, etc.).<sup>322</sup> If a highly competitive market exists in the immediate vicinity of the park and the pricing of unique items (e.g., handicrafts) is routinely negotiated between the vendor and the customer, the "competitive market declaration" method may be used.<sup>323</sup> The competitive market method reduces the agency's administrative burden in determining rates because competition forces the concessionaire to charge comparable rates.<sup>324</sup> The "indexing" method is used in conjunction with, or subsequent to, rates established by another method. It is especially useful for interim rate approvals and situations when the agency faces management constraints on time, travel, or money.<sup>325</sup> The final authorized method of establishing prices is by "financial analysis." This method involves a process by which the agency determines on an ad hoc basis if the prices are comparable with the industry after considering and exhausting all other methods.<sup>326</sup> Rate approval decisions may be appealed to the Regional Director.<sup>327</sup>

A concessionaire unsuccessfully challenged the application of both the CPA's franchise fee provisions and NPS-48 in the 1995 *Fort Sumter Tours* case.<sup>328</sup> The Secretary notified the concessionaire (FST) that it was considering renegotiation of the franchise fee pursuant to the CPA. Instead of negotiating with the government, FST filed a declaratory judgment action to determine its rights under the contract. After the government increased the fee, FST's action became an administrative appeal of the increase decision. FST argued first that the CPA prohibits the NPS from considering profits when determining franchise fees. The court found this argument to be inconsistent with the plain language of the CPA.<sup>329</sup> FST also claimed that NPS-48 impermissibly sought to limit concessionaire profits, but the court determined that the function of the guidelines was to provide a framework for the reporting of financial data and the determination of an appropriate franchise fee. Contrary to FST's contention, the agency properly used a comparison of the

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320. *Id.* at 64,803, 64,813.

321. *Id.* at 64,803.

322. *Id.* at 64,814.

323. *Id.* at 64,803.

324. *Id.* at 64,815.

325. *Id.* at 64,803.

326. *Id.*

327. *Id.* at 64,802.

328. *Fort Sumter Tours, Inc. v. Babbitt*, 66 F.3d 1324, 1327 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 1848 (1996).

329. *Fort Sumter Tours*, 66 F.3d at 1329 (citing 16 U.S.C. § 20b(b), (d)).

concessionaire's returns with the profits of other companies in the industry as a factor in determining an appropriate fee.<sup>330</sup> According to FST, the CPA authorizes unilateral reconsideration but not adjustment of franchise fees. The court, however, deferred to the Secretary's contrary interpretation because a provision authorizing unilateral reconsideration would be meaningless in the absence of the ability to adjust.<sup>331</sup> Finally, the court rejected FST's claim that the contract provision relating to adjustment of franchise fees was so broad that it afforded the government "an absolute right to sabotage the entire contract."<sup>332</sup> The contract included sufficient procedural constraints and safeguards to "provide a check on random adjustment of fees."<sup>333</sup>

Similar in effect was the 1982 *Yosemite Park*<sup>334</sup> decision. The NPS raised the rates it charged its concessionaire for electricity, using a different computation based on comparable private costs. The court agreed with the agency that this readjustment was "reasonable" within the meaning of the contract.

According to Interior Department investigators in their testimony before Congress in 1990, the Interior Department is losing tens of millions of dollars each year as a result of poorly drafted concession contracts.<sup>335</sup> The inadequacy of the fee provisions of these contracts is even more troublesome because there is no private right of action under the CPA to challenge a concession contract on the ground that it charges unreasonably low fees.<sup>336</sup> Similarly, members of the public may not sue for breach of a concession contract as third party beneficiaries.<sup>337</sup>

In 1993, the NPS amended the standard concession contract that provides a guide for the execution of large concession contracts.<sup>338</sup> Among other things, the 1993 contract reduces the compensation to which concessionaires are entitled upon termination of possessory interests.<sup>339</sup> In 1995, the NPS announced that it had begun a review of all of its policies concerning concession management activities.<sup>340</sup> In the interim, it eliminated a policy (set forth in

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330. *Id.* at 1329. The concessionaire argued that such a comparison would tailor profits to the average profitability of the industry, thereby encouraging mediocrity and discouraging efficiency. *Id.*

331. *Id.* at 1330.

332. *Id.* at 1331.

333. *Id.* at 1332. The concessionaire argued that the contract was inconsistent with the common law of contracts because it allowed for modification without consideration from the party opposing the modification. But the court regarded a fee adjustment as an action that takes place pursuant to the terms of the contract itself, rather than as a modification of the contract. *Id.*

334. *Yosemite Park & Curry Co. v. United States*, 686 F.2d 925 (Cl. Ct. 1982).

335. John Lancaster, *Profiteering in the Parks?; Concessionaires' Contracts Cost U.S. Tens of Millions, Hill Is Told*, WASH. POST, May 25, 1990, at A19.

336. *National Parks & Conservation Ass'n v. Hodel*, 679 F. Supp. 49, 54 (D.D.C. 1987)(citing *Glacier Park Found. v. Watt*, 663 F.2d 882 (9th Cir. 1981)).

337. *Id.* at 54 (citing *Berberich v. United States*, 5 Cl. Ct. 652, 655 (1984), *aff'd mem.*, 770 F.2d 179 (unpublished table decision) (Fed. Cir. 1985)).

338. Final Revision of National Park Service Standard Concession Contract, 58 Fed. Reg. 3140 (1993).

339. See *supra* Part II.B.2.c.

340. Revision of Certain Concession Policies, 60 Fed. Reg. 37,469 (1995); Concession Contract Policies, 60 Fed. Reg. 3435 (1995).

Chapter 24 of NPS-48) which limited a concessionaire's franchise fee to 50% of its pre-tax, pre-franchise fee profit.<sup>341</sup> Although the policy was intended as a guideline to aid in the establishment of fees, it was interpreted as setting a firm cap. The agency conceded that the policy lacked either an empirical or a theoretical justification and that it could result in the recovery of fees that amount to less than probable value. According to the NPS, the policy favored large concessionaires and reduced the fees payable to the government over a five-year period by as much as \$1.8 million on one concession contract alone.<sup>342</sup> Franchise fees may now exceed the old fifty percent figure, provided the amount is otherwise consistent with a reasonable opportunity for profit and with the objectives of providing adequate and appropriate service to park visitors.<sup>343</sup> Despite the change in policy, concessionaires with less than \$100,000 in annual gross receipts must still pay only two percent of those receipts as fees.<sup>344</sup>

The 1995 interim policy change also clarified that the NPS need not approve an interim rate schedule. This clarification addressed the practice of some concessionaires of accepting deposits for individual reservations without securing the rates for the facility or service reserved, but including in the confirmation notice a caveat that rates are subject to change without notice. This policy had led to increased rates that were not always justified.<sup>345</sup>

Finally, the NPS eliminated the interim right to appeal the selection of comparable businesses. Pursuant to the CPA,<sup>346</sup> the NPS determines rates primarily by comparison with the rates charged for facilities and services of comparable character under similar conditions, giving consideration to factors such as the length of the season, peakloads, average percentage of occupancy, accessibility, availability and cost of labor and materials, and type of patronage.<sup>347</sup>

The pre-1995 procedures allowed concessionaires to appeal the selection of comparables<sup>348</sup> and, if that appeal failed, to file a second appeal of the approved rate. A concessionaire whose appeal of the approved rate was rejected could also appeal the basis of the comparables selected. The elimination of the "comparable appeal" was meant to remove that duplicative appeal and expedite the appeals process.<sup>349</sup>

Commentators have criticized Park Service concessions policy on the grounds that relationships are too cozy, concessionaires are over-insulated from competition, and commercial development is harmful to park purposes.<sup>350</sup> Given the extremely broad secretarial latitude to regulate concessions

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341. Revision of Certain Concession Policies, 60 Fed. Reg. 37,469 (1995).

