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OUTDOOR RECREATION PLANNING & COORDINATION OPTIONAL OR REQUIRED IN NATIONAL PARK SERVICE UNDER P.L. 88-29?

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In November 1994, the National Park Service (NPS) issued a draft document entitled "Restructuring Plan for the National Park Service" (NPS Plan) Conspicuously absent from the NPS Plan was any expressed reference to Public Law 88-29, the Outdoor Recreation Coordination Act of 1963, as amended (the Act). 16 U.S.C.A. §§ 460/-460/-2. This Act directs the Secretary of the Interior "to take prompt and coordinated action to the extent practicable...to conserve, develop, and utilize" outdoor recreation resources. The Act further finds it desirable that this coordinated action involve "all levels of government and private interests" in effecting this national policy. Under the Act, the Secretary of the Interior is authorized to perform a number of enumerated functions and activities, including:

> (1) preparing and maintaining "a continuing inventory and evaluation of outdoor recreation needs and resources of the United States."
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> (2) preparing "a system for classification of outdoor recreation resources to assist in the effective and beneficial use and management of such resources."
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> (3) Formulating and maintaining "a comprehensive nationwide outdoor recreation plan, taking into consideration the plans of the various Federal agencies, States, and their political subdivisions."

While the Secretary of the Interior clearly has administrative discretion regarding the manner in which to effect this national policy and implement the law, it certainly is not within the discretion of the Secretary of the Interior, through the National Park Service, to decide whether or not to perform these functions or not. Given the expressed language of the Act, Congress clearly intended that the Secretary SHALL develop a comprehensive nationwide outdoor recreation planning process based upon intergovernmental cooperation among the various Federal agencies, States, and their political subdivisions. Further, the Act clearly mandates that Secretary of the Interior provide an administrative framework for outdoor recreation resources coordination which provides the following:

> The plan *shall* set forth the needs and demands of the public for outdoor recreation and the current and foreseeable availability in the future of outdoor recreation resources to meet those needs The plan *shall* identify critical outdoor recreation problems,

> recommend solutions, and recommend desirable actions to be taken at each level of government and by private interests.
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> The Secretary *shall* transmit the initial plan, which shall be prepared as soon as practicable within five years on and after May 28, 1963, to the President for transmittal to the Congress Future revisions of the plan *shall* be similarly transmitted at succeeding five-year intervals. When a plan or revision is transmitted to the Congress, the Secretary shall transmit copies to the Governors of the several States.

In 1981, Secretary of the Interior, James Watt, abolished the Heritage, Conservation, and Recreation Service (HCRS), formerly the Bureau of Outdoor Recreation (BOR). At that time, responsibility for administering the duties and activities required by P.L 88-29 were transferred to the National Park Service (NPS).

In addition, to the legal requirement to prepare a comprehensive nationwide outdoor recreation plan, the Secretary of the Interior, through the National Park Service, has had, since 1981, the following non-discretionary legal duty to provide technical assistance and cooperate with the States and private interests to achieve the purposes of the Act:

> Provide technical assistance and advice to and cooperate with States, political subdivisions, and private interests, including nonprofit organizations, with respect to outdoor recreation.

Once again, the discretion of the Secretary, through NPS, to perform these statutory obligations in outdoor recreation coordination does not include subsuming the Act's expressed legal mandates under the "streamlining" rubric of an NPS "Restructuring Plan." Most notably, in a section entitled "History of National Park Service Reorganization," the NPS Plan mentions the recognition and initiation of many "partnership" programs in the period 1965-68, including the Land and Water Conservation Fund Act. In so doing, however, the Plan fails to make any express reference to the Outdoor Recreation Coordination Act of 1963, as amended (the Act). 16 U.S.C.A. §§ 460/-460/-2. This apparent oversight in the Plan is symbolic of the reduced commitment of NPS resources allocated to intergovernmental planning and technical assistance responsibilities under the Act since 1981.

Since P.L. 88-29 is still good law, the NPS restructuring plan should reflect an administrative framework which more clearly delineates the planning, evaluation, and intergovernmental coordination functions enumerated in the Act. In its present form, the NPS Plan contains vague references to "consolidation and streamlining" which could further dilute the already lukewarm commitment the National Park Service has demonstrated toward its legal responsibilities under the Act. Such criticism is

warranted and justified in light of NPS budget and resources devoted to P.L 88-29 functions since 1981. Most notably, NPS has failed to effectively formulate a truly comprehensive nationwide outdoor recreation plan and maintain the level of state/local assistance established by BOR/HCRS under the Outdoor Recreation Coordination Act.

