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A Public Utility Model for Managing Public Land Recreation Enterprises

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Abstract

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Through review of relevant economic principles and judicial precedent, a case is made that public-land recreation enterprises are analogous to traditionally recognized public utilities. Given the historical concern over the societal value of recreation and associated pricing issues, public-land management policies failing to acknowledge these utilitylike characteristics and a subsequent agency regulatory responsibility are shown to be deficient. Existing institutional barriers, however, sometimes limit the options available to agency managers. Eight strategies for performance enhancement are offered.

Keywords: Public land, recreation, concessioner, public utilities, government regulation, National Park Service, USDA Forest Service, monopolies, public goods.

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Introduction

Congressional appropriations to federal agencies responsible for managing public-land recreation areas have not kept pace with demands. Consequently, public-land managers have been looking to alternative means of meeting the expectations of recreationists. Increasingly, they have turned to private concessions for delivering recreation goods and services, often in the absence of carefully evaluated policy governing these enterprises.

It will be shown that concessions are not a panacea but are in fact often used because administrative constraints limit potentially superior alternatives, such as direct government provision. Given the growing popularity of concessions, agency administrators must recognize their continued responsibility to manage public-land recreation in the interest of the landowners and not simply "turn over the keys" to private enterprise. It is suggested that the public-land recreation industry could be regulated under laws and policies generally used for public utilities; the case being made here is that public-land recreation enterprises are indeed a form of public utility to which all applicable economic theory and judicial precedent are relevant.

The implications of this line of thinking are explored vis-a-vis current agency policies, which fail to recognize the public utility character of these enterprises. The focus of the analysis is on the Forest Service (U.S. Department of Agriculture), although National Park Service historical perspective is offered where relevant. For a more detailed historical review of National Park Service and Forest Service recreation enterprise management, see Quinn (2000).

The model proposed in this paper is equally valid for public-land recreation enterprises managed by either the private sector or directly by government agencies. This point has gained importance given the recent (and currently temporary) option of federal agencies managing some recreation sites directly and retaining the bulk of user fees at the local level. The economic and social considerations associated with public utility management are no less applicable under this agency provision (recreation fee demonstration) scenario than in the private sector alternative.

Historical Concern Over Pricing and the Social Value of Public-Land Recreation

Much of the recent criticism of federal management of recreation concessions has focused on the returns (franchise fees) the private sector has paid to the government for the opportunity to use public land for its profit.[1] Although admittedly an easy target that plays well in the media, this narrow focus obscures a key issue of utility management, i.e., pricing and its associated social equity implications. Pricing equity historically received a great deal of attention.

Early debate over the designation of open spaces in the Western United States as national parks centered on keeping access to these lands a matter of public policy, as opposed to a function of the law of supply and demand applied to unique natural resources. Arguing in favor of designating Yellowstone as a national park, Senator Trumball of Illinois cautioned that without federal protection, access to the area would be restricted, that someone "may place an obstruction there, and a toll may be gathered from every person who goes to see these wonders of creation" (Quoted in Ise,

[1] See U.S. General Accounting Office (1988, 1991a, 1991b, 1992a, 1992b, 1993a, 1993b, 1996).

1961: 17). It can be argued that such tolls (in the form of access fees) exist today under public management. Yet the extent and magnitude of these tolls remain a matter of public policy rather than private right.

Park designation did not preclude the opportunity for private entrepreneurs to profit from public land. Sax (1981: 14) noted that after establishment in 1872, “Yellowstone was quickly invaded by as nefarious a bunch of promoters as the West had yet seen.” Other authors have recalled accounts of vendors “attacking” the tourists stepping down from trains "with the most objectionable kind of amusement park barker’s routine” (Everhart 1972: 115).