342. Concession Contract Policies, 60 Fed. Reg. at 3435.

343. *Id.*

344. Revision of Certain Concession Policies, 60 Fed. Reg. at 37,470.

345. *Id.*

346. 16 U.S.C. § 20b(c).

347. Revision of Certain Concession Policies, 60 Fed. Reg. at 3435.

348. "The selection of comparables is the cornerstone of the entire process." Concessions Rate Administration Program, 58 Fed. Reg. 64,800, 64,803 (1993).

349. Concession Contract Policies, 60 Fed. Reg. at 3436.

350. See, e.g., Mantell, *supra* note 145; A. RUNTE, *supra* note 147.



in existing law, and judicial reluctance to interfere with exercise of that discretion (except to require procedural compliance), the issue is more political than legal. This Part has described some recent NPS reforms intended to enhance competition and the Park Service's share of concession revenues. Nevertheless, if the law of national park concessions is to be changed in anything other than an incremental manner, park advocates will have to convince Congress to change it.

### III. REFORM OF NATIONAL PARK CONCESSIONS LAW AND POLICY: THE QUESTIONS

Evidently, no one who is willing to put his or her opinions in print is satisfied with NPS concessions law and policy. Park users, environmentalists, concessions contractors, academics, the General Accounting Office (GAO), legislators, and the NPS itself—all decry one or more aspects of the current situation. Nearly all concerned agree that some share of concession revenues ought to be returned to the national park system for maintenance and other needs. Most seem to agree that the anti-competitive aspects of the current system deprive the national park system of needed revenue while making service improvement more difficult. Preferential rights and possessory interests in particular are the objects of critical outrage. Most commentators apparently accept the appropriateness and desirability of contracting with private entities for visitor services, but many disagree on the optimum degree of facility development. In the overall scheme of things, overcrowding (which may contribute to overuse of park resources) and facility deterioration are more important than return to the government, but the latter problem certainly is not negligible.

#### A. *A Hierarchy of Reform Questions*

The present system, whereby the NPS chooses private entities to provide visitor services, began as a pragmatic administrative solution and later was embodied into the CPA. Interested parties now are virtually unanimous that the CPA is inadequate and should be heavily amended if not repealed. The reform fervor naturally raises a galaxy of questions. Competing versions of pending concessions reform legislation provide conflicting answers to some but not all such questions.

In assessing Park Service concessions law and policy, the issues can be divided into three categories: preliminary, greater, and lesser. The preliminary questions are very basic and can generally be answered without analysis. Those questions include:<sup>351</sup>

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351. Another preliminary question is whether Congress should have a uniform concessions policy for all land management agencies. The concessions reform bill introduced by Rep. Hansen in 1995, which is discussed below, would have put all of the concession-granting federal land management agencies under a single legal regime. H.R. 2028, 104th Cong. (1995). Rep. Meyers' competing bill, also discussed below, is confined to the National Park System. H.R. 773, 104th Cong. (1995). The other federal land management agencies have strongly resisted a unitary system, claiming that their situations and practices are necessarily and rightfully different. Uniformity

Should the park system have any developed visitor facilities?

Assuming some agreed level of facility development, should that development, maintenance, and operation be carried out by private or public entities?

The "greater" questions that any reform effort must answer, explicitly or implicitly, go to the basic structure and outlines of a new concessions regime. They include:

What are the optimum degrees of recreation facility development and provision of recreational services in national parks?

Are special incentives still necessary to induce businesses to bid for NPS concession contracts?

To which uses should concession franchise fees (and entrance fees) be directed?

To what extent, if at all, should the United States rely on private entrepreneurs to provide capital improvements?

Which entities should be responsible for which aspects of setting prices for tourist services?

Should the NPS be required to comply with the Administrative Procedure Act in promulgating concessions regulations?

Should NPS concession contract mechanisms be required to comply with all or some of the panoply of federal laws otherwise applicable to government contracts?

To what extent should NPS concessions law be spelled out by statute rather than delegated to administrative discretion?

Should NPS concessions contracts take the form of arms-length business transactions?

Answers to the greater questions will, to an extent, dictate the answers to the lesser questions. The characterization as lesser questions does not indicate importance. However, because they relate more to means than to ends, they necessarily have a lower priority. Assuming that the initial premises will lead to a concessions system resembling, at least in broad outline, the current system, the lesser questions will include:

Should preference rights to renewal or to provision of additional services be allowed, and, if so, to what extent?

Should the NPS treat large and small concessionaires differently, and, if so, to what extent?

When, if ever, are departures from competitive bidding justified?

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has obvious benefits to all concerned, but some of those differences are unquestionably real. Although uniform concessions policy is beyond the scope of this article, the answer ought to depend upon whether the benefits to be derived from the simplicity of administering a uniform system would exceed the costs of applying such a system to agency contracts not well suited to the template chosen. *See supra* notes 119-120 and accompanying text; Statement of David Unger, Forest Service, Before the Subcomm. on National Parks, Forests, and Public Lands of the House Comm. on Resources, July 25, 1995.

Should the value of improvements be measured by straight-line depreciation or by some other method?

Should franchise fees be based on percentages of gross receipts or on net profits or on some other basis?

What appeal mechanism, if any, would best provide an efficient means of dispute resolution?

What mechanism will provide the best evaluation of concessionaire performance?

Members of Congress, the GAO, NPS personnel, current concessionaires, the National Parks and Conservation Association, and many more groups and individuals have debated some of these issues at length over the past decade in several forums. The remainder of this section takes up each of the foregoing questions in the context of that continuing debate. Because the answer to any of those questions necessarily implicates a value judgment of a policy or political nature, there necessarily is no single right answer. Sharply differing versions of reform legislation were introduced in 1994 and 1995. Representative Meyers's (R. Kan.) 1995 bill, H.R. 773,<sup>352</sup> is the same as a bill that passed overwhelmingly in the House in 1994 but did not survive to enactment.<sup>353</sup> Representative Hansen (R. Utah) introduced a competing measure, H.R. 2028, in 1995 that is far more favorable to existing concessionaires.<sup>354</sup> It formed the basis for the Visitor Facilities and Services Enhancement Act of 1995,<sup>355</sup> which was passed by both houses of Congress as part of a reconciliation budget bill but was vetoed by President Clinton.<sup>356</sup> The two bills together offer a starting point for analysis of reform possibilities and approaches. The following subsections summarize the major arguments and positions adduced by legislators, commentators, witnesses, etc., and the authors will also assess the merits of the competing positions. The next subsection examines the two "preliminary" questions, and following subsections attempt to provide reasonable answers or approaches to the "greater" and "lesser" questions identified above.

