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COMMENTS ON NPS PROPOSED RULE FOR TRIBAL GATHERING OF PLANTS IN PARKS (APRIL 20, 2105)

RIN 1024-AD84; National Park Service, Department of the Interior

Mr. Joe Watkins
Office of Tribal Relations and
American Cultures
National Park Service
1201 Eye Street, NW
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Dear Mr. Watkins:

Public Employees For Environmental Responsibility (PEER) opposes the adoption of the rule proposed on April 20, 2015 (80 FR 21674) to allow managers of national park system units to authorize by agreement the gathering and removal of plants or plant parts by members of federally-recognized Indian tribes.

The proposed rule is a fundamental shift in the National Park Service's interpretation of its statutory mission and history. The logic advanced by the proposed rule has the likelihood to significantly damage long-standing protections erected by Congress to protect the natural and cultural resources of the parks. In addition as outlined below, the proposed regulation is contrary to law and beyond the authority of the National Park Service (NPS) to undertake. It is also reliant upon factual misstatements, undefined terms and indefensible assumptions.

PEER urges NPS to keep the current regulation at 36 CFR Part 2 that generally prohibits the take of park resources EXCEPT as provided for in law. The NPS regulations at 36 CFR **§** 2.1(a), prohibit the "possessing, destroying, injuring, defacing, removing, digging, or disturbing from its natural state:

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

Our position is based upon the following comments outlining serious concerns to which we respectfully request NPS to specifically respond.

I. PROPOSED RULE VIOLATES THE ORGANIC ACT

The NPS attempts to justify this proposal by the agency's astonishing discovery that the Organic Act of August 25, 1916 now supports, and always has supported, the "traditional" gathering practices of Indian Tribes. This basic regulatory premise, however, is utterly unsupportable.

A. Belies Plain Legislative Intent

There is not one word in the plain language of the Organic Act to support the conclusion that the Congress intended the NPS to conserve Indian Tribal traditional hunting, gathering on, or occupancy of park lands. The legislative history for the Organic Act also does not support extending the Secretary's conservation mandate to Indian tribal practices.

To the contrary, the Organic Act legislative history, scant though it may be, leads to the conclusion that Congress did not contemplate any so-called "consumptive" uses of the new park system it was creating. For example, there is a House Report that states that the overriding purpose of the bill (the Organic Act) was to preserve "nature as it exists." H. Rep. No 700, 64th Cong., 1st Sess. 3 (1916).

Moreover, the interpretation given the Organic Act by the first officials charged with its implementation reveals no indication that Indian Tribes may continue to occupy, hunt or gather natural resources from the parks. Lastly, there is no subsequent broad statute that subordinates the Organic Act protection of "wild life" below Tribal traditional practices.

B. Section 3 of the Organic Act Confers Park Plants with Highest Level of Protection

If there were any doubt that the Organic Act also mandates the strict conservation of plants (as well as animals), the NPS need look no further than section 3 of the Organic Act. Section 3 provides that the Secretary "may also provide in his discretion for the destruction of such animals and ***of such plant***

life as may be detrimental to the use of any said park…" 39 STAT 535. (Emphasis added)

Section 3 of the Organic Act imprints upon both animals *and plants* the highest level of protection so that not even the Secretary has *carte blanche* to allow for their destruction and/or removal. The proposed rule would place the protection of Tribal traditional life-ways above the conservation of "wild life," in particular, plants.

In its stated rationale for the proposed rule, the NPS suggests that somewhere in the penumbra of the Organic Act is a mandate to conserve traditional Tribal gathering practices and "opportunities for tribal youth" by allowing the removal of plants from within areas of the national park system. This previously unknown mandate cannot now be cited to supersede the explicit mandate that the NPS "conserve the wild life…therein." The "wild life" to which the Organic Act refers explicitly and unquestionably includes the plant life of the parks.

C. Plant Removal Does Not "Conserve" Plants

The proposed rule invokes a sacred word in the Organic Act – "conserve" – like a magic wand but the proposed rule offers no substance behind this invocation. The proposed rule would at least be consistent if park managers could sign agreements with Tribes ONLY if the harvesting, gathering and removal of plants actually led to proven "conservation" benefits of the plant(s). The proposed rule contains no such advice or limit. The belief that all Indian Tribal traditional plant gathering must automatically and necessarily "conserve" plants is a romantic notion but baseless assertion.

Instead, the NPS attempts to shoehorn Tribal gathering and removal of park natural resources into the Organic Act by asserting, without a shred of scientific evidence or specific data, that Indian Tribal take of plants may actually "conserve" plants.

PEER seeks to learn which plants, in which parks, and in which ecosystems will Indian Tribal plant destruction (by uprooting, digging, trimming, pruning, thinning) "conserve" the plants. We are unaware of plant communities whose natural processes of growth, succession, replenishment and/or replacement would be advanced by human harvesting or removal. Nor does the *Federal Register* discussion of the proposed rule provide a single example of such a plant. PEER has filed a request under the Freedom of Information Act with the NPS for the scientific data supporting this key assertion but the agency has not responded to that quest within the statutory time limit.

This rationale would make some sense if the plants in question were non-native plants in natural zones that the NPS, as a matter of definition, deems to

be detrimental to the enjoyment of the parks. But this proposed rule is not limited to non-native plants and is aimed almost entirely at native plant life, i.e. those plants that occurred prior to the arrival of European settlers.

D. Removal of Park Natural Resources Is Inherently a Consumptive Use

The NPS drafters blithely assert that since the take of plants would be "sustainable" and approximate pre-European conditions, such plant gathering cannot therefore, by definition, be called a "consumptive use". The proposed rule advances this radical premise that the NPS has never enunciated previously – that the *sustainable* removal of park natural resources is not, by definition, a "consumptive use."

If we accept this logic, then any *sustainable* removal of resources from a park, for example logging of trees, hunting or trapping, would also not be a "consumptive use."

Logging, trapping and hunting – however "sustainable" – are unquestionably consumptive uses. Moreover, the body of NPS law, regulation and court decisions holds that the take and removal of park natural resources, *sustainable* or not, is a consumptive use.