Similar concerns over commercialization and pricing emerged throughout the public land system. After an inspection of Yosemite Valley (then managed as a state park within a national park) in 1892, a special agent of the U.S. General Land Office reported, “Speculation, traffic, and gain are the dominant features of the management” (Ise 1961: 73). Likewise, a report of the Secretary of the Interior in 1892 declared that the “hotel charges were high, for primitive accommodations, the charges for stabling or hiring vehicles or saddle animals way beyond all reason, and as a result the park was inaccessible except to persons of ample time and means” (Ise 1961: 73).

This last quote clearly articulates an early concern by the federal government over the prices charged by private enterprises operating on public land and the recognition that such pricing might limit access to some public landowners.

These concerns continued to surface throughout the early 1900s and were at least partially responsible for the establishment of the National Park Service in 1916. Among the policy guidelines relayed to the first Park Service Director, Stephen Mather, by Interior Secretary Lane in 1918 were a few points of particular relevance here: “concessioners should be protected against competition if they were giving good service; and they should yield a revenue to the government, but **the development of the revenues should not impose a burden on visitors**” (Ise 1961: 194, emphasis added).

It soon became evident, however, that Mather’s primary focus was on luring private capital (primarily from the railroad companies) into the parks. Mather clearly understood that bringing more tourists to the national parks was important for gaining Congressional support for new park acquisitions and increased appropriations. He saw the railroads as one of the most reliable sources of capital necessary to provide high-quality visitor accommodations.

During this same period, a 1915 act of Congress (Term Permit Act)[2] authorized the Forest Service to permit privately owned recreation facilities on the national forests under special use permits, the first substantial Congressional recognition of the role of private recreation development on the forests. The act gave the service authority to lease-permit forest land to private persons or associations for the construction of summer homes (which the Park Service forbade), hotels, stores, or other recreation-related facilities. For years, the private capital attracted by this legislation was the only source of financing for developed recreation facilities.

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[2] Term Permit Act. An Act of March 4, 1915, 38 Stat. 1101, as amended; 16 U.S.C. 497.

To lure substantial private capital into recreation development on public land, it was often necessary to assure the developers that their investment was secure. This sometimes led to limiting or even removing all competition; in effect, the government established protected monopolies.

The general theory for some years before Mather had been that competition would keep prices down and the quality of services up. This resulted in so many concessioners in Yellowstone and Yosemite that few of them realized much profit even while rendering poor service. Mather was convinced that the concessioner system in the parks had to be changed. His solution was to establish a prime service provider for each national park, essentially establishing recreation service monopolies.

To sell this scheme to Congress and the public, Mather assured them that these monopolies would be regulated as were other public utilities. Mather believed that the federal parks were perfect settings for regulated monopolies. Public utilities were generally considered to be "natural monopolies" by most economists at the time; to Mather, national park recreation concessioners were simply another form of public utility. He made it clear that concessioners willing to operate under the regulated monopoly system would be not only interested in profits but also would have to possess a strong sense of park values and public service.

Mather pursued his "public utility" policy with characteristic fervor. It is notable that he never once used the word "concessioner" as a heading for the private enterprise section of his annual reports to the Secretary of the Interior, instead titling the subject "Public Utility Services." The use of this heading continued until 1934, 6 years after Mather's tenure ended. The term is no longer used, but we assert that it remains a valid label.

The emphasis on luring private capital for recreation development on public land continued into the 1930s when the New Deal policies of President Franklin Roosevelt brought about some abrupt changes. Focus within both the National Park Service and the Forest Service shifted toward direct government provision of many recreation goods and services, largely in the name of improving social welfare but also because of the large workforce made available through federal jobs programs such as the Works Project Administration and the Civilian Conservation Corps. At the same time, the protected private monopolies established under Mather were subject to increasingly stringent regulation, much to the chagrin of the recreation service industry.

It was during this period that the recognition of the social value of recreation on the national forests reached its pinnacle. The philosophy is perhaps best captured in a 1940 Forest Service publication in observing: "The job of general recreation is gradually being accorded the same basic importance as that of general education. It has become a public responsibility, recognized alike by county, State, and Federal Governments" (USDA FS 1940: 35). This same publication relays some of the mood of the agency personnel at the time:

> These are the people's forests. They need and have the right to use them for their pleasure. Most of them fall within the lower income brackets. The public forests offer the only chance for many of them to get some change

> and rest. And it is conceivable that the restoration of health and spirit which forest outings visibly produce will be worth as much to the Nation in the end as all the material national-forest crops (p. 36).