## B. *The Preliminary Questions*

### 1. Outlaw Facility Development?

It is far too late in history to argue that national parks should be left totally in a state of nature, without any facilities or amenities for human visitors. National parks were established for present enjoyment as well as preserva-

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352. H.R. 773, 104th Cong. (1995).

353. Statement of Rep. Jan Meyers Before the Subcomm. on National Parks, Forests, and Public Lands of the House Comm. on Resources, July 25, 1995, 1995 WL 443431.

354. H.R. 2028, 104th Cong. (1995).

355. See H.R. REP. NO. 104-280, pt. 1, at 581 (1995).

356. President Clinton vetoed H.R. 2491, the Seven-Year Balanced Budget Reconciliation Act of 1995, which included the Visitor Facilities and Services Enhancement Act of 1995. THE WHITE HOUSE OFFICE OF COMMUNICATIONS, PRESIDENT'S MESSAGE TO CONGRESS ON VETO OF H.R. 2491 (1995) (1995 WL 723231).

tion,<sup>357</sup> and most Americans could not use them without some support services, whether guides or buses or roads or food.<sup>358</sup> As a matter of elementary fairness, closing the parks, our nation's crown jewels, to all but hardy backpackers would be politically and popularly disastrous. Neither the Hansen nor Meyers bill considered the possibility of parks free of all facilities.

And, of course, the primitive recreation function is already served by the National Wilderness Preservation System.<sup>359</sup> In 1964, Congress prohibited development in wilderness areas, and the only human activities allowed are forms of nonmotorized recreation.<sup>360</sup> Roughly half the acreage of the park system has been designated as wilderness,<sup>361</sup> so those opportunities for a primitive wilderness experience are alive and well in the parks for those who choose to forgo facilities and amenities.

Even if abolition or phasing out of facilities in national parks were desirable, it would be highly impractical. The existing investment, which, under current law and the Fifth Amendment would have to be condemned,<sup>362</sup> runs into many millions of dollars. Razing and reclamation would add billions more to the federal bill.

## 2. Ban Private Entrepreneurs?

The powers-that-be have long assumed that private enterprise should provide national park services and facilities whenever and wherever it might be profitable and appropriate to do so. Both the Meyers and Hansen bills proceed on this assumption. Even though sentiment for turning that job over to the NPS or any other public agency seems to be completely lacking in any political quarter, and recent proposals have urged privatization of public resources rather than the reverse,<sup>363</sup> it still may be useful to examine the implicit assumption that private entities are the best service and facility providers before conforming all proposals for concessions reform to that assumption.

As matters now stand, private concessionaires receive monopolies to cater to captive markets for any service that someone will pay for. The NPS, on the other hand, builds the main infrastructure such as roads and bridges and provides services such as visitor centers, lectures, trail maintenance, hiker rescues, firefighting, security, campgrounds, clean ups, and so forth. All of these facilities and amenities are free to the visiting public—and to concessionaires. The concessionaires take large profits away from the parks while paying the United States a relative pittance that goes into the general fund, not to the park sys-

357. 16 U.S.C. §§ 1 to 1a-1.

358. *See, e.g.*, J. SAX, *supra* note 138.

359. Wilderness Act of 1964, 16 U.S.C. § 1131(a) (1994); PNRL, *supra* note 1, ch. 14B.

360. 16 U.S.C. § 1133 (c).

361. As of 1992, Congress had designated 39 million acres of the park system as official wilderness. PNRL, *supra* note 1, §§ 2.04[2], 14B.02[2]. Congress carved additional wilderness areas out of the California Desert Conservation Area in 1994. California Desert Protection Act of 1994, Pub. L. No. 103-433, 108 Stat. 4471 (1994).

362. On the subject of federal liability for takings, see PNRL, *supra* note 1, §§ 4.04-4.06, ch. 10B.

363. *E.g.*, S. 1031, 104th Cong. (1995); H.R. 2032, 104th Cong. (1995) (bills that would transfer to the states title to lands currently administered by the BLM).

tem.<sup>364</sup> The NPS collects admission fees at many units, but those small fees also go to the Treasury in Washington, D.C.<sup>365</sup> These facts support the argument that the NPS should provide the profitable as well as the unprofitable services to visitors. Public utilities traditionally were required to serve customers in relatively unprofitable outlying areas in exchange for the grant of exclusive access to more profitable population centers.<sup>366</sup> Permitting private concessionaires to reap the profits of a monopoly market without bearing a fair share of the cost of providing service to a captive market runs against this tradition; allocating the risk of gain as well as loss to the government would be consistent with it. Running a restaurant or gift shop is less complicated and demanding than running a spy satellite system or building a dam. Government personnel could pump gas, cut firewood, or run a canoe livery just as well as corporate employees, and they would likely have more solicitude for the parks' natural resources and values.

Certainly, elimination of private concessionaires would simplify many conundrums and avoid many sources of inefficiency. To avoid knotty compensation problems, it would be advisable, if not necessary, to impose such a prohibition on a prospective basis only. Existing concession contracts would be permitted to run their course but would not be renewed. If private concessions were phased out in this manner, the whole bidding system and its thousands of pages of regulations and its episodic bouts of litigation could be jettisoned (although the government would still have to enter into procurement contracts for construction materials, supplies, and the like). Most of the major concessionaire problems identified by critics of the current system—monopoly, possessory interests, preference renewal rights, low fees, and so forth—would be mooted.

Due to the political environment, the counter arguments will likely prevail, even though they are not nearly as strong as some of their advocates seem to believe. The truism that this country is founded on private enterprise, not socialistic public enterprise, has been forgotten or ignored whenever the Congress has realized that private companies cannot or will not accomplish what it deems to be a national priority. TVA, the irrigation of the West, Comsat, the Postal Service, rural electrification, Head Start, FDIC, agricultural extension offices, and indeed, the national parks themselves, are but a few examples. Still, the federal government has seldom ventured into profit-making activities, and tradition militates against it. That tradition owes much to the

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364. The federal government earned a 3.6% rate of return on all of its concessionaires' gross revenues in fiscal year 1994. It earned only a 2.8% rate of return on the six land management agencies' concessions. By way of contrast, the states of California, Maryland, Michigan, and Missouri received a 12.7% rate of return on a similar range of concessions contracts during that period. GAO, CONCESSIONS CONTRACTING, *supra* note 116.

365. Those fees are restricted by law. 16 U.S.C. § 4601-6a.

366. The practice of restricting service to the most profitable segments of a market is called cream-skimming. See *City of Morgan City v. South La. Elec. Coop. Ass'n*, 31 F.3d 319, 324 (5th Cir. 1994), *cert. denied*, 116 S. Ct. 275 (1995); *Associated Gas Distribs. v. F.E.R.C.*, 824 F.2d 981, 1035 (D.C. Cir. 1987), *modified*, 41 F.E.R.C. # 61,351 (1987); see also Danya B. Matthew, *Doing What Comes Naturally: Antitrust Law and Hospital Mergers*, 31 HOUS. L. REV. 813, 833 (1994); Tony Prosser, *Social Limits to Privatization*, 21 BROOK. J. INT'L L. 213, 237 (1995).

initial premise that government cannot operate as efficiently as private industry, another shibboleth more often recited than proven. The functioning of the federal government when it acts in its sovereign capacity is designed to be inefficient as a safeguard against tyranny.<sup>367</sup> Similar safeguards are less necessary when the government acts as a proprietor, and the government's exercise of its sovereign functions do not disable it from acting efficiently as a proprietor. Moreover, private sector monopolies are hardly a paradigm of efficient behavior.<sup>368</sup> Monopolistic concessionaires have not offered evidence that their performance is superior to what the government could achieve if it appropriated the profit-making potential of park concessions to itself.