The NPS should revisit the 1986 court decision in *National Rifle Association v. Potter* where Plaintiff (National Rifle Association) contended that this "language ("conserve… the wild life… therein") is certainly not inconsistent with properly regulated hunting and trapping..." While the decision in *NRA V. Potter* concerned animal trapping, the judge said this: "Had Congress intended section one of the (Organic) Act to allow the Secretary discretion to permit hunting and trapping…it would hardly have been necessary to grant him specific authority elsewhere to destroy…" animals.

The same can be said for plants. If Congress intended section one of the Organic Act to allow the Secretary discretion to permit plant gathering it would hardly have been necessary for Congress to grant the Secretary specific authority elsewhere to destroy plants.

II. ONLY CONGRESS HAS THE POWER TO ADOPT THIS CHANGE

Congress enacts the laws that establish and govern the national parks. The Secretary adopts rules to implement those laws. The Secretary's rules are obligated to operate within the confines of law. This hierarchy of authority is particularly vital when the NPS attempts to make rules that fail "…to afford the highest duty of protection and care…" to park resources, as called for by Congress. See House Report accompanying the Redwood Amendment - H.R. Rep. No. 581, 95th Cong., 1st Sess. (1977).

A. Redwood Amendment Bars Proposed Rule

In 1978 Congress enacted the Redwood Amendment to the 1970 General Authorities Act. In the Redwood Amendment Congress reaffirmed the fundamental purpose of preserving park resources. The Senate Report put it this way:

> "The Secretary is to afford the highest standard of protection and care to the natural resources within…the National Park System. ***No decision shall compromise these resource values except as Congress may have explicitly provided.*** S. Rep No. 58, 95th Cong., 1st Sess. 13-14 (1977); see also H.R. Rep. No. 581, 95th Cong., 1st Sess. (1977). (Emphases added)

This protective duty imposed by Congress on the Secretary and the NPS applies to plants as well as animals.

The proposed rule alleges that traditional Indian Tribal removal of park natural resources was prohibited in the national parks only "upon the promulgation of 36 CFR part 2 in 1983." This is historic revisionism at its worst.

Beginning with the first national park at Yellowstone, the parks have been deemed closed to Indian tribal removal of park natural resources. The NPS need only revisit the Supreme Court reference to the Yellowstone Park Reservation in the 1896 decision in *Ward v. Race Horse*. The closure of the parks to Indian Tribal removal of natural resources occurred long before NPS professionals crafted 36 CFR § 2.1(a) and (d) in 1983, in response to the Redwood Amendment.

This proposed rule simply fails "to afford the highest standard of protection and care to the *natural resources* within…" the parks. It fails to provide "the highest duty of protection to park resources." The proposed rule not only would compromise the protection of park resource values, it does so without Congress specifically providing for it.

B. NPS Ignores the Materials Act of 1947

The proposed NPS rule does not discuss another law – the Materials Act of 1947. The relevant part of that law states:

> SECTION 1. The Secretary, under such rules and regulations as he may prescribe, may dispose of…*vegetative materials (**including but not limited to yucca, manzanita, mesquite, cactus, and timber or other forest products***) on public lands of the United States,… Nothing in this Act shall be construed to apply to lands in any national park, or national monument…" 30 U.S.C. § 601 (Emphasis added)

This law is by no means dispositive of the issue of whether the Secretary may adopt a rule that allows park managers to dispose of vegetative materials from the national parks. But the Materials Act of 1947 is indicative of the high level of protection that the Congress has extended to plants and vegetation in the national park system. The NPS understandably makes no mention of this law.

C. Specific Congressional Enactments Underscore Need for a Law Not a Rule

Congress has specifically identified the preservation or commemoration of Native American culture as a purpose or authorized use in several specified national park areas. For example,

- 16 U.S.C. § 28(i)(e), enacted in 1975 (allowing Havasupai Tribe to lands within Grand Canyon National Park for "grazing and other traditional purposes");

- 16 U.S.C. § 396d, enacted in 1978 (Kaloko-Honokohau National Historic Park established "to provide a center for the preservation, interpretation, and perpetuation of traditional native Hawaiian activities and culture); 16 U.S.C. § 410jj; and

- The Big Cypress enabling act of 1974 provides that the " …members of the Miccosukee Tribe of Indians of Florida and members of the Seminole Tribe of Florida shall be permitted to continue their usual customary use and occupancy of …lands and waters within the preserve, including hunting, fishing and trapping on a subsistence basis and traditional tribal ceremonials." 16 U.S.C. § 698j.

In short, Congress knows very well how to waive the strictest standard of protection for natural resources and to permit gathering and removal of such resources by Indian Tribes.

Congress has explicitly provided for gathering of certain park natural resources by Indians and/or Indian Tribes in a handful of parks. The following is a thumbnail list of all congressional actions specifically authorizing Indians or federally-recognized Indian Tribes to gather and remove park natural resources:

- Bandelier National Monument – "The Secretary of the Interior shall allow enrolled members of the Pueblo of San Ildefonso and the Pueblo of Santa Clara to collect plants, including the parts or products thereof, and mineral resources within the Bandelier National Monument for traditional and cultural purposes." (P.L. 106-246 - Section 2101, Military Construction Appropriations Act for FY 2001 - 114 STAT 592; July13, 2000).

- Big Cypress National Preserve - Members of the Miccosukee and Seminole Tribes "shall be permitted…to continue their usual and customary use of Federal...lands and waters within the preserve, including hunting, fishing, and trapping on a subsistence basis…" (16 U.S.C. § 698j).

- Death Valley National Park – "The areas described in this subsection shall be the nonexclusive special use areas… (in which) the Secretary shall permit the (Timbisha Shoshone) Tribe's continued use of Park resources for traditional tribal purposes, practices, and activities." "(A)ny use of Park resources by the Tribe for traditional purposes, practices and activities shall not include the taking of wildlife." (P.L. 106-423 – 114 STAT 1880; November 1, 2000).

- El Malpais National Monument – "the Secretary shall assure nonexclusive access to the…monument by Indian people for traditional cultural and religious purposes, including the harvesting of pine nuts." (16 U.S.C. 460uu-47).

