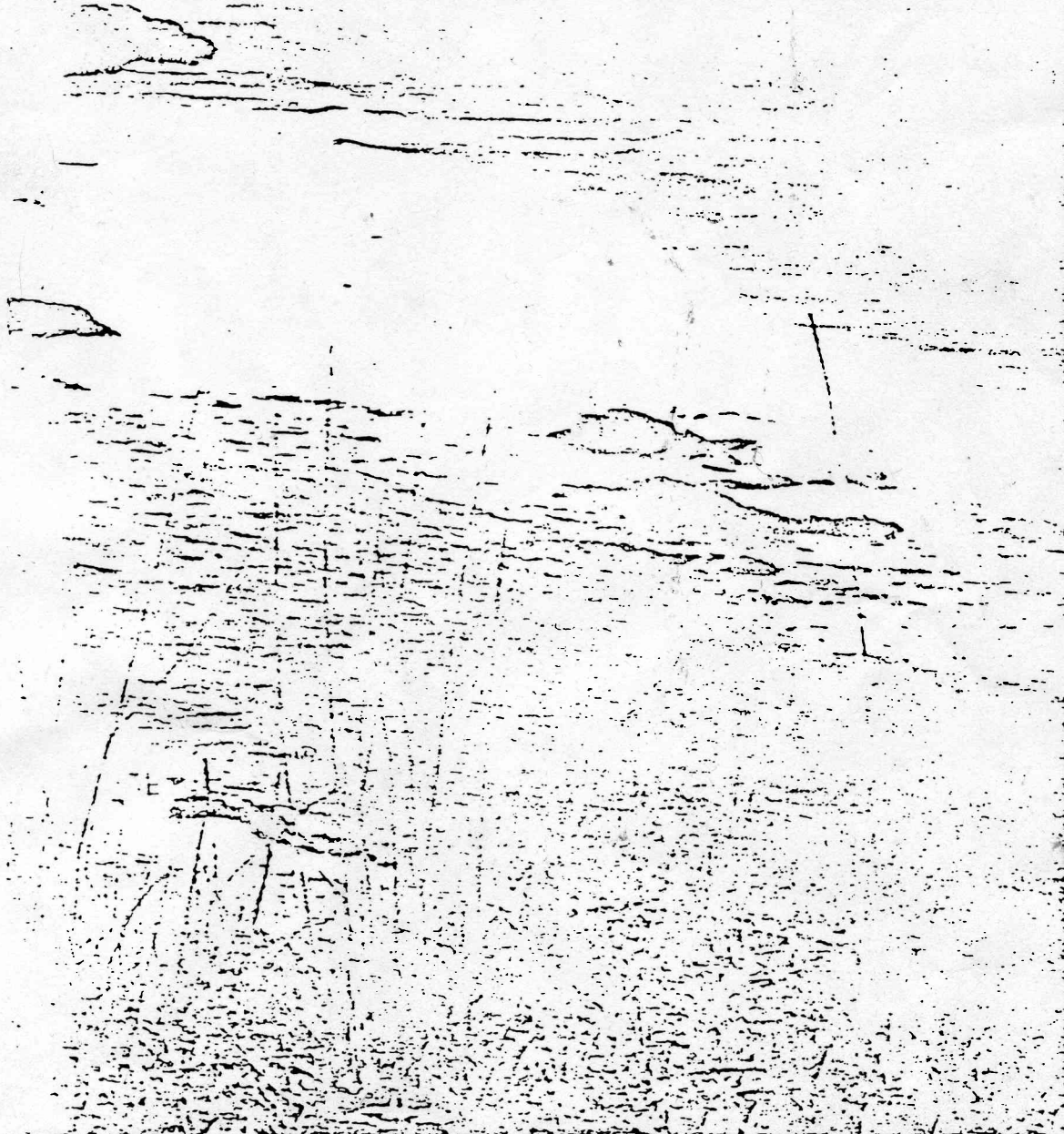




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Liberal political theory, insofar as it insists on the neutrality of the State among conceptions of the good life, may seem to limit social policy to two goals: the deontological goal of protecting the rights and the utilitarian goal of satisfying the interests of individuals. Environmentalists who consider themselves liberals may have a problem because these goals—and any “tradeoff” between them—do not generally justify policies environmentalists typically support. The author argues, however, that liberal political theory extends primarily to the structure of social institutions. At the level of social policy, liberalism is *liberal* if it protects fundamental rights and interests and responds on the merits to a variety of non-neutral cultural, ethical, historic, and aesthetic concerns. Accordingly, environmentalists may be liberals without contorting their objectives (as they often do) to square them with the rights-and-interests rhetoric they associate with deontological and utilitarian liberalism.

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COMMENT

PARKS, PEOPLE, AND PRIVATE PROPERTY: THE NATIONAL PARK SERVICE AND EMINENT DOMAIN

BY

STEVEN A. HEMMAT*

Private property serves as a major source of land in the creation, development, and growth of national parks in the United States. The National Park Service relies upon various acquisition methods and alternatives, such as fee simple purchases, donation of land, exchanges of land, positive and negative easements, zoning restrictions, and other governmental regulations. Additionally, the general Condemnation Act of 1888 authorizes officers of the National Park Service to exercise condemnation authority whenever they are empowered to acquire real estate. This Comment examines the development of land acquisition policy, acquisition authority, and the processes of general land acquisition and condemnation. A short survey of several national park areas follows. The author concludes that the grant of broad condemnation power is an unsatisfactory delegation of authority to unelected officials. Granting condemnation power to allow for the inclusion of private property into national park units must be done by Congress on an individualized basis and adopted through the democratic political process. Several statutory and administrative reforms are proposed.

* J.D. 1986, Northwestern School of Law of Lewis and Clark College; B.A. 1983, Whitman College. The author gratefully acknowledges Ron Arnold of the Center for the Defense of Free Enterprise, Grace Sheppard and Willis Kriz of the NPS Land Resources Division, and Warren Brown of the NPS Division of Park Planning and Special Studies for their assistance in the preparation of this Comment.

I. INTRODUCTION

Until 1959, Congress carved the national parks primarily out of federal public domain lands. State governments, private philanthropists, and other federal agencies transferred additional lands to the National Park Service (NPS).¹ This pattern changed with the authorization of the Minute Man National Historical Park in 1959² and the Cape Cod National Seashore in 1961.³ In both cases, Congress authorized the purchase of predominantly private land to serve as the basis of the park. In contrast to the "old parks"⁴ policy of eventual acquisition of private inholdings, the "new parks"⁵ policy was acquisition of all privately-owned lands within park boundaries,⁶ in some cases using the power of eminent domain.⁷ Despite the fact that the 1983 Land Protection Plan policy has since clarified and stressed alternatives to outright fee acquisition,⁸ condemnation as a method of acquiring private land for national park units continues up to the present

1. STAFF OF HOUSE SUBCOMM. ON PUBLIC LANDS AND NATIONAL PARKS, LAND ACQUISITION POLICY AND PROGRAM OF THE NATIONAL PARK SERVICE, 98th Cong., 2d Sess. 3 (Comm. Print 1984) (84 C.I.S. H442-5) [hereinafter HOUSE REPORT].

2. 16 U.S.C. § 410s-410x (1982).

3. 16 U.S.C. §§ 459b-1 to 459b-8 (1982).

4. "Old parks" refers to those units established before July 1959. "New parks" are units established after 1959. See Revised Land Acquisition Policy, 44 Fed. Reg. 24,790-92 (1979).

5. *Id.*

6. Professor Joseph Sax, a noted authority on parks, believes that park acquisition policy should not distinguish between old and new parks. He states a policy should

only distinguish: (1) between lands needed by the parks for basic resource protection, administrative purposes, or visitor use, which should be acquired in fee; and those where the only need is to insulate basic resources or uses, where development rights or easements or some other lesser interest should be acquired; and (2) between lands where potentially incompatible use requires acquisition to protect the parks, and those lands where . . . incompatible uses should be tolerated.