Even if concessionaires could supply such proof, it is not clear that economically efficient provision of goods and services is the appropriate yardstick of concessionaire performance. In national park concessions policy, service at the least cost, generating the highest profits, should not necessarily be high on the public priority list. Public policy should be more concerned with the quality of visitors' park experiences than with who provides them and at what profit margin. "National Park Service, Inc." is not going to displace private concessionaires on any large scale. Still, the idea that the agency is capable of providing services if and when private services are absent or unsatisfactory is not immoral or un-American, and it should not be automatically rejected. It might even be worthwhile establishing a pilot project where the Park Service operates expired concessions contracts at selected parks for several years.<sup>369</sup> At the end of that time, Congress could assess, using whatever criteria it devises to gauge conformity with the objectives of park concession operations, how the NPS concessions performed compared to previous private concessions at the same parks and to contemporaneously operated private concessions at other parks.

In any event, it seems clear that national parks will continue to have developed facilities for visitors and that private entities will continue to provide the lion's share of facilities and services. But, as earlier noted, nearly all concerned argue or concede that the present system is seriously flawed. How, then, should the system be changed? That question cannot be answered until Congress decides what the national parks should be, and for whom.

Concern with day-to-day crises often causes relative disregard for ultimate ends. Managers (and academics) often lack the time (or inclination) to envision the best resolution of the entire problematic subject, when they are beset

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367. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Frankfurter, J., concurring).

368. "[F]irms in a monopoly position can restrict output, increase profits, and consequently impose a social welfare loss by charging higher than competitive prices." SIDNEY A. SHAPIRO & JOSEPH P. TOMAIN, *REGULATORY LAW AND POLICY* 43-44 (1993).

369. Congress has often authorized pilot projects to determine whether to embark on new directions in natural resource law and policy. See, e.g., 7 U.S.C. § 2669 (1994) (establishing pilot projects for production and marketing of industrial hydrocarbons and alcohols from agricultural commodities and forest products); 16 U.S.C. § 1682 (1994) (implementing wood residue utilization pilot projects); 16 U.S.C. § 5403(j)(2)(E) (1994) (describing pilot projects for innovative approaches to management of maritime and underwater cultural resources at national parks and similar sites).

with putting out the daily fires. A vision of the optimum policy for concessions in the national park system is, of course, a statement of political and policy preference, but the task cannot be avoided if coherence is desired for any particular proposal.

The object of concessions reform should not be to punish present or past concessionaires for their real or imagined sins. They were, after all, merely taking advantage of a favorable package of benefits that Congress had decided was necessary and appropriate. Instead, the object should be promoting the public interest in future concessions. Although the public interest in any particular situation can be uncertain and controversial, the public interest in this case inheres in the nature of the national parks and the reasons they were reserved as parks. The parks were reserved, first, for the enjoyment of the American people. The organic Park Service statute specifically states that the "curiosities" in the parks must be available to all and cannot be monopolized by any one group.<sup>370</sup> Equally clearly, Congress never intended the national parks to be amusement parks, devoted entirely to human entertainments and comforts. Parks were created because Congress deemed each such area to be unique and awe-inspiring in its natural attributes, and Congress specified that those attributes (scenery, wildlife, etc.) were to be preserved for the enjoyment and wonder of future generations.<sup>371</sup> Hotels, gift shops, and canoe rentals may be enjoyable and may even conceivably inspire wonder, but they are not natural objects or systems worthy of preservation. Indeed, commercial enterprises are antithetical to basic park reservation purposes just as often as they are necessary to full enjoyment of the parks by some.

The major objects of national park concessions policy, therefore, should be to restrict and confine as much if not more than to enable. While the policy should ensure equal access and full enjoyment for all Americans, it should also strictly forbid overdevelopment of facilities. And while such a policy must be fair to concessionaires, it should not overcompensate them either by charging the government too little or by allowing them to charge the patrons too much. These of course are fine lines, but line-drawing cannot be avoided when achievement of conflicting aims is desired.

### C. *The Greater Questions*

#### 1. Limit or Lessen Facility Development?

The appropriate degree of development is a political question on a par with whether any development should be allowed. Political questions should be answered by Congress. In this case, Congress has already spoken to the issue generally by requiring the Secretary of the Interior to encourage the private provision and operation of "desirable" facilities and services for the accommodation of park visitors,<sup>372</sup> but its general answer controls relatively few specific problematic instances.

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370. 16 U.S.C. § 3 (1994).

371. *Id.* § 1.

372. *Id.* § 20a.

The National Park Service's charter speaks both to recreation ("enjoyment") and preservation.<sup>373</sup> Where the two collide, present recreation should yield to future preservation.<sup>374</sup> The harm to the scenic and biotic resources caused by intensive recreation is incompatible with future preservation, but current preservational policies are usually compatible with future recreation possibilities. In any event, the CPA codifies the notion of preservational precedence in the realm of facility development.<sup>375</sup>

The competing Meyers and Hansen bills diverge very sharply in describing the desired ends of a park concessions policy. Hansen's H.R. 2028 spells out only two purposes: (1) recognizing the importance of public-private partnerships; and (2) utilizing a competitive process to ensure fair prices, a fair return, and "a reasonable opportunity for the economic viability of the concessioner."<sup>376</sup> This assumes the appropriateness of existing and future facilities. In contrast, the Meyers bill, H.R. 773, is replete with references to the original park preservation purpose. Under this bill, Congress would find that facilities "should be provided *only* under carefully controlled safeguards against unregulated and indiscriminate use . . . and . . . should be limited to locations and designs consistent to the highest practicable degree with the preservation and conservation of park resources and values."<sup>377</sup>

Whether any particular recreational or commercial development is desirable or excessive is necessarily a circumstantial inquiry. If the appropriateness of the proposal is in doubt, the better view, given the statutory strictures, is to decide against it or to move the facility outside park boundaries. In many cases, lands surrounding or adjacent to parks are under the control of the BLM, the FWS, or, especially, the Forest Service. Gas stations, restaurants, gift shops, and even campgrounds seem better suited for lands not subject to the NPS's fundamentally preservational mandate. Coordination of concessions policy among the federal land management agencies may be inconvenient and require statutory amendments, but it will likely result in the achievement of a better balance between resource protection and the provision of efficient and adequate services to federal land users than the current patchwork arrangements do.

By the same token, the Park Service should accelerate its efforts to reduce private motor vehicles in parks. Shuttle bus systems can transport hikers to trailheads, campers to sites outside the back country, students to visitor centers, and all to the more popular attractions. Situations such as the overcrowding in Yosemite Valley and traffic jams around Old Faithful in Yellowstone

373. *Id.* §§ 1 to 1a-1.