- Grand Canyon National Park – "The Secretary…shall permit the (Havasupai) tribe to use lands within the Grand Canyon National Park which are designated as "Havasupai Use Lands" on the Grand Canyon National Park boundary map described in section 3 of this Act…for grazing and other traditional purposes." (16 U.S.C. § 228i(e)).

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

Consider two of the most recent congressional authorizations for Indians to take park resources. In 2000 Congress authorized gathering of natural resources at Bandelier National Monument and specified portions of Death Valley National Park. In Bandelier Congress limited the taking of plants and minerals to members of the San Ildefonso and Santa Clara Pueblos. In Death Valley Congress limited the traditional use of park resources to the Timbisha Shoshone Tribe. If the NPS already possessed the power to allow members of these (or other Tribes or Pubelos) to take natural resources in Bandelier or Death Valley, neither law would be necessary.

Since these two laws contain specific limitations, it would violate the laws were the NPS to permit members of other Pueblos or Tribes to take park resources from Bandelier and Death Valley, or even permit members of the specified Tribes/Pueblos to take resources that are not listed. If the proposed rule authors say that the rule would allow that, it would be not only contrary to, and outside of, the law but essentially infer that the statutes for

Bandelier and Death Valley lack any real meaning and are merely advisory footnotes from a feckless Congress.

If the Organic Act of 1916, or other law, gave to the NPS a broad authority to allow the taking of park natural resources by Indians in every park where they may lay aboriginal claim, then the above laws would be superfluous language. This conclusion violates a principle of statutory interpretation that acts of Congress are never deemed to be superfluous.

D. NPS May Not Substitute Itself for Congress

Where Congress has specifically provided for Indian Tribal gathering of park resources, they have done so explicitly. The omission of such gathering privileges in other unit enabling acts must be presumed to be intentional.

Thus, while the NPS states correctly that Congress has authorized traditional Indian gathering in several of the various acts creating individual units (the proposed rule cites El Malpais National Monument) the NPS is flat wrong to therefore suggest that it is free to permit the activity throughout the entire national park system.

The preamble to the proposed rule states that "[I]n designing the proposed rule, the NPS has applied the principles used by Congress when it has addressed the issue of tribal gathering." That self-congratulatory sentiment cannot mask the simple critical but undeniable fact that the NPS is not the Congress. The NPS cannot substitute its judgment for that of Congress, nor override the specific provisions of statute.

E. Forest Service Sought Statutory Guidance – Why Can't NPS?

Significantly, the NPS team who drafted the proposed rule discusses the 2008 law that authorizes Indian gathering of trees and forest products from lands in the national forest system. This fact, however, undercuts rather than supports the NPS proposed rule.

The law is the Food, Conservation and Energy Act of 2008, Section 8105; P.L. 110-234, May 22, 2008. That law provides for Indians to gather and remove "…trees, portions of trees, or forest products from National Forest System land for traditional and cultural purposes." The proposed rule accurately states "[T]he NPS and USFS have distinct statutory mandates and authorities." The Forest Service dates to 1905 and is charged by Congress to provide for the orderly and well-managed removal of natural resources from the national forests. In contrast, in 1916 Congress placed the resources of the parks under the highest level of protection, to be waived only as otherwise provided in law.

Thus, despite the Forest Service's largely resource extractive mandate, Congress believed it necessary to provide explicitly for Indian traditional and cultural resource gathering from the national forests. Yet the NPS, whose protective mandate is the strictest in our nation, believes it neither needs nor wants an equivalent authority.

As a result, in 2014 the Forest Service has proposed a rule to carry out the authority spelled out in the 2008 law. By contrast, in 2015 the NPS proposes a rule based on no such equivalent law, relying upon a strained and never before articulated vision of the Organic Act.

F. Congressional Authorization May Not be Dispensed with as a Mere Impracticality

The fact that the Forest Service sought clarification and authority from Congress on this issue raises the question of why NPS does not. The stated NPS rationale for not doing so is simply astonishing:

> "[I]t is, however, impractical (for the NPS) to seek specific legislative language for each unit of the National Park System in which there were individual tribal traditional uses."

The NPS proposed rule did not express precisely what makes seeking congressional guidance so "impractical." This rationale is especially surprising given that –

- As detailed above, NPS has sought and received federal enactments on plant gatherings in individual parks. Now that NPS is seeking system-wide authorization for plant removal it would make far more sense and take far less time to develop legislation for the entire national park system than the limited and specific authorizations Congress has provided in several unit enabling acts.

- NPS regularly seeks legislative authorization from Congress. For example, last session, NPS pursued legislation (The National Park Service 100th Anniversary Commemorative Coin Act (H.R. 627)) to direct the Secretary of the Treasury to mint and issue gold, silver, and half-dollar clad coins in commemoration of and to raise funds for the upcoming NPS centennial in 2016. Surely, if NPS finds it practical to seek congressional sanction for its fundraising apparatus it should be more than willing to do so for guidance on fundamental park resource protection issues.

- Finally, when it comes to significant decisions on park resource protection the primary determinant of the chosen approach should not be the administrative convenience or "practicality" but what approach

is proper, prudent and best furthers the mission of the national park system.

III. PROPOSAL REFLECTS AN ARBITRAY CHANGE OF POSITION

Even if one assumed that NPS has the discretion to change this rule, that discretion is not unlimited. The proposed rule cites its authority as the Organic Act mandate that the Secretary "shall make and publish such rules as he may deem necessary or proper for the use and management of the parks…" 39 STAT 535. But the Secretary must exercise this power within the confines of the overall mission with which Congress charges the NPS. Not any and every rule meets that test.

The team of NPS professionals who crafted the current regulation adopted in June 1983did so in light of all applicable statutes, including the American Indian Religious Freedom Act of 1977 and the 1978 Amendment in the Redwood National Park Expansion Act. Their work was thoughtful and tightly-reasoned. The NPS team added paragraph (d) to 36 § CFR 2.1 in the final rulemaking (48 FEDERAL REGISTER (FR) 30282). That paragraph responded to public comments that the protections afforded to park resources by 36 § CFR 2.1(a) were so strict that they effectively preclude Indian hunting and gathering in parks. In response, the NPS at that time made clear that Indian hunting and gathering of park resources could occur only where it was right by treaty or provided for in another Federal statute.