Sax, *Buying Scenery: Land Acquisitions for the National Park Service*, 1980 DUKE L.J. 709, 715, 737-38 (1980). Perhaps from a resource protection standpoint the Professor's distinction makes perfectly good sense. However, pressure groups which defend the rights of park inholders (*e.g.*, the National Inholders Association) could make the adoption of such a policy a political impossibility. *Id.* at 739.

7. This does not imply that condemnation was *never* exercised in the creation of "old parks." See, *e.g.*, 16 U.S.C. § 47e (1982).

8. Land Protection Plans, 48 Fed. Reg. 21,124-25 (1983).

day.⁹

The "taking clause" of the fifth amendment places a limitation on the inherent sovereign power of eminent domain¹⁰ by providing that "private property [shall not] be taken for public use without just compensation."¹¹ While the NPS Organic Act does not specifically vest the power of eminent domain in the agency,¹² Congress has delegated a broad power of eminent domain¹³ to the NPS through the Condemnation Act.¹⁴ In a significant decision

9. Park "units" include lands authorized in Title 16 of the United States Code, such as national parks, preserves, monuments, memorials, historic sites, historical reserves, recreation areas, seashores, lakeshores, and battlefield parks. The National Park Service currently administers over 79 million acres of land in 337 units throughout the United States. HOUSE REPORT, *supra* note 1, at 2; telephone interview with Grace Sheppard [hereinafter interview with Sheppard], Deputy Chief of the Land Resources Division, NPS (Oct. 18, 1985). In addition, this Comment will use the words "eminent domain" and "condemnation" interchangeably.

10. "It [eminent domain] does not require recognition by constitutional provision, but exists in absolute and unlimited form The concept of the power is an inherent attribute of sovereignty." J. SACKMAN, NICHOL'S THE LAW OF EMINENT DOMAIN, §§ 1.14, 1.3 (rev. 3d ed. 1985) [hereinafter NICHOL'S].

11. U.S. CONST. amend. V, cl. 5.

12. The NPS Organic Act reads:

The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations thereafter specified . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same . . . for future generations.

16 U.S.C. § 1 (1982).

13. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" U.S. CONST. art. IV, § 3, cl. 2.

14. When an officer of the Government has been . . . authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of . . . such . . . officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

40 U.S.C. § 257 (1982) (emphasis added). The original purpose of the bill was to give the option of condemnation of sites for public buildings in the cases where the government could not acquire the property on reasonable terms by contract. H.R. REP. No. 409, 50th Cong., 1st Sess. 1 (1888) (88 C.I.S. H2599). See *infra* note 116 and accompanying text.

interpreting the Condemnation Act, the U.S. Supreme Court stated that it does not impose:

any limitations upon the authority of the officials designated by Congress to exercise its power of condemnation . . . Far removed from the time and circumstances that led to the enactment of [the Act] in 1888 . . . this Court must be slow to read into [the statute] today unexpressed limitations restricting the authority of the very officials named in the [Act] as the ones upon whom Congress chose to rely.¹⁵

The NPS is therefore empowered to exercise condemnation power at *all* national park units unless specifically prohibited. Curiously, Congress has also granted eminent domain power to some park units under their respective authorizing acts within title 16 of the United States Code.¹⁶

This Comment discusses the development of acquisition policy, acquisition authority, and the process of land acquisition (including condemnation) within the National Park System. A limited survey of several national park areas follows and analyzes both effective and unsuccessful attempts by the NPS to utilize a variety of land acquisition and protection tools. Due to the false expectations of individual landowners and the lack of a uniform policy standard to address the use of eminent domain within the national parks, park managers possess wide discretion which unnecessarily increases the amount of conflict and tension existing in condemnation actions. The root of the problem lies in the broad eminent domain authority granted to those officers under the general Condemnation Act of 1888.¹⁷ This Comment concludes with a proposal for several important statutory and administrative reforms intended to alleviate the current situation.

15. *United States v. Carmack*, 329 U.S. 230, 236 (1946), *reh'g denied*, 329 U.S. 834 (1947); Note, *United States v. Carmack*, 27 B.U.L. REV. 229 (1947). *But see* NICHOL's, *supra* note 10, at § 3.21(4) ("The right to exercise the power of eminent domain must be conferred in express terms or by necessary implication . . . Authority to *establish or construct* does not imply authority to *condemn*.").

16. *See infra* note 112.

17. 40 U.S.C. § 257 (1982).

II. LAND ACQUISITION BY THE NATIONAL PARK SERVICE

A. *Development of Acquisition Policy*

In 1968, the National Park Service (NPS) began to develop formal policies for the acquisition of private lands.¹⁸ One NPS policy, adopted in 1979,¹⁹ made a distinction between inholdings (non-federal lands within the boundaries of a park existing before July 1959) and other lands. In contrast to the "old park" policy of *eventual* acquisition, the "new park"²⁰ policy was generally one of *prompt* acquisition of all privately-owned lands within park boundaries. Residents on the acquired properties were allowed to retain a life estate or estate for a period of years as long as the use of the land did not threaten park resources.

Between 1979 and 1981, the General Accounting Office (GAO) published a number of reports which blasted the NPS for acquiring too much land in fee rather than relying on alternative means of land protection.²¹ The reports were highly controversial and sparked a discussion about alternate ways to protect fully the National Park System, prevent hardships on property owners, and make the most cost-effective use of federal funds available for park acquisition.²²

In May of 1982, the Department of the Interior published a

18. The Administrative Procedure Act (APA) exempts rulemaking procedures from "matter(s) relating to agency management or personnel or to *public property*." 5 U.S.C. § 553(a)(2) (1982) (emphasis added). However, NPS acquisition policies follow procedures under the Interior Departmental Manual (DM), which recommends a minimum public comment period of thirty calendar days after the date of a proposed rule's publication in the Federal Register. 318 DM 6.4D, No. 2137 (June 30, 1982).

19. Revised Land Acquisition Policy, *supra* note 4. See generally Lambert, *Private Landholdings in the National Parks: Examples from Yosemite National Park and Indiana Dunes National Lakeshore*, 6 HARV. ENVTL. L. REV. 35, 38 (1982).

20. Revised Land Acquisition Policy, *supra* note 4.

21. See COMPTROLLER GENERAL OF THE UNITED STATES, *THE FEDERAL DRIVE TO ACQUIRE PRIVATE LANDS SHOULD BE REASSESSED*, CED-80-14 (Dec. 14, 1979); COMPTROLLER GENERAL OF THE UNITED STATES, *FEDERAL LAND ACQUISITIONS BY CONDEMNATION—OPPORTUNITIES TO REDUCE DELAYS AND COSTS*, CED-80-54 (May 14, 1980); U.S. GENERAL ACCOUNTING OFFICE REPORT TO SENATOR TED STEVENS, *FEDERAL LAND ACQUISITION AND MANAGEMENT PRACTICES*, CED-81-135 (Sept. 11, 1981).

22. HOUSE REPORT, *supra* note 1, at 5. See *infra* note 35.

new final policy statement entitled "Use of Federal Portion of the Land and Water Conservation Fund."²³ In response to this policy, the 1979 land acquisition policy and guideline was withdrawn,²⁴ and new policy implementation instructions went into effect on May 11, 1983.²⁵

Under the new policy, a "Land Protection Plan" (LPP) must be prepared by the appropriate superintendent for each unit in the National Park System that contains private or other non-federal land within its boundaries. Park superintendents were to complete the LPPs by September 30, 1985.

Under the LPPs, each superintendent was required to determine what land or interests in land need to be in public ownership and what means of protection other than acquisition are available to achieve unit purposes as established by Congress. Additionally, the LPPs were to be used to inform landowners about NPS intentions to buy or protect land through other means within the unit, help managers identify priorities for making budget requests and allocating available funds to protect land and unit resources, and find opportunities to help protect the unit by cooperating with state or local governments, landowners, and the private sector.²⁶ Although not all of the LPPs were completed by the expected completion date, most of the LPPs for the active units (those in the process of acquiring land) were completed by the deadline.²⁷

B. Acquisition Authority

Authority for general parkland acquisition comes from several sources, including the Land and Water Conservation Fund Act,²⁸ and the Uniform Relocation Assistance and Real Property Act.²⁹ Additional authority emanates from the specific acts which

23. See 47 Fed. Reg. 19,784 (1982).

24. See 48 Fed. Reg. 85 (1983).

25. Land Protection Plans, *supra* note 8, at 21,121.

26. *Id.* at 21,123.