374. See William Andrew Shutkin, Note, *The National Park Service Act Revisited*, 10 VA. ENVTL. L.J. 345 (1991) (arguing that Congress intended to subordinate use to preservation in the park system). The Eighth Circuit recently recognized that the national parks were "established for both recreational and conservationist purposes. These purposes will sometimes, unavoidably, conflict, and even the Government cannot always adequately represent conflicting interests at the same time." *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996).

375. 16 U.S.C. § 20a.

376. H.R. 2028, 104th Cong. § 2 (1995).

377. H.R. 773, 104th Cong. § 2(a) (1995) (emphasis added).



should not be tolerated. In some cases, rationing of recreational opportunities will be necessary. The NPS naturally is loathe to deny access to its clientele, but some situations demand restrictions on visitor numbers.<sup>378</sup> The Park Service closes hiking trails when continued use creates a risk of resource degradation and also limits back country camping permits to avoid overuse. There is no reason not to regulate access to services and amenities when a failure to do so would create similar risks.

## 2. Are Special Incentives Still Necessary?

No.<sup>379</sup>

## 3. Keep the Franchise Fees?

Virtually all concerned seem to agree that concessionaire franchise fees (and entrance fees) should be kept within the park system, not remitted to Treasury's general accounts. The GAO reported in 1996 that the rate of return on fiscal year 1994 concessions contracts was 3.3 times higher when the contracting agencies were allowed to retain over fifty percent of fees than when they were not. "[A]gencies authorized to retain fees reported obtaining more fees in proportion to their concessioners' gross revenues than agencies [including the land management agencies] that were not authorized to retain fees."<sup>380</sup> The GAO concluded that agencies not able to use concessions fees have less incentive to collect them, while those authorized to use fees to support agency operations "put forth extra effort to obtain a high rate of return on concessions."<sup>381</sup>

The Meyers bill, H.R. 773, would have created a special account; half the fee proceeds would be rebated to the park unit of origin, and half used anywhere in the park system "on the basis of need."<sup>382</sup> Additionally, H.R. 773 would have empowered the Secretary to establish park-by-park Park Improvement Funds from franchise fees.<sup>383</sup> The Hansen bill, H.R. 2028, included a similar provision, except that seventy-five percent of the receipts would be reserved for use in the area of origin.<sup>384</sup> The other differences between the rival provisions were not substantial.

These writers suggest that, while retention of fees within the NP system is an excellent and necessary step, it is only a first step. Even vastly increased fees will not begin to make a substantial dent in the backlog of needed park maintenance and rehabilitation.<sup>385</sup> If Congress seriously intends to maintain

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378. *Cf. Wilderness Pub. Rights Fund v. Kleppe*, 608 F.2d 1250 (9th Cir. 1979) (stating that since boating and rafting on the Colorado River posed a threat to the ecology of the river, the NPS could limit usage to 96,600 user days per year).

379. *See infra* Part III.C.8.

380. GAO, CONCESSIONS CONTRACTING, *supra* note 116.

381. *Id.*

382. H.R. 773, 104th Cong. § 9(a) (1995).

383. *Id.* § 9(b)

384. H.R. 2028, 104th Cong. § 10 (1995).

385. *See supra* note 70 (describing the backlog of NPS maintenance needs).

the national parks as the nation's crown jewels, further funding from some other source or sources will be requisite. A national heritage preservation fund, along the lines of the Land and Water Conservation Fund,<sup>386</sup> would be appropriate.

#### 4. Who Should Own Park Improvements?

The "possessory interest" given concessionaires by current law has been a considerable stumbling block to the introduction of competitive forces in NPS concessions policy.<sup>387</sup> Current concessionaires and their lenders and organizations remain zealous in defense of this concept, arguing that it is both necessary and fair. The Hansen version recites that the policy of the United States is "to encourage the private sector to develop, own and maintain" park facilities.<sup>388</sup> Should the concession contract terminate, the Hansen bill would allow the contractor to remove the improvements or be paid by the successor concessionaire "fair market value" as determined by independent appraisal.<sup>389</sup> The appraiser is to use an "income approach."<sup>390</sup> As to NF and BLM lands, the Hansen bill would have allowed the Secretaries to sell outright the lands and facilities to concession holders, the value again to be determined by appraisal.<sup>391</sup>

The Meyers bill, on the other hand, clearly states that title is to be vested and is to remain in the United States.<sup>392</sup> For concessionaires with existing possessory interests on the date of enactment, their rights upon termination remain governed by prior law.<sup>393</sup> For new contracts involving existing possessory interests, however, the value of the improvement is to be reduced annually by the straight-line depreciation provided by the tax code.<sup>394</sup> The improvement cannot be revalued upon transfer to another concessionaire,<sup>395</sup> but the Secretary can suspend the depreciation mechanism if necessary to obtain a satisfactory bid.<sup>396</sup> All new structures are treated the same way: the concessionaire's interest is limited to depreciated value as determined by the straight-line method.<sup>397</sup>

In essence, Representative Hansen would give concessionaires permanent property interests in whatever improvements they erect or purchase on the federal lands—and, for NF and BLM lands, the Hansen approach would go further and allow the concessionaires to obtain full fee title. The Meyers ap-

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386. 16 U.S.C. §§ 4601-4 to 4601-11. See Coggins & Glicksman, *supra* note 25.

387. See *supra* notes 301-304 and accompanying text.

388. H.R. 2028 § 11(a).

389. *Id.* § 11(c)(1).

390. *Id.* § 11(c)(2).

391. *Id.*

392. H.R. 773, 104th Cong. § 15 (1995).

393. *Id.* § 12(a). This approach has the merit of minimizing takings questions. See *supra* note 362 and accompanying text.

394. H.R. 773 § 12(b)(1)(B).

395. *Id.* § 12(b)(1)(D).

396. *Id.* § 12(b)(2).

397. *Id.* § 12(c).

proach would phase out private ownership of the facilities on park lands. From the public interest standpoint, the Meyers approach is clearly preferable. Possessory interests now operate to reduce or eliminate competition among putative concessionaires, and permanent monopolies nearly always result in price-gouging to the captive public. The GAO reported that in fiscal year 1994, new and extended concessions agreements that granted possessory interests to private contractors resulted in a rate of return of 3.8%, while the government reaped a 4.5% rate of return on contracts that did not provide for such a grant.<sup>398</sup> Whether or not privatization is a good idea for NF and BLM lands, it most certainly is a bad and politically unacceptable approach to the national parks.<sup>399</sup>

#### 5. Who Should Set Service Prices (and How)?

The Hansen bill generally would let concessionaires set rates and prices for services to the public.<sup>400</sup> Prices pursuant to "concession service agreements" (formal written contracts) would be subject to secretarial approval only if insufficient competition existed in the vicinity.<sup>401</sup> The approval determination would be based primarily on "comparable" services, but other factors could be considered. The Meyers bill assumes secretarial approval of all service charges and instructs the Secretary to consider the same factors as listed in the Hansen bill.<sup>402</sup>

It seems abundantly clear both that the concessionaire must have some primary controls over the prices it charges and also that some oversight mechanism is necessary to protect the captive public from monopolistic price-gouging. "Comparable" rates are an uncertain guide because many out-of-national-park services simply are not comparable to in-park services. A raft trip through the Grand Canyon, for instance, is not really comparable even to a raft trip of similar length further up the Colorado River, much less in other venues. In contrast, prices for goods (hot dogs, film, etc.) usually can be rated on comparability. Loose administrative oversight to curb the worst abuses probably is the best available mechanism in the circumstances, and the comparable rate at least is an objective starting point for reference.