Consistent with this philosophy, agency policy (as articulated in a 1940 document entitled “Basic Principles Governing Recreation Management on the National Forests”) directed that

> The Government will install and operate simple, moderate-rate resorts in order to ensure appropriate and timely developments and provision of adequate service **at the lowest feasible rates**. Where public funds are not available for this purpose, such installations will be permitted by private enterprise, but **under permit requirements which retain government control of the type of development and the quality and cost of services rendered** (USDA FS 1940: 21, emphasis added).

The emphasis on pricing was similarly expressed by Newton Drury (appointed as Director of the National Park Service in 1940): “Some believe that the concessions should pay more into the government treasury. My own opinion is that even more important is the obtaining of moderate rates for the public patronizing the concessions” (Hummel 1987: 136). Drury’s argument is relevant regardless of whether the recreation enterprise in question is run by the private sector or directly by a federal agency.

Here then is the dual nature of the government's financial oversight of recreation enterprises. To claim to favor one over the other (reasonable rates for the public versus increased revenue generation) is a legitimate stance for a policymaker, although by necessity a value-laden stance. To relinquish one's responsibility to assure **either** moderate rates **or** equitable financial returns to the public would not be a legitimate agency role.

Competition Versus Monopoly

Before proceeding with the case for a public utility model for evaluating recreation enterprises on public land, it is necessary to review the current debate over the restrictions to competition prevalent on both national forest and national park land. This debate has generally focused on the National Park Service because of the visibility of park concessioners and the existence of specific legislation governing national park concessions operations; i.e., the Concessions Policy Act of 1965 and the National Park Service Concessions Management Improvement Act of 1998. The points are equally valid for the Forest Service, however.

Following a series of studies in the 1950s questioning Park Service concessions policy, three separate government reports were issued in 1963, each concluding that the National Park Service concession contracts “made little economic sense and that the government’s policies amounted to subsidization of an industry that no longer needed it” (Mantell 1979: 23). These reports stimulated a call for legislative reform in concessions policy. The clout of the concessions industry was evident in the Congressional negotiations, and the outcome of the legislation did little to quiet critics.

Representative William Dawson, Chairman of the House Committee on Government Relations, lamented, “The bill almost entirely disregards the potential benefits of promoting even a moderate degree of competition among existing and prospective concessioners” (Cong. Record—House, September 14, 1965: 23634). Representative Jack Brooks of Texas added: “The whole purpose of this bill is to remove all competition from park concessioner contracts and to enact into law perpetual monopolies in our national parks. . . . In short, the entire bill is solely in the interest of the concessioners and primarily at the expense of the public” (Cong. Record—House, September 14, 1965: 23634).

Essentially, the 1965 act did little to change the concession-protective practices in place since the 1920s, but merely codified past administrative policies (including non-competitive permit renewal) into legislative form. This did not end the debate, however.

As early as 1966, just 1 year after passage of the Concessions Policy Act (1965), a report by the Bureau of the Budget requested by President Johnson concluded: “It is competition which encourages improved services. We believe such competition may well outweigh the benefits derived from exclusive renewal rights” (p. 38).

In a cover letter to all land management Department and agency heads, President Johnson added:

> It is important that recreation concession policies preserve the competitive forces which give vitality to our whole Nation. Constructive and innovative competition will be necessary if proper facilities are to be available to the public when they journey to our national parks, forests, and water projects . . . our public policy must encourage the kind of public cooperation and healthy private competition necessary to protect the public's interest (April 21, 1967 cover letter to Bureau of Budget Report, 1966).