27. Telephone interview with Warren Brown, Program Analyst for the Division of Park Planning and Special Studies and co-author of Land Protection Plans (Oct. 28, 1985).

28. 16 U.S.C. §§ 4601-4 to 4601-11 (1982).

29. 42 U.S.C. §§ 4601-4655 (1982).

established each park unit.³⁰ A brief overview of the first two acts is beneficial to understand the process by which parks are created within the National Park System.

The Land and Water Conservation Fund Act of 1965 established the Land and Water Conservation Fund (Fund), which provides the majority of funds for the federal acquisition of park and recreational lands.³¹ The Fund is currently authorized at \$900 million per year through 1989,³² although expenditure of money from the Fund is predicated upon the action of Congress.³³ After the budget for the Fund is approved by Congress, not less than forty percent can be allocated for federal acquisition. The remainder is to be used to match funds with the states in their planning, acquisition, and development of state and local parks.³⁴ Due to severe budget cuts, the future viability of the Fund for federal park acquisition is in serious question.³⁵

The Uniform Relocation Assistance and Real Property Acquisition Act of 1970 (Relocation Act)³⁶ is applicable to all federal land purchases and confers several benefits upon owners whose lands have been acquired by federal agencies. Under the Reloca-

30. HOUSE REPORT, *supra* note 1, at 1. See also text accompanying note 12.

31. 16 U.S.C. §§ 4601-4 to 4601-11 (1982); Glicksman & Coggins, *Federal Recreational Land Policy: The Rise and Decline of the Land and Water Conservation Fund*, 9 COLUM. J. ENVTL. L. 125 (1984); HOUSE REPORT, *supra* note 1, at 3.

32. 16 U.S.C. § 4601-5(c)(1) (1982). Of the over 2.8 million acres which have been purchased by federal agencies, the National Park Service acquired nearly 1.5 million acres of this land at a cost of almost \$2 billion between 1965 and 1983. Adding the land the NPS acquired through transfer and exchange from federal agencies, the total amount of acreage increased to almost 44 million acres. Glicksman & Coggins, *supra* note 31, at 125; HOUSE REPORT, *supra* note 1, at 4, 86-87.

33. 16 U.S.C. § 4601-6 (1982). See also Glicksman & Coggins *supra* note 31, at 138-39.

34. 16 U.S.C. § 4601-8(b) (1982).

35. The relevant sections of the 1987 Reagan budget proposal, recently approved by Congress, will drastically curtail Park Service Fund land acquisition authority. Pub. L. No. 99-500, Pub. L. No. 99-591. With an unappropriated budget authority balance of 4.3 billion dollars estimated to exist in the Fund by 1987, the Reagan proposal will allocate to the NPS a mere 15.2 million dollars for land acquisition, a decrease of 23 million dollars from 1986 levels. Executive Office of the President, Office of Management and Budget, Budget of the United States Government, Fiscal Year 1987 I-N51, I-N52 app. (1986); see also [16 Cur. Devel.] *Envntl. Rep. (BNA) 1831-32 (Feb. 7, 1986)*.

36. 42 U.S.C. §§ 4601-4655 (1982).

tion Act, federal agencies are required to offer an owner no less than the approved appraisal of the fair market value of the property. Additionally, the Relocation Act stipulates that the acquiring agency must pay for most, if not all, of what it may cost to convey title of the property and moving expenses for both owners and renters.³⁷

1. *Process of general land acquisition*

The purchase of land units in fee for the NPS is the responsibility of the land resources divisions of the regional offices of the NPS, or, if one exists, the Land Acquisition Office at the park level. The real property interests sought after by the NPS and the order in which the parcels are to be acquired are documented in each park's Land Protection Plan.³⁸ Prior to commencing negotiations, the respective division or office is to map the property, procure title evidence, complete and approve an appraisal of fair market value, and in some instances conduct a land survey.³⁹

The Relocation Act requires the NPS to offer the landowner no less than the fair market value of the land.⁴⁰ However, the legislation does not prevent acquisition of the property for *more* than the value appraised. In fact, with the exception of the Big Cypress National Preserve and the Everglades National Park, most land purchases have been for more than the value appraised by the NPS.⁴¹ Recent legislative enactments have limited the authority of the NPS to acquire lands in excess of the approved appraised value without the prior consent of the Appropriations Committees of Congress.⁴²

37. See 41 C.F.R. §§ 114-50.100 to .1306 (1985) (specific Interior regulations implementing the Relocation Act). See generally Annotation, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 33 A.L.R. FED. 9 (1977).

38. Land Protection Plans, *supra* note 8, at 21,125.

39. HOUSE REPORT, *supra* note 1, at 116.

40. 42 U.S.C. §§ 4601-4655 (1982); U.S. DEPARTMENT OF JUSTICE, LAND AND NATURAL RESOURCES DIVISION, A PROCEDURAL GUIDE FOR THE ACQUISITION OF REAL PROPERTY BY GOVERNMENTAL AGENCIES 29 (1972) ("Unless properties are to be donated to the United States, owners should not be requested to consummate a settlement for less than the approved appraisal of the property.").

41. HOUSE REPORT, *supra* note 1, at 116.

42. When this situation results, a letter stating the offered amount along with the appraised value, pertinent background information, justification for the acqui-

Several existing alternatives to NPS acquisition of fee simple interests may also adequately preserve unit resources. The acquisition of easements,⁴³ zoning restrictions,⁴⁴ government regulations,⁴⁵ and less-than-fee property interests⁴⁶ have been utilized

sition, and justification for the excess cost is submitted to the respective appropriation committees. *Id.* at 117.

43. Easements convey only some of the rights in a parcel of property. They may be either positive (giving right of access), or negative (restricting certain activities on the land). Examples of positive provisions are public access along a river or trail, NPS access to manage resources, and utility rights of way. Examples of negative provisions include restrictions on tree cutting, excavation or grading, extraction of resources, hunting or fishing, residential development, and commercial or industrial uses of land. It is an extremely flexible and useful tool to protect unit resources. Land Protection Plan policy recommends the use of easements where: (a) some, but not all private uses are compatible with unit purposes; (b) current owners desire to continue current types of use and occupancy of the land under terms set by NPS; and (c) scenic values need protection or access by the public or NPS only over a portion of the land. Land Protection Plans, *supra* note 8, at 21,127. Easements, however, may necessitate substantial monitoring and enforcement costs should the easement be violated. HOUSE REPORT, *supra* note 1, at 29.

44. Zoning is based on the power of government to protect the public health, safety, and welfare by regulating the use of land. Prohibitions and restrictions falling within this exercise of "police power" may generally be invoked by the government without making compensation to those adversely affected. J. GELIN & D. MILLER, *THE FEDERAL LAW OF EMINENT DOMAIN* 55 (1982). *But see* R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (questioning the constitutionality of such takings under the "police power"). Some authorizing legislation specifically provides for cooperation between NPS and local governments in the development of zoning regulations. The Land Protection Plan policy recommends the consideration of zoning when: (a) local government has a local zoning ordinance in place or appears to be willing to adopt one; (b) there is evidence of state and local support for the protection objectives of the unit; (c) some reasonable private use of the land is consistent with unit purposes; and (d) private land use needs to be controlled and managed rather than prohibited to meet unit objectives. Land Protection Plans, *supra* note 8, at 21,126. Zoning has three major disadvantages: (a) the potential for political change on local zoning boards and planning commissions could undercut the resource protection program; (b) zoning will not provide opportunities for public use and access; and (c) NPS enforcement costs may be expensive.