#### 6. External Procedures: Should the NPS Comply with the APA or General Government Contract Law?

Section 12(d) of the Hansen bill would deny GAO jurisdiction under the Competition in Contracting Act of 1984,<sup>403</sup> supersede seven other resource laws,<sup>404</sup> exempt the NPS from NEPA compliance in connection with contract

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398. GAO, CONCESSIONS CONTRACTING, *supra* note 116 at 34.

399. *See generally* Coggins & Nagel, *supra* note 25.

400. H.R. 2028, 104th Cong. § 5 (1995).

401. *Id.*

402. H.R. 773, 104th Cong. § 13 (1995).

403. Competition in Contracting Act, Pub. L. No. 98-369, 98 Stat. 1175 (1984) (codified as amended in scattered section of 31 U.S.C. and 41 U.S.C.).

404. H.R. 2028 § 16.

renewals,<sup>405</sup> and require the agencies to promulgate a single set of implementing regulations.<sup>406</sup> The Meyers bill would exempt the NPS from the general federal leasing statute,<sup>407</sup> and require regulation promulgation in several situations,<sup>408</sup> but it otherwise does not address those procedural compliance issues.

Whatever legislative reasons underlie the APA public property exemption from rulemaking requirements,<sup>409</sup> they are not sufficient to overcome the presumption that legal rules governing national parks should be accessible without undue effort by any interested party. Neither prospective contractors nor the general public should have to resort to obscure and unpublished agency manuals to determine the rules of the concessions contract game. The Park Service, by expanding its use of rulemaking procedures in recent years,<sup>410</sup> implicitly recognizes the validity of that proposition. There is no good reason why the NPS should not be required to make its rules public and available.

The advisability of subjecting concessions contracts to general government contracting law is a more abstract and more difficult question.<sup>411</sup> Given the specifics in either the Meyers or Hansen bills, however, and the safeguards each contains (Meyers more than Hansen), it seems unduly duplicative and inefficient to import other sets of criteria probably intended for use in ordinary government procurement, not provision of visitor services.

#### 7. Statutory Rules or Administrative Discretion?

Neither the Hansen nor the Meyers bill directly confronts the questions whether and to what extent Congress should delegate administrative "flexibility" to the National Park Service. Implicitly, the Hansen bill, by calling for "partnerships" and not limiting facility development, opts for much administrative discretion except in the realm of impinging on concessionaire rights and interests.<sup>412</sup> This version avoids "micromanagement" while allowing contractors property rights that could preclude effective, discretionary regulation. The Meyers bill is stricter on both the agency and its concessionaires. It too necessarily delegates considerable administrative authority, but it has both clearer directives on how such authority is to be exercised and also limits assertions of private property rights in various ways.

We submit that the Meyers approach is preferable, although it probably does not go far enough in channeling administrative discretion. The history of federal public land law in general is replete with instances where agencies have abused administrative discretion to accommodate commodity land us-

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405. *Id.* § 7(e).

406. *Id.* § 18(a).

407. H.R. 773 § 16.

408. *Id.* §§ 6(a), 7(b), 8(b).

409. 5 U.S.C. § 553(a)(2) (1994). *See supra* notes 198-199 and accompanying text. *See generally* Arthur Earl Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540 (1970).

410. *See supra* note 200 and accompanying text.

411. *See supra* notes 177-184 and accompanying text.

412. H.R. 2028, 104th Cong. § 2 (1995).

ers.<sup>413</sup> The extremely low return to the government from national park concessions can be added to that list. Some degree of flexibility and discretion is inevitable, otherwise the land managers would be mere ciphers. Nevertheless, Congress traditionally has erred on the side of too much flexibility and too few concrete legal guidelines.

#### 8. "Partnerships" or Arms-Length Relations?

In any assessment of the Hansen and Meyers concessions reform legislation, a very basic question is whether the relationships between the United States and its contractors are to be paternalistic or businesslike. Paternalism (through subsidies, preferences, forgiveness, gifts, etc.) traditionally has been rife throughout federal land law,<sup>414</sup> and contemporary instances still abound. In most cases, special treatment of this ilk has done more harm than good, leaving such legacies as sterile, eroding grazing land, wasteful, inappropriate agricultural practices, mine-scarred landscapes, poisoned watercourses, and ugly clearcuts. We submit that the far superior policy is for the United States to act in a businesslike arms-length fashion when dealing with for-profit institutions, whatever their size.

#### D. *The Lesser Questions*

##### 1. Preference in Renewal or New Services?

The Meyers version recites that "a competitive selection process" is good public policy and goes on to reject flatly preference in renewals<sup>415</sup> or in contracting for additional services,<sup>416</sup> subject to two exceptions. Providers of "outfitting guide, river running, or other substantially similar services within a park" are entitled to preference renewal if their performances were satisfactory.<sup>417</sup> Small concessionaires (gross receipts under \$500,000) similarly have a right to meet competing bids.<sup>418</sup> The Hansen bill stresses "economic viability" as well as the need for a "competitive process."<sup>419</sup> That process is watered down, however, by the provisions which would award existing concessionaires "renewal incentives." If the prior concessionaire exceeded the contract requirements, it would be entitled to a renewal incentive of twenty percent "of the maximum points available" under performance evaluations;<sup>420</sup> a concessionaire who merely "meets" those agreement requirements would get five percent.<sup>421</sup> The Hansen bill would also empower the Secretary to "modify" existing agreements to allow the concessionaire to provide "closely relat-

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413. See, e.g., PNRL, *supra* note 1, §§ 19.01[2], 21B.04[1].

414. See generally *id.*

415. H.R. 773, 104th Cong. §§ 2(b)(5), 7(g) (1995).

416. *Id.* § 7(j).

417. *Id.* § 7(h).

418. *Id.* § 7(i).

419. H.R. 2028, 104th Cong. § 2(2) (1995).

420. *Id.* § 7(d)(2)(A).

421. *Id.* § 7(d)(2)(B).

ed" services, evidently without any competitive process.<sup>422</sup>

Hansen's bill implicitly recognizes the anticompetitive effects of preferences by reducing their scope considerably. Still, the Meyers approach is preferable (although it arguably does not go far enough) because it is a clear statement that largely avoids the squabbles that will be inevitable in the Hansen partial credit scheme. The existence of the preference renewal right was a primary reform impetus; rooting it out as completely as possible should be the first task of such reform. The GAO reported that in 1994, new NPS contracts that included preferential rights of renewal generated a 3.8% rate of return. Contracts without a preference resulted in a 6.4% rate of return.<sup>423</sup> These figures confirm the obvious: "concessions agreements entered into on a competitive basis had higher rates of return than those that were not competed."<sup>424</sup> Preferential renewal rights deprive prospective concessionaires of much of their incentive to spend time and money preparing bids because of the likelihood that the incumbent concessionaire will again wind up with the contract.<sup>425</sup>

Representative Meyers's preference for guide services makes little difference in practice because such services seldom constitute monopolies and usually do not require elaborate in-park facilities. Preference renewal for relatively small concessionaires, however, effectively insulates what may be the least efficient providers from competition by other small businesses.