As illustrated by the following description of *Citizens to Preserve Overton Park v. Volpe*, the Executive branch has broad discretion in administering the laws under authority granted by Congress. This authority, however, is limited by the expressed language of each particular statute. Similarly, the Secretary of the Interior has broad discretion to choose the manner in which to administer Public Law 88-29, the Outdoor Recreation Coordination Act. Further, the Secretary's administrative decisions regarding the implementation of the Act are entitled to a presumption of regularity by the federal courts. This administrative discretion of the Interior Secretary, however, is necessarily limited to a range of choices and administrative decisions which have some rational connection to the planning and evaluation objectives stipulated in the Act.

Judicial Review of Administrative Procedures

In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), the Supreme Court of the United States considered whether agency discretion allowed the Secretary of Transportation to use his own best judgment, and effectively ignore the clear language of a statute. In this particular instance, Section 4(f) of the Transportation Act 923 U.S.C. 138) provided that no federal funds could be used to construct a highway through a park if a "prudent and feasible" alternative exists.

The Secretary claimed that the law afforded him wide administrative discretion in determining whether a "prudent and feasible" alternative existed to highway construction through park land. Specifically, the Secretary argued that the law allowed him to balance a wide range of competing factors in determining what was "prudent and feasible." In particular, the Secretary maintained that he could weigh the detriment associated with the destruction of park land against other socio-economic factors, such as the cost of other routes and safety considerations. Further, the Secretary claimed it was within his discretion under the law to determine the importance he would attached to each factor. Having done so, the Secretary maintained it was within his discretion to then determine, on balance, whether other alternative routes would be "prudent."

Applying this reasoning to a transportation project in Memphis, Tennessee, the Secretary determined that no "prudent or feasible" alternative existed to a plan which would run a highway through Overton Park, a 342 acre city park. In their complaint, the Citizens to Preserve Overton Park (Citizens) argued

that the Secretary had abused his discretion and had acted contrary to the clear legal mandate of Section 4(f) of the Transportation Act. The U.S. Supreme Court agreed with the plaintiffs.

In the opinion of the Supreme Court, it was not the intent of the law to allow the Secretary unbridled discretion to approve the destruction of park land. On the contrary, the Court found, if the law was to have any meaning, the Secretary could not approve the destruction of parkland, unless he found alternative routes presented unique problems. According to the Court, if the Secretary of Transportation had the discretion to weigh the cost of alternative routes and community disruption against the destruction of park land, highways would be constructed through parks whenever possible.

The Supreme Court, therefore, found that the clear intent and language of the statute would allow federal funds to construct a highway through a park only in the most unusual situations. As noted by the Court, Section 4(f) provided clear and specific directives to the Secretary that no highway project through a park was to be approved, unless there was no feasible and prudent alternative. Further, if the Secretary did approve any such project, he was to require all possible planning measures to minimize harm to the park.

The issue, therefore, was whether the Secretary of Transportation, in this particular instance, had properly construed his authority under Section 4(f) of the Transportation Act to approve park land use for federally funded highway construction. In so doing, the Court would review the Secretary's determination pursuant to the Administrative Procedure Act (APA). The APA provides that a person suffering a wrong because of agency action, within the meaning of a relevant statute, may seek judicial review of the federal agency's action. In this instance, the Citizens alleged that park land was being diverted to a federally funded highway project in violation of the procedural requirements of Section 4(f) of the Transportation Act.

In applying APA review to the Secretary's determination, the Supreme Court distinguished between the scope of the Secretary's authority and his discretion under Section 4(f) of the Transportation Act. Clearly, the Secretary had the legal authority to approve a federally funded highway project through a park, as long as no "prudent and feasible" alternative existed. Under such circumstances, the Supreme Court found that the Secretary's authority and discretion was, therefore, limited to a small range of choices.

Applying this reasoning to the facts of the case, the Supreme Court found that the Secretary had abused his discretion. Under Section 4(f) of the Transportation Act, the Secretary's authority to approve the use of park land for a federally funded highway project was limited by law to unusual situations where no feasible alternatives existed, or situations where such alternatives presented uniquely difficult problems.

In this particular instance, the Court found the Secretary had simply concluded that no "prudent or feasible" alternative existed to constructing a highway through Overton Park without producing an administrative record on which to base this decision. The Supreme Court, therefore, sent this case back to the lower courts and ordered that the Secretary of Transportation prepare a full administrative record to either support, or refute, his conclusion that no "feasible or prudent" alternative existed to routing a highway through Overton Park. Once the Secretary had prepared an administrative record in support of his determination, the federal court would then conduct a "searching and careful" APA review of the Secretary's decision. In so doing, the court would consider whether the Secretary's decision was based on a consideration of relevant factors, i.e., the existence of prudent and feasible alternatives, and mitigation measures, required by Section 4(f) of the Transportation Act.

While "careful and searching," the Supreme Court noted that APA review of agency action by federal courts is a narrow standard. Under this narrow APA standard, federal courts are not empowered to substitute their judgment for the agency's. On the contrary, the APA requires federal courts to defer to a federal agency's determination on issues within the agency's expertise (such as transportation projects involving park land), unless there has been a clear error in judgment.