45. In addition to zoning, federal agencies along with state and local governments may utilize a number of other laws that can help protect unit resources. These regulations may control air and water pollution, dredging or filling of wetlands, hunting and fishing, tree cutting, resource extraction and excavation, and sub-division of land. Land Protection Plans, *supra* note 8, at 21,126. "Regulations cannot usually provide for public use, but can prevent harm to natural or cultural resources." *Id.*

46. An NPS unit may find it desirable to allow private owners to reserve cer-

by the NPS in various units instead of outright fee acquisition.⁴⁷ The use of these methods, either singly or in combination with each other, would have to be tailored to the unique needs of each individual unit.⁴⁸

If, after careful consideration of the various protection alternatives, absolute fee acquisition is still deemed necessary, the NPS unit must engage in the procedure outlined above to acquire the property. Acquisition methods utilized include: (a) purchase of fee or less-than-fee interests from a willing seller; (b) donation of fee or less-than-fee interests by private landowners, conservation groups, state and local governments; (c) exchanges of land; (d) transfer of land from other federal agencies; and (e) condemnation of land. It is the last method, condemnation of land by

tain interests, such as a reservation of the right to occupy or use the property for a term (usually 25 years) or until death. Such compatible private uses of the land may result in great advantages for both the NPS and the private owner. The Park Service would be assured of eventually acquiring the tract at a value below the cost of an outright fee simple acquisition, while the private owner would receive ready cash from the NPS purchase and still remain on the land. The disadvantage is that life or term estates do not provide for immediate public use or access to the property.

47. In choosing between the acquisition or regulation of park land, Professor Sax suggests the government acquire an ownership interest in fee if one of the following conditions exists: (1) the land is needed for occupancy by the Park Service or by park visitors; (2) the land, though not necessary for occupancy, requires the acquisition of interests under the law of eminent domain; or (3) the federal government imposes constraints that go beyond the kind of regulations that have become familiar under the general police power in American law or in the resolution of conflicts between neighbors. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 269 (1976). In these times of governmental fiscal restraint, funds may not be available to procure land under condition (3) above, especially if the government is constitutionally compelled to first expend its limited financial resources under conditions (1) and (2). See *supra* note 35. Even though the Supreme Court struck down the automatic spending cuts provision of The Balanced Budget and Emergency Deficit Control Act of 1985 as an unconstitutional delegation of executive power to an officer of Congress, (*Bowsher v. Synar*, 106 S. Ct. 3181 (1986)), the 1987 Budget has been adopted conforming to the Act, thereby causing severe budget cuts in non-exempt federal agencies such as the NPS.

See generally Pub. L. No. 99-177, §§ 200-275, 99 Stat. 1038-1101 (1985) (popularly known as the "Gramm-Rudman-Hollings Act").

48. See OFFICE OF THE ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, U.S. DEPARTMENT OF THE INTERIOR, *NEW TOOLS FOR LAND PROTECTION: AN INTRODUCTORY HANDBOOK* 8 (1982) (an excellent matrix to visualize and match various management objectives, activities, and conservation techniques).

exercise of eminent domain power, that will be the primary focus of the remainder of this Comment.

2. *Process of condemnation*

The general statutory provisions which regulate condemnation proceedings are codified in the Condemnation Act⁴⁹ and Declaration of Taking Act.⁵⁰ The Condemnation Act empowers an authorized federal government officer to acquire real estate by condemnation. This legislation allows eminent domain power to be utilized by the NPS without a similar grant of power in the NPS Organic Act.⁵¹ The rules of litigation between the federal government and the private landowner before a United States district court are mandated in Rule 71A of the Federal Rules of Civil Procedure.⁵² The Department of Justice processes the condemnation cases for the NPS.⁵³

The Uniform Real Property Acquisition Policy, as adopted and applied to the NPS in the Code of Federal Regulations, requires that the agency, to the greatest extent practicable, make every reasonable effort to acquire real property without resort to

49. *See supra* note 14.

50. [T]he petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute . . . shall vest in the United States of America . . . and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

40 U.S.C. § 258a (1982).

51. *See supra* text accompanying notes 12 and 14.

52. "While formerly state law controlled procedural matters, since Rule 71A, Federal Rules of Civil Procedure, which establishes the procedure to be followed in eminent domain actions . . . procedural as well as substantive matters in federal condemnation cases are controlled by federal law." UNIFORM APPRAISAL STANDARDS FOR FEDERAL LAND ACQUISITIONS, INTERAGENCY LAND ACQUISITION CONFERENCE 3 (1973).

53. *See supra* note 14.

litigation.⁵⁴ However, condemnation action and, therefore, resort to the courts, is generally needed when a landowner is unwilling to sell at the government's offered price. In this situation an NPS unit files a "Complaint in Condemnation" pursuant to the Condemnation Act. The landowner continues to occupy the premises until the final price of the tract is determined by the court.⁵⁵

However, if a tract is believed by the NPS to pose an imminent threat to the unit resources, the NPS may exercise its vested power of eminent domain under the Declaration of Taking Act.⁵⁶ This process allows the NPS to take immediate possession of the land, without waiting for determination of the price of the land. Declaration of Taking actions require the NPS to deposit with the court the agency's proposed compensation for the tract. The landowner may use the funds at the court's discretion.⁵⁷ If the compensation finally awarded by the district court exceeds the amount received by the former landowner, the court will enter a judgment against the NPS for the deficiency plus interest.⁵⁸

III. SURVEY OF NATIONAL PARKS

A survey of several units demonstrates the process of land acquisition. These units were chosen because of: (1) their varied approaches to land acquisition; (2) their different powers vested by legislative enactment; and (3) their varied sizes, locations and longevity.

A. Cape Cod National Seashore

The Cape Cod National Seashore (Seashore) was established by Congress on August 7, 1961.⁵⁹ It encompasses some 43,524

54. 41 C.F.R. §§ 114-50.301 and .302 (1985).

55. See *supra* text accompanying note 14; interview with Sheppard, *supra* note 9.

56. *Supra* note 50.

57. Courts generally allow 90% of the amount deposited by the federal government to be released to the landowner, depending upon the amount of outstanding taxes, liens, and other encumbrances on the property. Telephone interview with Willis Kriz, Chief of the Land Resources Division, NPS (Apr. 18, 1986).

58. See *supra* text accompanying note 50; interview with Sheppard, *supra* note 9.

59. 16 U.S.C. §§ 459b-1 to 459b-8 (1982). See generally Thomas, *The Cape Cod National Seashore: A Case Study of Federal Administrative Control Over*

acres of land and water on the outer cape. The authorized boundary includes about thirty-nine miles of ocean beach along the outer cape and six and one-half miles of beach fronting Cape Cod Bay. This was one of the first units created of previously private residential and commercial properties. After twenty-five years, the Seashore is still actively pursuing a plan of land acquisition.⁶⁰

The Cape Cod National Seashore Act of 1961⁶¹ confers upon the Secretary of the Interior (Secretary) the authority "to acquire by purchase, gift, condemnation, transfer from any Federal agency, exchange, or otherwise, the land, waters, and other property, and improvements thereon."⁶² Acquisition by condemnation is specifically set out in the Act and includes several restraints on the power of the Secretary. Persons whose land has been acquired through condemnation may elect to retain the right of use and occupancy of the property for residential purposes for a term of twenty-five years or less.⁶³ The Act also suspends the Secretary's authority to acquire improved property⁶⁴ by condemnation so long as the towns comprising the Seashore have in force, and applicable to the property, a duly adopted, valid zoning bylaw approved by the Secretary.⁶⁵ The unit has adopted "use guidelines for private property" that direct private owners of improved property to comply with the Act.⁶⁶ This "Cape Cod formula" cre-

Traditionally Local Land Use Decisions, 12 B.C. ENVTL. AFF. L. REV. 225 (1985).

60. See generally Cape Cod National Seashore Land Protection Plan (1985). The Act originally appropriated \$16 million to the unit for acquisition purposes. This amount was increased in 1970 to \$33.5 million, and to almost \$43 million in October 1983. 16 U.S.C.S. § 4596-8 (1985 Supp.)

61. 16 U.S.C. §§ 459b-1 to 459b-8 (1982).

62. 16 U.S.C. § 459b-1 (1982).