## 2. Distinguish Between Large and Small Contracts?

Representative Hansen's H.R. 2028 differentiates between "concession service agreements" and "concession licenses."<sup>426</sup> The former is the usual concession contract while the latter may be given for "infrequent" activities where either any number can supply the goods or services involved or the situation lacks "competitive interest."<sup>427</sup> Concession licenses may not exceed three years<sup>428</sup> and are nontransferable,<sup>429</sup> but no fee setting mechanism is indicated. The Meyers bill, on the other hand, makes size distinctions in several contexts. As mentioned above, concessionaires who either have annual gross receipts of less than \$500,000 or provide guide services (evidently assumed to be small entities) remain entitled to preference renewal rights.<sup>430</sup> H.R. 773 would also provide different rules for "concession contracts" and "commercial use authorizations."<sup>431</sup> The latter would be relatively rare because the secretarial authority to issue them would be tightly restricted. They would be available only if:

422. *Id.* § 7(f).

423. GAO, CONCESSIONS CONTRACTING, *supra* note 116, at 35.

424. *Id.* at 6.

425. *Id.* at 7.

426. H.R. 2028 § 4.

427. *Id.* § 4(a)(2).

428. *Id.* § 4(b)(1).

429. *Id.* § 6(b).

430. H.R. 773, 104th Cong. §§ 7(h), 7(i) (1995).

431. *Id.* §§ 3(2), 6.

The applicant has gross revenues of not more than \$25,000 (or operates outside a park, using the park only incidentally);<sup>432</sup>

The use will have "minimal impact" on park resources and is consistent with park preservation;<sup>433</sup> and

In the aggregate, the uses do not harm park values.<sup>434</sup>

Only a "reasonable" fee need be paid for commercial use authorizations, which are limited to two-year terms.<sup>435</sup>

The United States and individual states long have had laws and policies that discriminate in favor of smaller business entities, the Small Business Administration subsidies being only one of many examples. That policy preference is rife in many areas of public natural resources law, from reclamation limitations<sup>436</sup> to mining claim assessment work fees.<sup>437</sup> Still, it is not beyond reasonable contention that such discrimination is inappropriate when dealing with for-profit businesses. As argued above, it is a bad idea to make renewal preferences available and such preferences should be jettisoned entirely from NPS concessions law. The case is even stronger for abolishing preferences for relatively small concessionaires because the competitors being precluded usually are also small businesses.

The distinction between contracts and licenses, however, is sensible in several contexts. The difference between, say, a hotel complex concession and permission to conduct horse rides along park trails is enormous in most ways of measuring. Representative Meyers' limitations on licenses, stressing minimal impact on park resources, would be consistent with basic park policies—although the \$25,000 gross revenue limitation seems overly restrictive.

### 3. Should Departures from Competitive Bidding be Allowed, and If So, When?

Both the Hansen and Meyers bills are full of exceptions to competitive bidding, and, indeed, the main contract award mechanisms of each contain subjective standards that detract from pure competition. Preferences, possessory interests, and noncompetitive licenses (not to mention the natural advantages of an entrenched operation) also lower the quantum of competition. In line with the recommendation above that the United States eschew paternalism in favor of treating businesses as businesses, we submit that any concessions reform legislation expressly adopt competitive bidding as the norm and tightly restrict any administrative discretion to depart from that norm. An obvious situation where a departure probably will be justified is when no bids are received in response to a proposal.<sup>438</sup> But such exceptions should be rare.

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432. *Id.* § 6(c)(1).

433. *Id.* §§ 6(b)(1) to 6(b)(2)(B).

434. *Id.* § 6(b)(2)(D).

435. *Id.* §§ 6(b)(2)(A), 6(d).

436. *See* PNRL, *supra* note 1, §§ 21B.03[4], 21B.04[3].

437. *See id.* § 25.03[6].

438. *Cf.* PNRL, *supra* note 1, § 20.03[3] (discussing the Forest Service's authority to reject

#### 4. Depreciation or Appraisal as a Valuation Method?

The Hansen bill in essence continues the present system whereby a concessionaire whose contract is terminated is entitled to compensation for the "fair market value" of any improvements to be used by the successor, and it establishes income-approach appraisal as the method for determining that value.<sup>439</sup> The Meyers bill, on the other hand, would phase in straight-line depreciation as the valuation method for concessionaire built improvements.<sup>440</sup> The difference is fundamental. The Hansen approach gives contractors a perpetual near-fee interest in facilities on park lands, while the Meyers approach would result in eventual public ownership of those facilities. For all of the reasons elicited in sections IIB.2.c and IIIC.4 above, straight-line depreciation is a far better measuring standard. Indeed, we urge Congress to consider whether to go an additional step and deduct from initial cost of improvement the depreciation actually claimed by the concessionaire on its income tax returns.

#### 5. Franchise Fees: Gross or Net?

Both the Meyers and Hansen bills finesse the problem of franchise fee calculation. The Meyers version recites that:

Franchise fees, however stated, shall not be less than the minimum fee established by the Secretary for each contract. The minimum fee shall be determined in a manner that will provide the concessioner with a reasonable opportunity to realize a profit on the operation as a whole, commensurate with the capital invested and the obligations assumed under the contract.<sup>441</sup>

This standard, of course, says virtually nothing. The Hansen bill is only a little more forthcoming. The Secretary is to set a minimum fee based on "historical" data, but the final fee will be the amount actually bid.<sup>442</sup> The fee thereafter can be modified only for inflation unless the concessionaire agrees.<sup>443</sup>

Publicity about seemingly absurdly low franchise fees fueled the concern that led to these reform proposals, yet neither directly confronts the problem.<sup>444</sup> In other contexts, Congress has set minimum royalties for mineral extraction<sup>445</sup> and park entrance fees are also dictated by legislation.<sup>446</sup> A private lessor seldom guarantees its lessee commensurate profits. The Meyers version, with its generous grant of discretion to the NPS to set minimum fees, is better than the Hansen version, but a statutory provision setting a minimum at some percentage of gross revenues appears even more preferable.

all bids on timber sale contracts).

439. H.R. 2028, 104th Cong. § 11(c)(1995).

440. H.R. 773, 104th Cong. § 12 (1995).

441. *Id.* § 8(a).

442. H.R. 2028 § 9(b).

443. *Id.* § 9(c).

444. See *supra* notes 221-223 and accompanying text.

445. See PNRL, *supra* note 1, §§ 22.03[3][d], 23.03[2][b][iv], 24.04[3][b].

446. 16 U.S.C. § 4601-6a.