On June 30, 1983, the Department of the Interior (DOI) made this rule final in the *Federal Register*. The Preamble for the Final Rule discussed public comments that "…questioned the applicability of this regulation (36 CFR § 2.1) to the taking, use or possession of fish, wildlife or plants for ceremonial or religious purposes." The Preamble continued –

> "[I]n response to these comments, the service has added a provision to this section (36 CFR 2.1(d)) prohibiting such activities except where authorized by Federal statutory law, treaty rights, or in accordance with sections 2.2 or 2.3. ***This section (36 CFR 2.1(d)) is also intended to cover activities undertaken by Native Americans."*** 48 FR 30255. (Emphasis added)

The Preamble explained "The NPS intends to provide reasonable access to and use of, park lands and park resources by Native Americans for religious and traditional activities. ***However, the National Park Service is limited by law and regulation from authorizing the consumptive use of park resources."*** Emphasis added. (*Ibid*.) As a consequence, the Final Rule added subsection (d) to 36 CFR § 2.1. Title 36 CFR § 2.1(d) states:

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

The current regulation is unequivocal and clear. The regulation at 36 CFR § 2.1(d) contains two main exceptions. The NPS proposes to add a third exception – written agreements.

Agencies are free to change their positions over time. An agency may even make an abrupt reversal as the NPS now proposes. Thirty-two years have elapsed since the NPS stated its position on this issue but the mere passage of time is not enough to support the NPS about-face. The NPS must produce a compelling justification. "For an agency to reverse its position in the face of a precedent it has not persuasively distinguished is quintessentially arbitrary and capricious." *Louisiana Public Service Commission v. FERC*, 184 F. 3d 892, 897 (D.C. Cir. 1999).

If the NPS now modifies 36 CFR 2.1, it must offer a reasoned explanation far more compelling than the Preamble to the proposed rule. *Motor Vehicles Mfrs. Assn. v. State Farm Mut. Automobile Assn.,* 463 U.S. 29, 41-43 (1982).

IV. PROPOSED RULE'S RATIONALE JUSTIFIES TAKE OF PARK WILDLIFE

One unmistakable danger for our national parks entailed in this proposed rule is that if the NPS makes this argument to permit Indian Tribal take, then it can (or may be) forced to adopt this premise for take of animals, or take by others.

Only one thin line of the proposed rule protects park animals and fish (although not minerals or cultural resources) from Indian Tribal traditional harvesting and removal. The proposed rule states that it "would not alter the prohibition on taking fish or wildlife for such purposes." The rationale for the distinction that NPS now draws between parks plants and animals is not explained in any fashion.

The NPS must answer clearly, cogently and dispositively why all of the lofty sentiments expressed in the rule do not also support the removal of animals from the parks by traditionally associated Indian Tribes. Many Indian Tribes have expressed interest in removing animals from parks that were once their aboriginal lands. Yet the rule drafters treat these tribal interests as a non-issue.

This distinction is troubling because the rationale offered by NPS in the proposed rule for allowing the removal of plants from parks for Tribal

traditions applies as much to animals, minerals, and cultural resources as it does to "lowly" plants. Here is a sample of the major justifications:

- "The NPS has a unique relationship with Indian Tribes that is strengthened by a shared commitment to stewardship" of park land and park resources;

- This relationship is augmented by the historical, cultural, and spiritual relationships that Indian tribes have with park land and resources with which they are traditionally associated;

- Indian tribes practiced their traditional harvest…on lands that are now included in the National Park System;

- The NPS seeks to provide opportunities for tribal youth and the public to understand tribal traditions;

- The NPS seeks to manage the various areas of the National Park System in a manner that helps tribes maintain their cultural traditions and relationships with the land;

- The NPS has a long history of…supporting the continued practice of tribal cultural traditions; and

- The NPS proposal provides new opportunities for the NPS and Tribal governments to work together in support of the continuation of sustainable Indian cultural traditions, and

- "The concept of acknowledging and respecting the special and longstanding connections that Indian tribes have with parklands prior to the establishment of park units is specifically described in NPS Management Policies 2006, 1.11."

Despite a single line of explanatory text disclaiming application to park wildlife, the proposed rule lays the intellectual and legal groundwork for a rapid expansion to include park animals, fish, minerals and cultural resources. Indeed, many of the proposed rule justifications refer to a much the broader class of "park resources."

The NPS should explain why its unique relationships with Tribes, Indian Tribal resource stewardship commitments, agency obligations to foster Tribal traditions, joint research projects, and the NPS desire to educate Indian youth, etc. apply ONLY to plants. Otherwise, these cited NPS-Tribal values may propel the NPS to cross the threshold of the animal kingdom's door in the future.

V. SECRECY OF AGREEMENTS UNWARRANTED

The proposed rule requires clarification about the extent to which the NPS may conceal the agreements from release under the Freedom of Information Act (5 U.S.C. § 552) (FOIA). The NPS raised the issue of confidentiality in the proposed rule but does not specify what the NPS would seek to withhold from public disclosure or on what legal basis.

FOIA mandates a broad public disclosure of documents related to Federal agency actions upon request. FOIA also allows an agency to withhold certain documents from release if the documents qualify for an exemption. One exemption is for "matters that are :…(3) [S]pecifically exempted from disclosure by statue (other than the Privacy Act),…"

The proposed rule states that "[T]he NPS believes that under existing law it (the NPS) can protect sensitive or confidential information submitted by tribes. (See *e.g*. 54 U.S.C. § 307103)." The citation is to the National Historic Preservation Act (NHPA) of 1965, as amended in 1992 formerly found at16 U.S.C. § w-3.