If the Bureau of the Budget Report and President Johnson’s letter seem contradictory to the Concessions Policy Act of 1965, evidence would indicate that the latter has held sway. An audit report by the Interior Department’s Inspector General found that of 29 contracts up for renewal between 1985 and 1989, 28 were awarded to the existing concessioner **who submitted the only offer** for the contract (Meyers 1993). (However, as a result of the National Park Service Concessions Management Improvement Act of 1998, changes may be forthcoming within the parks. This legislation is ostensibly designed to increase competition for park services.)

Even in the absence of legislative mandate, much the same result is generally found within the Forest Service. Yet the agency has avoided scrutiny, in part by declaring that it does not have a formal policy granting preferential rights to existing concessioners, unlike the Park Service under the 1965 act.

The intent of the above discussion is not to argue one way or the other over the benefits or costs of restricting competition among recreation enterprises. It is important to understand, however, that such restrictions are commonplace, and monopoly power of some concession operations is the inevitable outcome. This then begs the question of how the agencies choose to deal with these monopolies they themselves have established and protect from competition.

“Natural Monopolies” and Public Utilities

Stephen Mather concluded that a single firm, protected from competition, would best serve the public interest in the national parks. Without the fanfare of Mather, the Forest Service also has granted utilitylike monopoly status at many national forest locations. As noted above, this philosophy holds in many cases today. There is often sound economic rationale for such thinking. To meet agency objectives and public expectations (including economic efficiency and protection of environmental quality), it is sometimes desirable to limit production to one firm. This is commonly the case in situations involving economies of scale and scope, whereby one firm can meet public demand more cheaply than multiple firms. Park and forest recreation enterprises not only exhibit economies of scale and scope, but they also are located in unique natural settings (often far from urban supply centers) that contribute to single-firm efficiency. Such conditions result in what are generally referred to as “natural monopolies.”

Although most authors have focused on economies of scale and scope in defining natural monopolies, others have suggested that the supply characteristics of goods determine their tendency to result in monopoly. In his classic treatise on the subject, Barnes (1942) argued that the “economic basis of a monopoly may be found in the natural limitations on the supply; in the limitations on the number of locations suitable for the business; in the character of the product which limits the area of distribution; or in the superiority of service by a monopoly which leads to a public policy of restricting entry” (p. 18). These criteria are clearly applicable to public-land recreation facilities.

In his assessment of the economic characteristics of public utilities, Martin Glaeser pointed to many of the same traits outlined above for natural monopolies, including natural limitations of a source of supply, scarcity of advantageous sites, and conditions where effective competition has been deterred by the government. He emphasized that enterprises granted noncompetitive rights of operation by a government entity have, almost without dissent, been considered as utilities and therefore, “persons are free to enter upon a public service enterprise, but having entered upon an undertaking of this character they are constrained by the peculiar system of rights and duties” (Glaeser 1925: 184).

Glaeser observed:

> In a society which is accustomed to look to government initiative for the supply of common needs, the facility will be supplied as a public function. On the other hand, a society which is distrustful of the state as an agency for supplying such common needs, and a society in which the forms of associated private activity like corporations have been developed, will leave the supplying of such common needs to a private agency under a franchise privilege, **not as a matter of common right, but as an agency of the state**.

Similarly, Barnes suggested that:

> Public utilities are distinguished from other businesses by the formal obligations to the public which are exposed upon such companies. . . . Utility enterprises must be prepared at all times to render a service that is adequate both in quality and in quantity. In the absence of an alternative, the consumer must take the service from the only utility available, and **it is, therefore, appropriate that the company should be under a legal obligation to provide the service at a reasonable price** (1942: 42, emphasis added).

The conditions described above are directly applicable to those commonly found for public-land recreation enterprises. An example will help demonstrate this point.

Case Example: Shuttle-Bus Service Within the Sabino Canyon Recreation Area

Located on the outskirts of Tucson, Arizona, in the Coronado National Forest, Sabino Canyon Recreation Area has long been popular with both local residents and visitors from throughout the United States. The area receives more than 1 million visitors annually, making it one of the most heavily visited developed recreation sites in the National Forest System.