63. 16 U.S.C. § 459b-3(a)(1) (1982).

64. Improved property is defined as "detached, one-family dwelling the construction of which was begun before September 1, 1959, together with so much of the land on which the dwelling is situated." 16 U.S.C. § 459b-3(d) (1974).

65. 16 U.S.C. § 459b-3(b)(2) (1974).

66. The guidelines explain that an owner may jeopardize his eligibility for a "Certificate of Suspension of Condemnation of Improved Party" if the property is used in a manner inconsistent with the purposes of the Act.

Examples of compatible activities include normal maintenance and upkeep of private property, minor modifications of existing structures and outbuildings, replacement of roofing, and the repair or replacement of utility lines. Incompatible activities include (1) subdivision, timbering, or intensification of current uses which may be detrimental to the Seashore purposes; (2) alterations of existing structures or new construction having one or more of the following characteristics:

ated, in effect, federal zoning in the form of indirect federal control over local land use decisions.⁶⁷

As of December 31, 1983, roughly 18.6% of the federally acquired land at the Seashore had been taken through the power of eminent domain (condemnation and declaration of taking), with ten percent of the land condemned under the Declaration of Taking Act procedures. Less than one percent of the acreage was protected by easement.⁶⁸ Few landowners have retained the use and occupancy of their property under the provisions of the Act. Life estates comprise a very small number of tracts.⁶⁹ Of the "adequately protected" land, the NPS directly controls 62.7% of the Seashore, with the rest of the land under the control of other federal agencies, the state, local government, and others.⁷⁰

Of the remaining fifty-six parcels to be protected, the Seashore proposes the purchase of fee simple interests in only twenty-nine of the 261 acres. Less-than-fee acquisition (such as easements) by the NPS will protect 169 acres, while cooperative agreements will be achieved for the other sixty-three acres. Zoning will continue to give some level of protection to environmental

(a) new separate residences or new residences physically linked to the existing structure, (b) replacement of a major structure with one that is larger than its predecessor by more than fifty percent, (c) impairment of historical integrity of an identified historic structure; (3) expansion of existing uses to a point where they cause damage to the scenic, cultural, or natural resources of the area; (4) conversion of non-commercial property to commercial uses; (5) damage to natural, scientific, or cultural resources including topographic changes or disruptions of natural drainage patterns, or disturbance of natural vegetation or wildlife; (6) creation of hazards that endanger the safety of park visitors; (7) major increase in commercial use or traffic at access or crossing points on interior park roads which could result in hazardous conditions that may endanger the safety of park visitors. Cape Cod National Seashore Land Protection Plan B-2, 3 app. (1985) [hereinafter Cape Cod Protection Plan].

67. Thomas, *supra* note 59, at 233.

68. Cape Cod Protection Plan, *supra* note 66, at 18. See also text accompanying note 50.

69. Cape Cod Protection Plan, *supra* note 66, at 10. See also text accompanying note 63.

70. The Cape Cod Protection Plan list the following as adequately protected land: (1) NPS land: 27,139 acres; (2) other federal (U.S. Coast Guard and Defense Department): 147 acres; (3) Commonwealth of Massachusetts: 11,930 acres; (4) local town land (Provincetown, Truro, Wellfleet, Eastham, Orleans, and Chatham): 2,612 acres; (5) private ways (providing access to developed property): 180 acres; (6) developed property: 1,115 acres; (7) commercial property: 140 acres. Cape Cod Protection Plan, *supra* note 66, at iv, 18-19.

and aesthetic values. Although the zoning used at the Seashore does not prohibit development, it provides for control over density, type, location, and character of private development.⁷¹ In addition, other pertinent federal, state, and local laws assist in protecting the Seashore.⁷²

The Cape Cod National Seashore is an example of an NPS unit which has succeeded in protecting unique environmental interests. The Seashore has achieved most of its goals since its inception in 1961. Congressional policy and intent which balanced the use of eminent domain with private interests were clearly drafted into the Act. Though the unit infrequently exercised its eminent domain discretion, it achieved the goals of protecting unit resources with creative management and the coordinating efforts of other governmental bodies. Still, warning signs loom on the horizon. With federal funds for parkland acquisition strictly limited,⁷³ the "Cape Cod formula" of using federal condemnation power as a means of regulating local land use activity may no longer remain a viable resource protection policy.⁷⁴

B. Olympic National Park

The Olympic National park, located on the Olympic Peninsula in Washington State, was established by Congress in 1938 to preserve for the benefit, use, and enjoyment of the people the Park's spectacular coastline, scenic lakes, majestic mountains and glaciers, and the magnificent rain forests. The Olympic Peninsula is ecologically isolated, bounded on the west, north, and east by

71. *Id.* See also Cape Cod Seashore; Zoning Standards, 36 C.F.R. § 27.1-4 (1985).

72. Cape Cod National Seashore has concurrent jurisdiction over the acquired lands within its boundaries. The discharge of pollutants into the environment is restricted by the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1982). Other federal laws which protect the Seashore are the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-10 (1982); the Archeological Resources Act of 1979, 16 U.S.C. §§ 470aa-470ee (1982 & Supp. II 1984); the National Historic Preservation Act, 16 U.S.C. §§ 470-470w-6 (1982); and the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1982). Additionally, the Massachusetts Wetlands Protection Act, (MASS. GEN. LAWS ch. 131, § 40 (1974)) prohibits private parties and governmental agencies from filling, removing, dredging, or otherwise altering a wetland or any area within 100 feet of a wetland.

73. See *supra* note 35.

74. See also Thomas, *supra* note 59, at 255 (referring to the "Cape Cod formula" as a "paper tiger").

large bodies of saltwater, and on the south by forests. Eleven species and varieties of plants, five mammals, three fish, and at least one butterfly occur nowhere else outside of the Olympics.⁷⁵

The purpose and intent of the 1938 Act made it clear that the establishment of the Park did not nullify the property rights of inholders.⁷⁶ An amendment in 1958 authorized the Secretary of the Interior to exchange some federal land for lands and interest in lands not in federal ownership within the exterior boundaries of the park.⁷⁷ Legislative history of the amendment indicates that one of the Act's purposes was to partially eliminate private in-holdings in the Park which ostensibly created problems in the administration of the Park.⁷⁸ The need for the 1958 amendment indicates that condemnation authority was not utilized during the early history of the Park.

Condemnation power was specifically granted to the Secretary under the Olympic National Park Act under the 1976 amendment which extended the Park to include the Ozette and Point of Arches areas.⁷⁹ Technically, however, the Park unit already had vested eminent domain power under the Condemnation Act.⁸⁰ Two conclusions can be offered as a result of the 1976 amendment: (1) Congress was attempting to encourage the unit manager to use condemnation proceedings, or (2) Congress did not realize that condemnation power already existed in the unit. Unfortunately, legislative history does not reveal an answer to this question. Nevertheless, this confusing situation points to the need for the clear and concise vesting of eminent domain power on a specific, rather than general, basis.

C. *Ebey's Landing National Historical Reserve*⁸¹

The Ebey's Landing National Historical Reserve (Reserve) of

75. Olympic National Park Land Protection Plan 2 (1983).

76. 16 U.S.C. § 255 (1982).

77. 16 U.S.C. § 251b (1982).

78. S. REP. No. 1553, 85th Cong., 2d Sess. (1958) *reprinted in* 1958 U.S. CODE CONG. & AD. NEWS 2638.

79. 16 U.S.C. § 251 (1982).

80. *See supra* note 14.