The National Historic Preservation Act provides:

> Access to information
> (a) AUTHORITY TO WITHHOLD FROM DISCLOSURE.—The head of a Federal agency, or other public official receiving grant assistance pursuant to this division, after consultation with the Secretary, shall withhold from disclosure to the public information about the *location*, character, or ownership *of a historic property* if the Secretary and the agency determine that disclosure may— (1) cause a significant invasion of privacy; (2) risk harm to the historic property; or (3) impede the use of a traditional religious site by practitioners. 54 U.S.C. § 307103 .

The NHPA defines "historic property:"

> In this division, the term ''historic property'' means any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object. 54 U.S.C. § 300308.

Park "wild life" – plants or animals - are not objects included on, or eligible for inclusion on the National Register of Historic Places. The proposed rule cites an inapt authority.

Another law that the NPS may seek to employ (though not cited in the proposed rule) is the National Park Omnibus Management Act of 1998 (NPOMA), P.L. 105-391, 112 STAT. 3497. NPOMA contains the following statutory exemption from FOIA.

> SEC. 207. CONFIDENTIALITY OF INFORMATION. Information concerning the nature and specific location of a National Park System resource which is endangered, threatened, rare, or commercially valuable, of mineral or paleontological objects within units of the National Park System, or of objects of cultural patrimony within units of the National Park System, may be withheld from the public in response to a request under section 552 of title 5, United States Code, unless the Secretary determines that— (1) disclosure of the information would further the purposes of the unit of the National Park System in which the resource or object is located and would not create an unreasonable risk of harm, theft, or destruction of the resource or object, including individual organic or inorganic specimens; and (2) disclosure is consistent with other applicable laws protecting the resource or object. 112 STAT. 3497

When the NPS signs an agreement for a Tribe to gather plants or their parts from a park area, none of the above exemption allows the NPS to withhold information from public release under FOIA. The statutory exemption is explicitly limited to a national park system resource that is "endangered, threatened, rare, or commercially valuable." None of these classes of a park system resource should ever be included in an agreement for Tribal gathering. If the NPS intent is to include such resources in agreements, then the case for a thoroughgoing NEPA review, not a categorical exclusion, (see below) becomes even more compelling.

The NPOMA statutory exemption also allows the NPS to withhold information on "objects of cultural patrimony." NPOMA does not define the term but there is a concern that the NPS now consider plants and, by inference, other forms of park wild life to be "objects of cultural patrimony." Such an interpretation would not be justified.

It should be noted that NPOMA's intent is to shield from FOIA disclosure the nature and specific location of certain resources so to protect such resources from collection and removal. It would be beyond ironic if the NPS now intends to use NPOMA to shield from public disclosure the identities of the Indian Tribal collectors or the nature and extent of their collection.

Significantly, the NPS lacks a statutory authority for withholding release of information on this subject as clear as that governing the national forests.

The Food, Conservation and Energy Act of 2008, P.L. 110-234, provides:

> SEC. 8106. PROHIBITION ON DISCLOSURE. (a) NONDISCLOSURE OF INFORMATION.— (1) IN GENERAL.—The Secretary shall not disclose under section 552 of title 5, United States Code (commonly known as the ''Freedom of Information Act''), information relating to— (A) subject to subsection (b)(l), human remains or cultural items reburied on National Forest System land under section 8103; or (B) subject to subsection (b)(2), resources, cultural items, uses, or activities that— (i) have a traditional and cultural purpose; and (ii) are provided to the Secretary by an Indian or Indian tribe under an express expectation of confidentiality in the context of forest and rangeland research activities carried out under the authority of the Forest Service. (2) LIMITATIONS ON DISCLOSURE.—Subject to subsection (b)(2), the Secretary shall not be required to disclose information under section 552 of title 5, United States Code (commonly known as the ''Freedom of Information Act''), concerning the identity, use, or specific location in the National Forest System of— (A) a site or resource used for traditional and cultural purposes by an Indian tribe; or (B) any cultural items not covered under section 8103.122 STAT. 1288-89.

Congress provided the Secretary of Agriculture a clear and specific description of information shielded from FOIA disclosure. The NPS would be well advised if it sought legislative direction on the same issue as it cannot argue for a right to withhold based upon an analogy to another agency.

The NPS should also be aware that there exists no generalized ''Indian Trust'' exemption under FOIA. Nor are communications between Tribes and the NPS considered ''interagency communications'' that may qualify for FOIA Exemption Number 5. See *Department of Interior v. Klamath Water Users Protective Association* 532 U.S. 1 (2001).

PEER routinely obtains from the Interior Department permits and the annual collecting reports of Tribes authorized to take golden eagles under a permit issued by the U.S. Fish and Wildlife Service. PEER intends to obtain the data from the NPS for Tribal agreements to collect park resources. Such public information is vital to assessing the nature and extent of Tribal gathering should the NPS authorize it.

Since the NPS raised confidentiality in the proposed rule, it is incumbent on the agency to now explain precisely what it ''believes'' it may withhold from public disclosure and on what legal basis.

VI. RULE IGNORES NATIVE HAWAIIANS AND OTHER GROUPS

The proposed rule relies largely upon the Federal (and NPS) relationship with federally recognized Tribes as represented by their Tribal governments – the "Government-to-Government" relationship. There is no doubt that Indian Tribes are political entities with which the United States possesses a distinct and special relationship. The NPS believes that it is on more secure ground to rely on that relationship to justify a limited waiver of strict resource preservation of park resources (so far only plants).

This NPS approach leaves Native Hawaiians out in the cold, however. Native Hawaiians also display many of the same traditional relationships to the parks in Hawaii that predate the arrival of Europeans and the creation of the parks. The proposed rule does not provide for a park manager to enter into an agreement with Native Hawaiian groups, individuals or religious leaders as there are no federally recognized Tribes in Hawaii nor does the United States possess a trust relationship with Native Hawaiians. See *Rice v. Cayetano* (528 U.S. 495 (2000))

The NPS should articulate its position or intent relative to Native Hawaiians. Otherwise, the NPS silence on this issue (of which it must surely be aware) could be interpreted to mean that it intends to tacitly allow Native Hawaiian resource gathering to continue in Hawaii parks, without agreements that the proposed rule requires of Indian Tribes.