## 6. How to Resolve Disputes?

The Hansen bill provides for establishment of a Board of Concession Appeals which, although similar to the Interior Board of Land Appeals, would be "an independent administrative review board."<sup>447</sup> It would have jurisdiction over all concessions matters except "expiration of a concession authorization."<sup>448</sup> Thereafter any person may seek judicial review in the Court of Federal Claims pursuant to the Tucker Act.<sup>449</sup> "Concession license" decisions would be reviewed in federal district court.<sup>450</sup> Then, in a curious provision, the Hansen bill says that "[i]f the Secretary concerned breaches a concession authorization, the Secretary shall pay just compensation to the concessioner."<sup>451</sup> The Meyers bill contains no equivalent provision, leaving matters to review under the Administrative Procedure Act or to contract damage actions under the Tucker Act. It does instruct the Secretary to promulgate dispute resolution regulations in the sole context of contract awards.<sup>452</sup>

We agree with Representative Hansen that a reform bill ought to spell out a dispute resolution mechanism, but we disagree with the version he has proposed. First, the "just compensation" provision is unprecedented, unwarranted, and little short of silly. Just compensation is the appropriate remedy for a Fifth Amendment taking;<sup>453</sup> damages are appropriate for a breach of contract. The agency is already liable for contract breaches under the current law.<sup>454</sup> Second, creation of an independent board makes sense only if the legislation covers all concession-granting agencies—a question beyond the scope of this article. Third, the exception from review of concession authorization expiration is at best mysterious: if preference rights are to be retained at all, then those with some form of preference certainly have a legitimate interest in seeking review if they are terminated.

A faster and cheaper alternative mechanism would be assignment of a single administrative law judge to the National Park Service to make the initial ruling on NPS/concessionaire disputes, with one appeal to the Secretary. The statute should specify periods of time in which both the ALJ and the Secretary must rule. Thereafter, review would be in the appropriate federal court, depending on whether the relief sought is equitable (federal district court) or damages (Court of Federal Claims).

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447. H.R. 2028 § 12(a)(1).

448. *Id.* § 12(a)(2).

449. *Id.* § 12(c)(2).

450. *Id.* § 12(c)(3).

451. *Id.* § 13.

452. H.R. 773, 104th Cong. § 7(a)(2) (1995).

453. U.S. CONST. amend. V.

454. See PNRL *supra* note 1, ch. 9.

### 7. How to Evaluate Concessionaire Performance?

The Meyers and Hansen bills do not differ very drastically in the matter of evaluating concessionaire performance. The Meyers bill requires only "periodic" (as opposed to annual) evaluations, does not define performance criteria, and generally gives the Secretary more authority to discipline or terminate unsatisfactory concessionaires.<sup>455</sup> The Hansen version contains sketchy criteria and in general is more solicitous of concessionaire interests.<sup>456</sup> Neither provision adds much to either bill, and neither seems to change current law very much.

The Court of Federal Claims in the 1993 *YRT* case<sup>457</sup> formulated a rather restrictive test for the judicial review of NPS selection of concessionaires, which, according to the court, "essentially involve[s] a matter of business judgment."<sup>458</sup> This deferential review posture is appropriate, but for reasons somewhat different from those stated by the court. As indicated above,<sup>459</sup> the Park Service ought to engage in arms-length transactions with its concessionaires, rather than bestowing upon them unwarranted and preferential treatment not available to businesses normally operating in a competitive market. But Park Service concessions are not just businesses designed to maximize profit for their operators. Instead, they have been authorized by Congress to enhance the recreational experiences enjoyed by Park Service visitors, and that ought to be an important touchstone of concessionaire performance. It is therefore appropriate, as Meyers's bill does, to vest in the NPS considerable discretion to select, evaluate, and terminate concessionaires in conformity with that goal. The agency's efforts to implement its responsibilities typically will require a balancing of potentially conflicting aspects of recreation, such as the provision of more campgrounds and the preservation of unspoiled natural areas. In exercising that discretion, the Park Service should of course assess the concessionaire's managerial competence and financial solvency;<sup>460</sup> poorly supplied concessions facilities that are in physical disrepair are not likely to meet the demands of park visitors, and they may detract from visual enjoyment of the parks. These are likely to be the easy cases, however. How should the NPS regard an efficient concessionaire whose operations appear to reflect less than an optimal sensibility for the scenic wonders amidst which the concession is located? The criterion referred to in the *YRT* case—the extent to which the concessionaire understands the NPS mission and the concessioner's role in carrying out that mission<sup>461</sup>—is obviously quite amorphous, but at bottom the priorities it reflects are sound. Concessionaire evaluations should be based on factors that include quality of visitor services, financial perfor-

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455. H.R. 773 § 14.

456. H.R. 2028, 104th Cong. § 8 (1995).

457. *YRT Servs. Corp. v. United States*, 28 Fed. Cl. 366 (1993); see *supra* Part II.B.2.b.i.

458. *YRT Servs. Corp.*, 28 Fed. Cl. at 394.

459. See *supra* Part III.B.8.

460. See *YRT Servs. Corp.*, 28 Fed. Cl. at 371-72.

461. *Id.* at 376.

mance, and compliance with the provisions of the contract and applicable laws.<sup>462</sup>

### CONCLUSION

Millions of visitors each year stream through the national parks. Many if not most of them seek out goods or services to embellish some aspect of their visits. The management of national parks concessions is therefore big business. The consensus of opinion from all corners seems to be that this business has not been functioning smoothly. The excessive development of concessions facilities, the shielding of concessionaires from normal competitive processes, the provision of an inadequate share of concessions revenues to the government, and the inability of the Park Service to devote the government's revenue share to needed facility maintenance and other park improvement projects all have been raised as negative features of the status quo.

Although a consensus in favor of reform has emerged, the shape of that reform has been harder to agree upon. The two major reform vehicles debated in Congress during the 104th Congress represent incremental reform, although one of the reform bills, H.R. 1028, seems more heavily weighted in favor of concessionaire interests than the other, H.R. 773. We have suggested in this article that a broader inquiry is called for, one which takes nothing for granted and which questions even heretofore unassailable premises such as the assumptions that the parks ought to be developed and that concessions facilities are best run by private entrepreneurs. We also recognize, however, that, even revolutions in administrative structuring hailed as *fait accomplis* often wind up as revolutions that never were. Radical reforms engendered by reassessments of initial premises are therefore unlikely.

The less fundamental but still important questions implicated in national park concessions reform include determination of the optimal level of recreation facility development and recreational services, of the uses to which concession fees should be allocated, of the locus of responsibility for and the mechanisms that govern the establishment of fees for goods and services, and of the degree to which concessionaires should be treated in a manner apart from other government contractors. It will be impossible for policymakers to resolve these questions without an overriding conception of the role that the parks should play, which in turn may entail establishing a hierarchy among the functions served by the national parks. In our view, the most fundamental tension is between developing the parks in a manner that increases access to park resources and developing them in a manner that removes from the parks the natural attributes responsible for their designation as national parks in the first place. There is certainly ample room in many instances to achieve the first goal without sacrificing the second. If, however, conflict becomes un-

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462. See, e.g., H.R. REP. NO. 104-280, pt. 1 (1995), available in 1995 WL 646552 (§ 9306(a)(1) of the Visitor Facilities and Services Enhancement Act of 1995).

avoidable, then we submit that the preservation purposes of the parks should take precedence over their recreational aspects, as Congress appears to have intended both when it enacted the Park Service's organic act and when it adopted the CPA. Having faced the essential policy conundrums involved in resolving this tension, policymakers should find it relatively easy to answer the more prosaic questions raised in section IIID above, or at least to conclude that these questions can be addressed by analogy to government contract mechanisms in other areas.