81. Ebey's Landing National Historical Reserve is not an actual unit of the National Park System, but is classified as an "affiliated area" under 16 U.S.C. § 461 (1982). However, the Reserve is characterized by substantial financial and

Washington State was established by Congress in November 1978 "in order to preserve and protect a rural community which provides an unbroken historical record from the nineteenth century exploration and settlement in Puget Sound to the present time."⁸² The Reserve comprises the Central Whidbey Historical District, which includes a scenic island community of farms, woodlands, open space, historical structures, and the historic town of Coupeville. The resources to be protected constitute the historic rural environment of central Whidbey Island. The Reserve is comprised of approximately 13,100 acres of land and 4,300 surface acres of salt water for a total of 17,400 acres.⁸³ The resources to be protected by the reserve are quite varied.⁸⁴

The legislative authority for the acquisition of property at Ebey's Landing explicitly prohibits the use of eminent domain: "[t]he Secretary [of the Interior] is authorized to acquire such lands and interest . . . by donation, purchase with donated or appropriated funds, or exchange, except that the Secretary may not acquire the fee simple title to any land without the consent of the owner."⁸⁵ The Reserve was authorized to carry out the provisions of the Act at an amount not to exceed five million dollars, of which \$500,000 was to be used for development.⁸⁶

The Reserve has managed well without the use of eminent domain power. Several traditional and non-traditional methods were incorporated into its land protection plan by project man-

technical support from the NPS. Additionally, Ebey's Landing resembles NPS units in its compliance with the NPS 1983 Land Protection Plan policy. Despite the technical classification of the Reserve, its strong relationship with the NPS and its experience under the Land Protection Plan policy make it deserving of inclusion in this survey.

82. National Parks and Recreation Act of 1978, 16 U.S.C. § 461 (1982).

83. Ebey's Landing National Historical Reserve Land Protection Plan 3 (1984) [hereinafter Ebey's Landing LPP].

84. The reserve's LPP identifies several key resources to be protected at Ebey's Landing. They include (1) visual resources, such as seascapes and prairies; (2) archeological resources, of which 33 sites have been identified at the Reserve; (3) historical resources, which include at least 91 residential and commercial structures in the National Register of Historic Places; (4) recreation resources, which include saltwater beaches and scenic vistas; (5) fishery resources, such as smelts, mussels, and clams; and (6) sensitive biotic resources. Two listed endangered and threatened species, the peregrine falcon and the bald eagle, may occur within the Reserve. *Id.* at 3-7.

85. 16 U.S.C. § 461 (1982).

86. *Id.* at § 508(f).

ager Reed Jarvis to protect the resources of Ebey's Landing. These include:

(1) maintenance of a favorable public attitude for the reserve by dealing with each landowner on an individual basis and taking into account his or her future needs;⁸⁷

(2) purchase and donation of development rights (easements) to preserve some of the open and rural character of the reserve though currently purchase of the rights is limited due to high cost and the limited amount of money remaining for land protection;

(3) purchase in fee simple which would be used to preserve the historical rural character of the critical areas, though as with the purchase of development rights, it is a costly venture;

(4) development of a zoning plan in cooperation with local governments to protect the critical areas and those lands adjacent to the critical areas;

(5) exchange of acquired land for fee simple title of land in critical areas in order to build a contiguous land ownership;

(6) exchange of fee simple title of land to a private party for the development rights on both parcels. For example, the NPS owns Blackacre which is suitable for farming. Smith who farms on Whiteacre desires to expand his agricultural base by acquiring Blackacre. The Reserve will trade fee title of Blackacre to Farmer Smith for development rights on both farms. In this way, the Reserve can protect the resources of both parcels of land while Farmer Smith can increase his production capacity.⁸⁸

Although the Ebey's Landing formula may not be an appropriate substitute for eminent domain in all NPS units, the creative methods utilized to protect reserve resources should serve as an example for future acquisition programs at NPS sites. Reed Jarvis and his staff at Ebey's Landing should be credited for having explored, developed, and implemented such creative alternatives to the power of eminent domain.

87. Telephone interview with Reed Jarvis, Project Manager of Ebey's Landing National Historical Reserve (Oct. 25, 1985).

88. *Id.* Ebey's Landing LPP, *supra* note 83, at 20-21.

D. Cuyahoga Valley National Recreation Area

The Cuyahoga Valley National Recreation Area (CVNRA) of Ohio has posed a difficult situation for the NPS. The CVNRA was established in 1974 to protect numerous sites of historic significance, in addition to preserving the relatively undeveloped valley as a setting for outdoor recreation.⁸⁹ The legislative history of the Act made it clear that the use of scenic easements should be a major part of the land acquisition program for the area.⁹⁰

There is an interesting history behind the acquisition language of the Cuyahoga Valley legislation. During the congressional hearing concerning the creation of the CVNRA, several related bills were under consideration. Congressman John Seiberling of Ohio, a supporter of the CVNRA, claimed that the bills were identical in content.⁹¹ However, in at least acquisition authority, Seiberling was incorrect. H.R. 7167, the version which did not pass, had proposed acquisition by zoning⁹² in a manner similar to the "Cape Cod" formula.⁹³ The bill, H.R. 7077, which eventually passed Congress, had originally *included* condemnation power;⁹⁴ however, this power was conspicuously absent from the final bill passed by Congress⁹⁵ and now codified.⁹⁶ The obvi-

89. S. REP. No. 1328, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6649-50.

90. *Id.* at 6655.

91. *Proposed Cuyahoga Valley National Historical Park and Recreation Area: Hearing Before the Subcomm. on Nat'l Parks and Rec. of the House Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess. 104 (1974) (74 C.I.S. H441-21) [hereinafter *Hearings*].

92. "(b) No real property of interest therein may be acquired under this Act without the consent of the landowner as long as there is in force and applicable thereto a duly adopted, valid zoning law or ordinance approved by the Secretary [of the Interior]" *Id.* at 4.

93. *See supra* notes 65-67 and accompanying text.

94. "SECTION V—LAND ACQUISITION. The Secretary [of the Interior] is authorized to acquire lands within the park by donation, purchase with donated or appropriated funds, by condemnation or by exchange" *Hearings, supra* note 91, at 15.

95. *See* H.R. REP. No. 93-1511, 93d Cong., 2d Sess. 2 (1974) (74 C.I.S. H443-46); S. REP. No. 93-1328, 93d Cong., 2d Sess. 8 (1974) (74 C.I.S. S443-74).

96. "[T]he Secretary . . . may acquire lands, improvements, waters, or interests therein by donation, purchase with donated or appropriated funds, exchange, or transfer." 16 U.S.C. § 460ff-1(b) (1982). Standing alone, the canon of statutory construction *expressio unius est exclusio alterius* would deem the power to condemn *ultra vires*. *See also* LAND AND NATURAL RESOURCES DIVISION, U.S. DEPART-

ous lack of specific authorization did not, however, prevent the NPS from using condemnation proceedings to acquire private property in the Cuyahoga Valley. By 1982 the NPS, apparently acting under the Condemnation Act,⁹⁷ had acquired at least fifty out of 378 residential parcels through condemnation.⁹⁸ The irony of this situation is that the Department of the Interior was initially against the enactment of the Cuyahoga Valley legislation.⁹⁹

Neither Congress nor the courts are likely to remedy such actions by the NPS. Congress can no longer rely upon the legislative veto as a means of providing prospective relief of an agency action.¹⁰⁰ While other mechanisms of oversight and control may be utilized by Congress, such specific corrective legislation would prove difficult to achieve.¹⁰¹

MENT OF JUSTICE, A PROCEDURAL GUIDE FOR THE ACQUISITION OF REAL PROPERTY BY GOVERNMENTAL AGENCIES 2 (1972) ("If defects in the agency's authority to condemn are found, or if the extent of that authority is unclear, it is recommended that clarifying legislation or an explicit authorization in an appropriation act be obtained before acquisition of properties is commenced.").

97. See *supra* note 14. Whether congressional proponents of H.R. 7077 intentionally dropped the explicit condemnation language in order to alleviate local landowner opposition to the bill is a speculative, but not unrealistic, assessment of the facts.

98. Letter from Congressman John Seiberling (D., Ohio), Chairman of Subcommittee on Public Lands and National Parks, to the Wall St. J., June 14, 1982 at 21, cols. 1-2. A statistical summary of the private acres taken through condemnation at the Cuyahoga Valley is not included in its Land Protection Plan of October 1984. Cuyahoga Valley National Recreation Area Land Protection Plan 3 (1984). For a popular account of the private landowners' plight at the CVNRA, see Weiss, *Park Service Land-Grab*, THE PROGRESSIVE, 35-37 (Oct. 1985).