Indians are not the only people in the United States who engaged in traditional activities on lands that pre-date park designation. Ethnographers will point out, and some already have, that the NPS needs to foster the collection and subsistence activities in parks of non-Indians as well. They call these "traditionally-associated peoples."

For example, people have collected ramps (a member of the lily family) in what is now Great Smoky Mountains National Park long before it was a park. That is true for Cherokee and Scots-Irish settlers alike. Is not the collection of ramps a traditional practice of the early white settlers? If so, is their traditional practice not also protected by the Organic Act?

It should be expected that some will ask that the NPS go beyond gathering by Indian Tribes and include Native Hawaiians, as well as other "traditionally associated peoples," Native and nonnative. NPS must clearly state why the Organic Act and other authorities provide only for gathering only of park plants for the traditional purposes by Indians and by no one else.

VII. INAPPLICABLE AND INAPPROPRIATE EXPANSION OF *DE MINIMIS* GATHERING UNDER 36 CFR § 2.1(c)

The NPS states that the decision to open the parks to Indian gathering of park plants is only an extension of the "limited gathering by hand of certain

renewable natural resources plants (that) has been allowed by the NPS for more than fifty years." The NPS proposed rule is incorrect. The NPS has allowed some form of such gathering for even longer than fifty years. The very first NPS regulations from June 27, 1936 allowed "[T]hat flowers may be gathered in small quantities, when, in the judgment of the superintendent or custodian, their removal will not impair the beauty of the park or monument." 1 FR 673. The NPS did not include this provision in any of its subsequent major rulemakings (1941, 1967 or 1983).

In its last major rulemaking of 1983, the NPS adopted 36 CFR § 2.1(c), under which a park superintendent may designate certain "fruits, berries and nuts" that persons may gather "by hand for personal use or consumption…." Such designation is not done lightly but only under the tests spelled out in regulation. The motive of this rule is to afford a park visitor the privilege of eating a blueberry at Denali, or a pinyon nut at the Grand Canyon (if so designated) without being subject to criminal penalty. It is intended to be a "*de minimis*" gathering.

Indians Tribal members and other Native Americans, as with all other park visitors, are now permitted to gather, and already do gather, fruits, nuts and berries in many parks where the superintendents have designated them. It is already legal for an Indian Tribal member to gather designated fruit, nuts or berries in a park for a "personal use." "Personal use" under current NPS practice arguably and reasonably includes Indian traditional uses.

The strict limitations of 36 CFR § 2.1(c) afford only a "*de minimis*" gathering under existing 36 CFR § 2.1(c). It prevents the gathering and removal of entire plants, including their root systems, or the harvesting of plant shoots, stems, the aforementioned flowers, limbs, branches, leaves or the felling of trees.

The proposed rule goes well beyond the "*de minimis*" gathering provisions of 36 CFR § 2.1(c) to allow such conduct. The NPS could have tweaked 36 CFR § 2.1(c) in the most minor of ways to add certain other plant parts such as leaves or shoots to "fruits, nuts and berries."

There is, however, no evidence that NPS considered this or any other alternative to the proposed rule. In fact, the NPS considered NO alternatives at all. It was not always so. Within living memory the NPS approached the Indian gathering issue with more thought and reason and far less zeal than that evidenced by the proposed rule.

President Jimmy Carter signed the American Indian Religious Freedom Act (42 U.S.C. § 1996) into law on August 11, 1978. The intent of AIRFA is "to insure that the policies and procedures of various Federal agencies, as they

may impact upon the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the free exercise of religion." House Report No. 95-1308 for P.L. 95-341 (AIRFA), page 1.

In response to a request from then NPS Director William Whelan, on September 21, 1978, only five weeks after AIRFA's enactment, Associate Interior Department Solicitor for Conservation and Wildlife James Webb advised on evaluating any conflict between Indian religious resource gathering practices and the Service's policies/regulations. Solicitor Webb advised that

> "In making its evaluation the National Park Service must in particular be guided by the injunction that '(t)he authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System...'. (The Redwood Amendment, Act of March 27, 1978, 92 Stat. 163.) This provision "...elevates the decisionmaking and management standards of the National Park Service in favor of greater protection for park resources and values."

Associate Solicitor Webb then advised that "In this context, ***this special provision*** reiterates an overriding governmental interest in the protection of park resources and values and ***reinforces the limitations on the Secretary's discretion and flexibility*** in making those administrative changes to accommodate religious activities that would have adverse effect on park resources and values. ***As a consequence, the National Park Service should, more so than other agencies, seek express congressional guidance and specific legislative solutions on identified conflicts***." (Emphases added. See the entire text of the Webb advisory here: http://www.peer.org/docs/nps/8_11_10_Legal_opinion.pdf)

Even in the light of constitutionally–protected free exercise of religion, affirmed by AIRFA, Webb advised the NPS on the limitation on agency discretion to permit the religious take of park resources. Today, the NPS can point to no such equivalent advisory from the Departmental Solicitor, let alone an advisory that countermands Solicitor Webb's 1978 legal guidance.

VIII. PROPOSED RULE TURNS ON VAGUE "TRADITIONAL" PURPOSES

The proposed rule then eliminates the words "ceremonial or religious" from the existing rule and substitutes the word "traditional." The NPS makes this very significant substitution without a single word of explanation.

The differences between the words "ceremonial," "religious" and "traditional" are meaningful. Yet it is unclear how "traditional purposes"

differ from "religious purposes." This question is made all the more trenchant by the NPS deliberate but unexplained proposed removal of the words "ceremonial or religious purposes" from current 36 CFR § 2.1(d).

By its plain meaning, "traditional purposes" suggests a broader set of purposes than "ceremonial or religious purposes." It is also the term Congress used in the 2008 law that governs the national forest system.

The proposed rule defines a traditional purpose as "a customary activity or practice that is rooted in the history of an Indian tribe and is important to the continuation of that tribe's distinct culture." In addition the rule stipulates that to be eligible for an agreement, "the proposed gathering and removal is a traditional use of the park area by the Indian tribe."