In the 1930s, the Works Projects Administration and the Civilian Conservation Corps undertook a series of ambitious development projects within the area. A 4-mile paved road with nine stone bridges was constructed in the canyon bottom. Dams were built, creating pools for recreationists. Extensive camping and picnic facilities were constructed. Plans called for extending the road and constructing a large dam farther up the canyon (in an area now Congressionally designated Wilderness), but funding shortfalls prevented completion of the project.

In the 1960s and 1970s, the Forest Service invested heavily in the infrastructure of the recreation area. New roads were built, electricity and water-sewer lines were installed, and many new restrooms and recreation facilities were constructed. The first visitor center in the Forest Service's Southwest Region was erected here in 1963. Visitation skyrocketed.

For more than 40 years, residents and tourists were free to drive their personal vehicles within the canyon. The narrow, winding roads were designed for 1930s traffic, however, and by the 1960s, traffic jams and car exhaust fumes were commonplace on weekends and holidays. The very experience that many people were coming to enjoy was being destroyed.

In 1973, much of the road system was temporarily closed to private motor vehicles in order to install sewer lines. The closure provided an opportunity to address the problems in the canyon, including noise and air pollution, litter, vandalism, rowdiness, and congestion. A draft environmental statement was issued in 1975 outlining the concept of a public transportation system in the canyon. A shuttle-bus was recommended as the best solution to the pollution and vehicle congestion problems in the canyon. Four primary objectives for the system were presented:

1. Enhance the experience of forest visitors.
2. Emphasize the natural and environmental factors of this experience.
3. Provide interpretive and educational services and opportunities.
4. Maintain and improve the quality of the ecosystem (soil, water, air, vegetation, and wildlife).

In addition, it was emphasized that “a major concern was who was going to be excluded from the canyon, such as the poor and handicapped.”[3]

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[3] From U.S. Department of Agriculture, Forest Service memo. “History of Shuttle System in Sabino Canyon,” October 24, 1988, p. 1.

In 1977, a request for proposals (RFP) entitled "Invitation to Provide a Public Transportation System in Sabino Canyon Recreation Area" was sent to 22 prospective providers. The permit was awarded to TWA Canteen Services, and they began operations in June of 1978. In that same year, the road accessing the main body of Sabino Canyon was closed to private motor vehicles; all motorized public transport was thereafter provided by a shuttle bus. The remainder of the roads within the recreation area were closed to private vehicles in 1981.

Many of the public users of Sabino Canyon who previously drove personal vehicles into the area were not pleased with the decision to prohibit their freedom of motor vehicle access. One means by which the Forest Service placated the public was to assure them that the closure was in the public interest and that the mass transit system would provide comparable access to that enjoyed before the new system.

The Forest Service initially assured that the shuttle-bus was indeed a public transportation system affordable to all but the very lowest income groups, those that generally did not visit Sabino before the private vehicle closure. The fare was 85 cents for adults and 50 cents for children. On Wednesdays, the adult fare was reduced to 40 cents. Special discounts were occasionally offered during slow periods. This was not to last, however.

Like other public transportation systems, and public utilities in general, the shuttle-bus system in Sabino Canyon exhibits strong economies of scale. An infrastructure of roads and related facilities has been provided by the public through general tax revenues and associated agency appropriations. The shuttle-bus operation itself requires investment in a fleet of power units and trailers, fuel storage and distribution, maintenance facilities, and personnel. Average costs per rider decline rapidly with increased use, although when demand reaches certain levels, it may be necessary to add additional buses to accommodate riders, thereby causing small “steps” in the declining average cost curve. Similarly, marginal costs of an additional passenger on a less than full shuttle are essentially zero (additional wear and tear and fuel costs from the extra customer being negligible). Yet the additional rider calling into use another shuttle bus has added a measurable marginal cost. These “steps” are typical of utilities and do not alter the fact that economies of scale result in a single firm being the most cost efficient means of providing shuttle-bus service in Sabino Canyon.