99. "The Department contends that the resources of the valley will be sufficiently protected through a program now underway in which matching grants from the Land and Water Conservation Fund are combined with State and local funds for the purchase of land in the area." S. REP. No. 1328, *supra* note 89, at 6654.

100. In *I.N.S. v. Chadha*, an immigration judge suspended an alien's deportation pursuant to 8 U.S.C. § 1254(c)(1). The U.S. House of Representatives vetoed the suspension under 8 U.S.C. § 1254(c)(2), which authorized one House of Congress to invalidate the decision of the executive branch to allow a particular deportable alien to remain in the United States. This veto power was held to be unconstitutional. 462 U.S. 919, 924-28 (1983). The court soon thereafter affirmed without opinion a ruling which struck down congressional use of the two-house veto. *United States Senate v. F.T.C.*, 463 U.S. 1216 (1983), *aff'g* *Consumers Union v. F.T.C.*, 691 F.2d 575 (D.C. Cir. 1982) (en banc).

101. Mak, *One Fell Swoop: The Chadha Decision and the Need for Supreme Court Clarification*, 9 SETON HALL LEGIS. J. 161, 199-200, 203-04 (1985).

The judiciary has refused to intervene in such matters. In an unpublished Sixth Circuit decision, the court interpreted the Cuyahoga Valley Act to have authorized the Secretary of the Interior "to employ the power of eminent domain to acquire those parcels of land required for park use." The court refused to look at the legislative history of the Act, saying that the judiciary's role is limited in a question concerning eminent domain.¹⁰²

The GAO has harshly criticized the NPS for its land acquisition practices at Cuyahoga Valley. In a 1981 report, the GAO published the results of a telephone survey with 236 randomly selected residents of the CVNRA. Many Cuyahoga Valley landowners did not believe they were properly informed about the NPS's intent to acquire an interest in their property or were treated fairly during the negotiation process.¹⁰³ The GAO report also found that little use was made of easements as an alternative to fee acquisition. The area superintendent directed the land acquisition office to acquire no easements that exceeded twenty-five percent of the full fee value. As of 1981, the NPS had acquired no agricultural easements in the Cuyahoga Valley.¹⁰⁴

Contrary to congressional intent, these land acquisition policies resulted in the elimination of many pastoral and historic settings.¹⁰⁵ The GAO report also stated that zoning as a land acqui-

102. *Cuyahoga Valley Home-owners & Residents Association v. Andrus*, No. 82-3324, 716 F.2d 902 (6th Cir. 1983), *cert. denied*, 464 U.S. 1008 (1983). *See also* note 116 (discussing the limited role of the court in evaluating the "public use" requirement in eminent domain legislation).

103. The GAO survey found that 77% of the 236 landowners said they did not believe their properties would be acquired. Eighteen of 29 landowners who knew their property would be in the recreation area said that the interest to be acquired would be a scenic easement. Although the 1979 NPS policy required officials to obtain landowners' input in the development of land acquisition plans, only five percent of the 117 landowners who knew of the plan said that they had participated in the development of the plan for the area. Thirty-eight percent of the 147 landowners whose property was acquired in fee simple said that they objected to this type of acquisition. Thirty-six percent of the 236 landowners said that they believed the Park Service's land acquisition practices in the area were unfair; 33% had no opinion, and 31% considered them fair. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO SEN. TED STEVENS, FEDERAL LAND ACQUISITION AND MANAGEMENT PRACTICES, CED-81-135 at 19-20 (Sept. 11, 1981). *See also* note 97 and accompanying text.

104. REPORT TO SEN. TED STEVENS, *supra* note 103 at 18.

105. *See generally* S. REP. No. 1328, *supra* note 89, at 6656 (for legislative history regarding "improved property").

sition alternative had not been promoted.¹⁰⁶ While subsequent expansion of the unit could account for some increase of expenses, the reliance on fee acquisition at the CVNRA is reflected in its authorized appropriations, which have increased from \$34,500,000 in 1974 to \$70,100,000 in 1978.¹⁰⁷

A more vigorous program of fee acquisition at the CVNRA was advocated in a 1984 report by the staff of the House Subcommittee on Public Lands and National Parks. The report indicated that in 1983 over fifty landowners were willing to sell their property in the CVNRA. With over six million dollars in unobligated funds available for acquisition, the report criticized the NPS for not having purchased this land.¹⁰⁸ The report, however, did not address the reason *why* the NPS should have bought the land.

Statutory authority does not direct the NPS to buy every tract of land where a willing seller exists. If the NPS can protect the unit's resources in an effective and less expensive manner, the NPS should be complimented for not wasting taxpayers' money on unnecessary fee acquisitions. Current and future prospects for severe financial constraints on parkland acquisition only serve to magnify this important reality.¹⁰⁹

The House report also criticizes the NPS for delays incurred in approving a declaration of taking at the CVNRA. At risk in the three-month interim was potential development of the property. By the time the NPS had filed the Declaration of Taking, the then current owner had received zoning and other local approvals and had begun marking and cutting down trees for a housing development.¹¹⁰ The NPS might have remedied this problem in one of two ways. First, the CVNRA might have developed a closer

106. REPORT TO SEN. TED STEVENS, *supra* note 103 at 19.

107. 16 U.S.C. § 460ff-5(a) (1982).

108. HOUSE REPORT, *supra* note 1, at 16.

109. When considering the amount of acreage left to protect, the high costs of acquiring land, and the limited funds available, it is important that the Park Service acquire only those lands, or interests therein, needed and that alternatives to fee simple acquisition be used to the maximum extent feasible.

U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE SECRETARY OF THE INTERIOR, NEW RULES FOR PROTECTING LAND IN THE NATIONAL PARK SYSTEM—CONSISTENT COMPLIANCE NEEDED at 16-17 RCED-86-16 at 16-17 (Oct. 31, 1985) [hereinafter REPORT TO THE SECRETARY OF THE INTERIOR]. See *also* note 35.

110. HOUSE REPORT, *supra* note 1, at 19-20.

relationship with the local zoning authorities and developed some form of cooperative land use plan for the CVNRA and vicinity. Second, an equitable remedy such as an injunction for a threatened irreparable injury to the land might have been sought in forestalling further development on the property until the Declaration of Taking became effective. The House report did not suggest either of these alternatives.

The success of many other NPS units was not replicated at the CVNRA. Misunderstanding of the unit's legislative purpose, poor public relations, and the agency's overzealous nature in resorting to unnecessary and expensive land acquisition practices resulted in an unsatisfactory situation in the Cuyahoga Valley.

IV. PROPOSAL FOR REFORM

As exemplified by the units discussed, there exists no uniform policy standard or guideline for the implementation of NPS eminent domain authority. As a result, the individual unit managers are left with wide discretion.¹¹¹ Although legislation for forty-one of the NPS units explicitly provides for some form of eminent domain discretion of the Secretary of the Interior,¹¹² the

111. Telephone interview with Warren Brown, Program Analyst for the Division of Park Planning and Special Studies (Oct. 28, 1985).