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

The existing and narrowly constructed 36 CFR § 2.1(c) places the park manager in control of the limited personal use of fruits, nuts, berries (which Indians and Tribal members, like all others who visit the parks, may also avail themselves of 2.1(c).) The draft rule has no such safeguards. It would be very difficult for a proposed rule on Indian gathering to limit the purposes for which the Indians may gather plants.

In addition, the proposed rule contains the stipulation that "commercial use of natural resources is prohibited…" but again as a practical matter, the NPS can be expected to show little interest or ability in enforcing any "no-commerce" provisions of gathering agreements with Tribes.

These large uncertainties only reinforce the need for NPS to follow Solicitor Webb's 1978 advice:

> "As a consequence, the National Park Service should, more so than other agencies seek express congressional guidance and specific legislative solutions on identified conflicts."

IX. AGREEMENTS PLACE PARK SUPERINTENDENTS IN DAMAGE CONTROL POSTURE

The draft rule authorizes Tribes to request, and each park superintendent to sign, an agreement governing the collection of park natural resources. The Tribe would designate the enrolled members who could collect. Before signing an agreement, the park manager must determine that the gathering

"will not result in a ***significant adverse impact*** on park resources or values." (Emphasis added)

Thus, the agreements as envisioned contemplate damage will occur to the park resources being collected. The standards that will govern the agreements are nowhere to be found in the Organic Act or subsequent laws that protect the parks. Nor are they defined in regulation or NPS Management Policies.

The proposed rule allows suspension of collection activities but only upon a superintendent finding (and presumably documenting) finding of threat to "public health and safety" or a need to protect "environmental or scenic values."

These requirements seem designed to facilitate park impairment scenarios and put park superintendents of having to create Tribal discord with likely political backlash (with likely career consequences) in order to end abuses.

Given that the proposed rule does not set time limits on the duration of agreements, it will be assumed by Tribes that once entered into they will become permanent entitlements.

The net result will be that the conservation of park resources will become subordinate to the values of Tribal cooperation.

X. PROPOSED RULE UNSUPPORTED BY SCIENCE

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

The draft rule does not require that the NPS continually monitor the health of plant communities subjected to collection pressure. Instead, the draft offers the unsupported notion that traditional gathering, when done with traditional methods and in traditionally established quantities, helps to conserve plant communities. The rule does not explain how gathering "conserves" plant communities. Nor has NPS responded to an overdue PEER Freedom of Information Act request seeking scientific support for these assertions.

Available evidence indicates that gathering may significantly alter plant communities and their dynamics by the selective removal of certain plants, their parts or seeds. In some parks, scientific reports show large scale reductions of plant species under the pressure of so-called traditional gathering, e.g. ramps at Great Smoky Mountains. Anecdotal reports from

Walnut Canyon National Monument, Arizona, show great reductions in plants, like rockmat, collected by Navajo medicine men, while the NPS managers looked the other way.

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

NPS should integrate complete ecological assessment and monitoring information into the decision-making process for initial agreements. In addition, the agreement should be time-limited and not renewed unless there is concrete, independently confirmed evidence that park resources are better conserved.

XI. PROPOSED RULE CREATES CONFLICTS WITH OTHER RESOURCE PROTECTION LAWS

The draft rule makes no mention of the Endangered Species Act or the Wilderness Act, among other laws. Further, it appears to flout the requirements of the National Environmental Policy Act.

A. Adverse Effects on Federally Listed Species Unmentioned

The proposed rule makes no mention of whether NPS managers may enter into agreements that authorize Tribal gathering of plant species (or their parts) listed as endangered or threatened under either Federal or State laws, or are otherwise sensitive.

In addition, the proposed rule makes no provision to safeguard plants that are located in habitat designated as critical to listed animals. The science of ecology is firmly established enough that the NPS should understand that allowing the collecting of plants may cause harm to listed animal species. It is conceivable, for example, that a listed species of animal may depend at critical junctures upon certain plants; plants that may also be the object of collection activities. Thus, authorizing plant collection may "harm" listed animal species. "Harm" is one form of "take." Section 9 of the Endangered Species Act proscribes "take."

Thus, this draft rule has significant implications both for listed plant species, and for listed animals that may depend upon affected plants. But the NPS does

not intend to consult with the U.S. Fish and Wildlife Service under section 7 of the Endangered Species Act about the rule. Nor are park superintendents directed to engage in consultation as part of the Tribal agreement process.

The NPS should state clearly if prospective agreements with Tribes may authorize the collection and removal of plants or of their parts that are federally-listed as endangered or threatened. In addition, it should explain how Endangered Species Act protections will not be infringed upon.

B. Wilderness Act Compliance Uncertain

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

Presumably, plant collecting under the proposed rule would be allowed in the designated wilderness that comprises nearly half of the national park system. (Note that in some Alaska park designated wilderness, Congress already authorizes subsistence by rural residents [Native and non-Native alike] including gathering plants.)

NPS leaves unstated whether traditional Indian gatherers be required to gain access in wilderness only by the traditional means of foot or horseback. Similarly, will NPS prohibit use of chain saws to coppice pinyon trees for example for greater yield? These are question that already confront the wilderness managers at some parks.

Before these wilderness conflicts are aggravated, the NPS should specify how Wilderness Act requirements will be implemented in the development and execution of Tribal agreements.

C. Clear NEPA Violations

While the NPS has carried out tribal consultation under Executive Order 13175, it has neglected to consult with the public and other stakeholders as required by the National Environmental Policy Act (NEPA) of 1970.

NEPA requires federal agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions. The NPS dispenses with these requirements with the proposed rule, instead invoking a "categorical exclusion." The NPS provides that analysis may occur only for each individual agreement.

There are over 500 federally-recognized Indian Tribes throughout the country, not including Regional and village corporations in Alaska. Many of those Tribes have aboriginal association to lands in most of the parks. Many parks have several (some parks have over a dozen) associated Tribes. While precisely how many areas may be affected is not stated (and NPS offers no data about this issue), it seems beyond dispute the proposed rule could affect the majority of areas of the national park system.