One obvious reason for least-cost provision is for the land-owning public to minimize the impact on the general revenue fund (if service is provided free of charge or at a nominal rate), or alternatively to minimize the shuttle-bus user fee required to cover operating costs. The public landowners would not want to block entry to competitors to obtain least-cost provision in order that the sole provider could maximize profits at the shuttle-riding landowners’ expense. The fact that the public prohibited themselves from driving in their canyon (through agency direction) and elected to institute a public transportation system in lieu of private vehicles clearly leads to the unambiguous conclusion that the shuttle operation is “affected with a public interest.” This important point will be revisited below in the discussion of judicial precedent in the arena of government price regulation.

Single-firm shuttle service offers more than simply least-cost efficiency. Provision by more than one firm would result in nonmonetary costs associated with traffic congestion, excess noise and air pollution, and visitor confusion. Multiple competitive firms would need additional public land (sensitive Sonoran Desert ecosystem in this instance) for maintenance, warehousing, and sales facilities. Such nonmonetary concerns are commonplace in public-land recreation, often leading to services provided by a single firm protected from competition.

Because of the initial capital investment burden of starting up a new service and of the Forest Service's apparent initial insistence that the charge remain low, TWA Services did not achieve an adequate return, and they sold the business in 1980 to Sabino Enterprises, Inc. This transfer was made with approval of the Forest Service but without reopening the process to competitive bidding.

From 1980 to 1985, the adult fare increased steadily to $3. In 1985, the service changed hands again, having been sold to Sabino Canyon Tours, Inc. (SCT). This transfer also was allowed to take place by the Forest Service without evaluating competitive interest for the enterprise. Sabino Canyon Tours, Inc. was granted a 10-year special-use permit for "operating and maintaining a public transportation system . . . "[4] The fare was immediately raised to $4 for adults and $2 for children.

During the 1980s, the agency and the concessioner began inexplicably to view the transportation system as simply a tourist attraction, a "ride" if you will. With this thinking in mind, an additional fare increase to $5 per adult was granted in 1989, based on comparison with entertainment and tourist attractions in the Tucson area, such as movie theatres and the "Old Tucson Studios" theme park. There is little logical basis for these comparisons. Although a simple interpretive narration is provided as required by the Forest Service, the primary function of the shuttle is a public-land transportation system. Furthermore, if a conscious decision was made to change the purpose of the shuttle from a public transportation system to a "tourist attraction," a new prospectus should have been issued allowing other potential operators to compete for the service. It is entirely possible that TWA Services, which did not want to run an 85-cent mass transit system, may have been interested in operating a $5 tourist attraction. In 1998, the agency approved yet another fare raise to $6, increasing the already large net profit of this operation by an additional $200,000+ per year.[5]

With a few vocal exceptions, the public has been relatively silent through these fare increases. Several explanations are likely. First, the users seem to have forgotten (or, in the case of nonlocals, do not know) that they agreed to the private vehicle ban in their canyon because a reasonably priced mass transit system would be made available. Second, there is a commonly held belief that the system is run by the Forest Service and therefore an expectation that the fare is simply whatever is necessary to cover costs. Third, informal surveys of users indicate that most believe revenues from

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[4] U.S. Department of Agriculture, Forest Service Term Special Use Permit, dated May 20, 1985. On file with: Coronado National Forest, 300 W. Congress, Tucson, AZ 85701.

[5] The author is unable to disclose actual costs and net revenues of concessioner enterprises owing to law protecting the confidentiality of financial data. The Regional Accountant for the Southwest Region of the Forest Service, however, has substantiated that profits at SCT, Inc. are "excessive."

the shuttle-bus system remain in Sabino Canyon for operating and maintaining the recreation area's facilities. Lastly, many tourists, unaware of the history of the shuttle bus, mistakenly compare the cost of a movie or other private recreation enterprises, and believe $6 is a reasonable price to see an area as beautiful as Sabino Canyon. In fact, Zajac (1978) observed that “under a rigid policy of no new entry [by competing firms], customers may not be wooed by rivals and may not have any reason to feel that prices they pay are inequitable” (p. 81).