112. The author found the following NPS units with at least some vested condemnation power on the part of the Interior Secretary. All are found in Title 16 of the United States Code (1982 & Supp. II 1984): Yosemite National Park, § 47e; Redwood National Park, § 79g(b); Colonial National Historical Park, § 81e; Saratoga National Historical Park, § 159a; Chalmette National Historical Park, § 231b; Olympic National Park, § 251i; Theodore Roosevelt National Park, § 242; Cumberland Gap National Historical Park, § 263; Canyonlands National Park, § 271c(b); Virgin Islands National Park, § 398d(d); Great Smoky Mountains National Park, § 403i; Mammoth Cave National Park, § 404c-11; Lowell National Historical Park, § 410cc-34(a); Richmond National Battlefield Park, § 423k; Fredericksburg and Spotsylvania County Battle Fields Memorial, § 425a; Stones River National Battlefield, § 426d; Site of Battle with Sioux Indians, § 427; Kings Mountain National Military Park, § 430a; Gettysburg National Military Park, § 430g; Vicksburg National Military Park, § 430h-3(b); Monocacy National Battlefield, § 430k; Kennesaw Mountain National Battlefield Park, § 430u; Wilson's Creek National Battlefield, § 430kk; Antietam Battlefield, § 430nn; Perry's Victory and International Peace Memorial, § 433c; Fort Frederica National Monument, § 433h; Pipestone National Monument, § 445d; Pioneer National Monument, § 449; Fort Stanwix National Monument, § 450m; Andrew Johnson National Historic Site, § 450p; Ackia Battleground National Monument, § 450r; Homestead National Monument of America, § 450u; DeSoto National Memorial, §

general Condemnation Act grants the power of eminent domain to every NPS unit without specific legislative authority.¹¹³ The following reforms would correct such inequities:

(1) The general Condemnation Act of 1888 should be repealed by Congress. It should be replaced by a statute which vests a particular federal agency with eminent domain authority *only* when such authority has been specifically granted to that particular federal unit in its authorizing legislation.¹¹⁴ While the 1888 general Condemnation Act may have been “a natural means for Congress to adopt in putting its constitutional powers into use on a scale commensurate with the size of the nation and the need of the time,”¹¹⁵ our current notions of procedural due process, fair play, and the expansive interpretation of “public use”¹¹⁶ should be considered in fashioning a modern replacement for the Act.¹¹⁷

(2) Acquisition power should be tailored to accomplish the specific needs of each unit.¹¹⁸ Congress should grant eminent do-

450dd; Booker T. Washington National Memorial, § 45011; Cape Hatteras National Seashore Recreational Area, § 459a; Cape Cod National Seashore, § 459b-3; Padre Island National Seashore, § 459d-1; Fire Island National Seashore, § 459e-1(a), (e); Canaveral National Seashore, § 459j-2; Pictured Rocks National Seashore, § 460s-7(a); Sleeping Bear Dunes National Seashore (inferred), § 460x-8(b).

113. See *supra* notes 14 and 15.

114. This particular proposal will impact upon *all* federal agencies which conduct eminent domain proceedings under the general Condemnation Act. While a discussion of these agencies is beyond the scope of this Comment, Congress should likewise review the authorizing legislation of these respective agencies and tailor their condemnation powers accordingly.

115. *Carmack*, 329 U.S. at 236. See also note 14.

116. Any restriction which the authors of the 1888 general Condemnation Act may have envisioned by limiting such power to the procurement of real property for “other public uses” has long since been forgotten. The Supreme Court’s interpretation of “The Public Use Doctrine” of the fifth amendment serves as an instructive example. The Court has exhibited a permissive attitude in deciding whether a taking scheme by the government fulfills the “public use” requirement in eminent domain questions. Unless the scheme is irrational, the Court will acquiesce to the legislative branch the question of “public use,” thereby making such a requirement a preordained fact. “[I]f a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.” *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 244 (1984).

117. See *supra* note 97.

118. For example, the purpose of the Chaco Culture National Historical Park, associated with the Chaco Archeological Protection Site System (CAPSS) in northwestern New Mexico, is to provide for the preservation and interpretation of

main power *only* to those NPS units where it is absolutely necessary to accomplish the legislated purposes of the unit. Facilities with limited protection mandates such as Ebey's Landing find that they are able to function adequately without the power. NPS units, perhaps in an urban environment, might discover it impossible to fulfill their congressional purposes without the power of eminent domain.¹¹⁹

(3) Congress should carefully tailor the eminent domain authority it dispenses to individual NPS units to prevent misuse of discretion by unelected officials. Congress must shoulder a greater responsibility in the implementation of NPS eminent domain authority. Ministerial functionaries not directly accountable to the public should be prevented from engaging in policy choices. Legislation should be drafted to incorporate procedural and substantive checks in such condemnation authority.

(4) Congress must avoid vague legislative authorization language. Congressional intent to vest condemnation power to a unit should be unequivocally stated. Such legislation may have prevented the unfortunate situation which occurred at the CVNRA.

the unique archeological resources associated with the prehistoric (Indian) Chacoan culture, and to facilitate research activities associated with these resources. 16 U.S.C. § 410ii(b) (1982). The Joint Management Plan provides for the coordinated management, protection, and interpretation of 33 sites by the Bureau of Land Management, Bureau of Indian Affairs, Navajo Nation, individual Navajo Indians, and private landowners. Joint Management Plan, Chaco Culture Archeological Protection Site System 26 (1982). *See also* 16 U.S.C. § 410ii-1(b) (1982).

Congressman Bill Richardson (D., New Mexico) has introduced a bill which would add all of the CAPSS archeological protection sites to the Chaco Culture National Historical Park. The proposed bill would allow the Secretary of the Interior to "acquire by exchange or purchase the beneficial interests which the Navajo Nation may have in the archeological protection sites . . . or the Secretary shall seek to enter into a cooperative agreement with the Navajo Nation." H.R. 3685, 99th Cong., 1st Sess. (1985). Since condemnation is explicitly prohibited from use in the acquisition of property held in trust for the benefit of any Indian tribe, 16 U.S.C. § 410ii-3(a), there is a serious question whether the general Condemnation Act could be utilized to take Indian property under the proposed bill.

119. The Lowell National Historical Park, located in Massachusetts near the New Hampshire border, is such an example. A significant textile producing site in the 19th century, the Lowell unit was established in 1978 in part to preserve "a very large proportion of the buildings, other structures and districts in Lowell [which] date to the period of the Industrial Revolution and are nationally significant historical resources." 16 U.S.C. § 140cc (1982). Protection alternatives to acquisition would be wholly inadequate to preserve such historical resources while allowing for public access.

(5) The judiciary must not abdicate its responsibility as guardians of the Constitution by refusing to rule upon alleged abuses of eminent domain power. While the congressional creation and expansion of park units are admittedly public uses under the fifth amendment, this should not prevent the courts from evaluating the legislative history and the purposes of each act to enforce congressional intent.

(6) The NPS should carry the Land Protection Plan policy¹²⁰ one step further and establish uniform eminent domain guidelines for all units vested with such power from Congress. Implementation of the power must be exercised sparingly. Alternatives to fee acquisition where it would comparatively protect unit resources must be utilized over eminent domain in most, if not all, contingencies.¹²¹ Innovative preservation programs such as those conducted at Ebey's Landing should continue to be explored and expanded especially in these times of severe fiscal austerity.

V. CONCLUSION

The National Park Service, in its seventy-year existence, has been the steward of our national crown jewels, the national parks. The various policies put forth to tackle the onerous task of maintaining and expanding these resources have not always been universally accepted. A pitched battle is often fought in the national arena between various constituencies, frequently ending in political compromise. And yet, a rude surprise often awaits individuals who believe their private land is secure from a taking. A nineteenth century Act of Congress vesting general condemnation power in officers of the federal government may be invoked, extraneous to the park legislation enacted through the democratic political process. This scenario can be avoided once appropriate reforms are adopted by Congress.

120. In its first review of the 1983 Land Protection Plan (LPP) policy, the General Accounting Office found the NPS had not consistently complied with the policy. Of the 38 LPPs reviewed by the GAO, 25 were found deficient. For example, some plans rejected acquiring the minimum interest needed for resource protection, citing landowner concerns or unsupported claims of cost-effectiveness. The NPS takes strong exception to many of the GAO's criticisms. REPORT TO THE SECRETARY OF THE INTERIOR, *supra* note 109 at 8, 18-19 RCED-86-16 (Oct. 31, 1985). The author believes such inconsistencies in compliance will be remedied in part by the inevitable swing of the budget ax. See note 47.

121. See *supra* notes 47 and 109.

A variety of circumstances dictate that eminent domain may, and in some cases *must*, be used as a tool in the creation, development, or growth of present and future units of the National Park Service. However, this vesting of condemnation power must be granted to park units on an individual basis by Congress, grounded on a fair representation of the facts to those whose lives and property are likely to be affected, and forged in the heat of the democratic process.

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The cover is a scene along the northern Oregon coast, looking south from Ecola State Park toward Cannon Beach and Haystack Rock.

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