When an agency finds that its proposed action falls within a categorical exclusion, the agency must then determine whether there are any "extraordinary circumstances" that nevertheless require the agency to perform an environmental evaluation. 40 C.F.R § 1508.4; 43 C.F.R. §46.215 While the NPS warrants that no extraordinary circumstances exits, it seems clear that not only that some extraordinary circumstances apply to the proposed rule but that nearly all of the listed extraordinary circumstances apply, to wit:

> (b) Have significant impacts on park, recreation or refuge lands;
> (c) Have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources;
> (d) Have highly uncertain and potentially significant environmental effects to involve unique or unknown environmental risks;
> (e) Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects;
> (f) Have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects;
> (h) Have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species;
> (i) Contribute to the introduction, continued existence, or spread of noxious weeds or non-native invasive species known to occur in the area or actions that may promote the introduction, growth, or expansion of the range of such species. 43 C.F.R. § 46.215

Thus, the NPS use of a categorical exclusion constitutes a clear violation of NEPA. PEER calls upon the NPS to prepare an environmental review that examines the effect the proposed rule may have upon the parks, before adopting any final rule. Apart from the legal argument, since NPS is obviously unsure of the actual effects of its proposed action throughout the park system that is all the more reason for the NPS "to look before leaping."

XII. PROPOSED RULE ROOTED IN NPS DIRECTOR'S PERSONAL IDEOLOGICAL POSITION

This rule springs from a July 2010 conference with the Eastern Band of the Cherokee Indians where NPS Director Jonathan Jarvis publicly proclaimed that the NPS regulations that preclude Native Americans from gathering plants from parks are "wrong." He vowed that one of his goals as Director was to revise the regulation and implement an about-face on Native Americans collecting in the national park system.

Without waiting for this rule revision, documents obtained by PEER under the Freedom of Information Act evidence widespread violation of the current no-gather rule by park superintendents with the apparent approval and support of the Director. In clear defiance of the current rule, the NPS under Director Jarvis seems to have adopted a "don't ask, don't tell" posture on Indian removal of plants.

Director Jarvis' sentiments that the current NPS regulations are "wrong" are presumably sincere and heartfelt. His zeal about this issue is long held and well known. But conviction alone does not justify procedural or logical shortcuts. The NPS failed to analyze this rule under NEPA. It did not seriously consider the implications for conservation of park resources or ascertain compliance with federal mandates under statutes such as the Endangered Species Act.

As detailed above, what the NPS now proposes is a disconcerting reversal of its current regulation. The NPS adopts a new interpretation of the Organic Act mandate to include promoting Tribal traditional uses of park natural resources. At the root of this proposal appears to be an ideologically-based vision that Indian take of natural resources, especially although not limited to practices predating European, arrival, is now a purpose of the parks.

This notion that the "first peoples" have an unbroken connection or claim to the land reduces the last century of park preservation history to a footnote. During that century, and the four centuries before that, our land has witnessed migration, displacement, dispossession and imposition of statutory constructs of many kinds. The system of national parks is but one of those constructs. It was 119 years ago, in 1896, when the Supreme Court effectively ended the Bannock Shoshone hunting rights in Yellowstone National Park. Reversing so many years of history is neither easily done nor wise.

During those intervening decades, the world has become increasingly complex and interwoven. Not all Indian Tribal members practice traditional faiths. Some are Christians. Not all of the descendants of Old World arrivals are Christians, Jews, Muslims or of other religious persuasions. Some have adopted Native American religious beliefs, as they are free to. Not only Indians have traditional ties to the lands that are now within our parks.

Appalachian mountain folk, high country ranchers, loggers of redwoods also have such historical ties.

None of this is to suggest excluding Tribes from our parks. The nation recounts and officially recognizes the history of Indian Tribes and others in our parks. Several laws authorize resource gathering by specific Tribes in specific parks. A number of authorities uphold the rights of Indians to access sacred sites in parks for the observance of First Amendment-protected religious rituals. In 1935 Congress established an Indian Arts and Crafts Board in the Department of the Interior and has adopted measures since then to ensure the authenticity of crafts sold as "Indian-made." Many gift shops in the parks place these arts and crafts on sale "for the education and enjoyment of the public," as the proposed rule correctly points out.

However, none of these laws include the taking of park plants or animals throughout the national park system. The otherwise worthy principles cited by the proposed rule – tribal coordination, cooperation and consultation - do not outweigh the Organic Act.

The challenge for NPS and the public is how can we accommodate all of these traditional ties and still preserve the integrity of our national parks. The approach suggested by this proposed rule is an intellectual sleight-of-hand that redefines the integrity of park natural resources to include their uses by Indians, and then, perhaps, trappers, settlers, ranchers and miners. In effect, it wrongly declares the aboriginal and/or historical uses to themselves be the pre-eminent park resources.

PEER suggests that the NPS best preserves park integrity by hewing to its mission of strict resource preservation for the enjoyment of ALL Americans – aboriginal and newer residents *alike*. No other Federal agency can lay claim to such a mission. It is unique and precious.

We hope that Director Jarvis will temper his personal zeal with reason as he proceeds. Preserving our parks as special places requires tough decisions, and the wisdom to know when such a decision must be referred to the higher authority of Congress. As "impractical" as it may be, the 1979 advice of Associate Solicitor Webb to the NPS Director to seek such advice over the matter of Indian resource gathering remains as valid today as then.

CONCLUSION

The Organic Act protects "wild life" in the national parks. This includes plants. Plants are essential in the ecological processes that sustain park ecosystems. Removing native plants, even common ones like sagebrush at Sand Creek and willow at Zion, adversely affect park ecosystems. The Organic Act does not

preserve Indian traditional or cultural consumptive use of park natural resources – plant or animal.

The NPS states the scientifically unsupported notion that gathering and removal of park natural resources is "conservation." The proposed rule is based upon the flatly incorrect notion that *sustainable* take of park resources cannot (or never) be a "consumptive use." In addition, the NPS has failed to distinguish how these arguments do not ultimately apply to park animals.

To clear the path for plant gathering the NPS has, in essence, applied an intellectual wrecking ball to long-held agency understanding of its strict resource preservation mandate.

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

Sincerely,

Jeff Ruch
Executive Director

Cc. NPS Director Jonathan Jarvis