It is important to understand that visitors to Sabino Canyon (and other such public-land sites) own not only the land but also the road on which they are riding and all the recreation facilities they enjoy. Economic principles and GAO reports are consistent on this issue—**visitors should not be charged by a private entrepreneur for what they already own, they simply should be charged for use of the private operator's capital**.[6]

The Sabino Canyon transportation structure is a curious example of public landowners banning themselves from driving on their land, permitting a single private entrepreneur to set up a mass transit service, and then allowing the entrepreneur to charge whatever it wants (and to retain the profits) to provide access to the canyon the public owns. In exchange for this privilege, the concessioner pays the landowners about 2 percent of the gross revenue, most of which is returned to the federal treasury.

The Sabino case example is representative of many public-land recreation service enterprises. In such public utilitylike cases, a single provider, protected from competition, may be the most effective and efficient means of meeting public objectives. However, with this structure come attendant agency responsibilities.

Forest Service Policy

Forest Service policy for regulating agency-created monopolists is ambiguous. Although the agency maintains the position that it “reserves the right” to regulate private enterprise pricing, in reality no such regulatory role is exercised. Empirical evidence of actual policy implementation may be gleaned from regional agency correspondence.

Audits of permittees are appropriate in the course of permit administration and indeed are considered by many to be a legal responsibility of an agency. In response to a request for an audit of a recreation enterprise to evaluate a proposed price increase, however, the position of one region was that an audit was not warranted and would “only serve to antagonize the permit holder.” Their understanding of agency policy on pricing oversight was clearly stated in the responding memo: “The Forest Service is not concerned with trying to determine ‘excess’ or even ‘normal’ profit levels for our permit holders. To do so would place us in an indefensible legal position regarding interference with the holder's rights” (USDA FS 1994).

The Pacific Southwest Region of the Forest Service (Region 5), with the largest recreation program of the nine agency regions, published a concession-management document in October 1993 directing that “the criteria [sic] evaluating fees paid by the public will be dropped from the evaluation criteria list.” The regional interpretation was

[6] See U.S. General Accounting Office 1980, p. 57.

that "**National Direction is for the Forest Service not to control fees charged by permittees**. This being the case there is no need to evaluate proposed rates to be charged by concessionaires" (USDA FS 1993a: 14, emphasis added).

Similarly, the Southwest Regional Office (Region 3), upon review of a campground prospectus, suggested that prices to the public be eliminated as an evaluation criterion. They supported this position by arguing, "We haven't controlled prices charged by permit holders for almost 20 years, so why should we evaluate their proposals based on prices charged to the public" (USDA FS 1993b).

These statements represent an apparent agency position that private enterprise pricing is not a governmental concern, but rather strictly a function of the "market." However, for many public-land recreation enterprises, there **is** no competitive market to influence pricing. The competition has been restricted by the limited resource supply and by the agencies themselves.

Many recreation concessioners are essentially franchises that are protected from competition by their exclusive agency-granted permits. As noted, there may be valid justification for such exclusive permits in "natural monopoly" situations such as recreation enterprises. When these franchises are established, however, certain legal obligations fall on the permitting entity. This point has been addressed in many judicial precedents. Baldwin (1989: 14) reported that Court rulings that arose from challenges to franchising emphasized that: "the state could not by such contracts void the basic powers of the state. . . . Franchises that voided these powers were ruled to be illegal. . . . Franchises that alienated these basic rights were those that were inordinately long or ones where some unreasonable privilege **such as freedom from price regulation**, was granted" (emphasis added). The contradiction with the Forest Service position is evident. Acknowledgment of the public utility paradigm for public-land recreation enterprises illuminates the untenable nature of the agency position statements outlined above.

Regulation and Related Judicial Precedent

The United States generally has followed a policy of private ownership of public utilities, with accompanying regulation. Despite attempts through the 1930s and 1940s to nationalize national park recreation concessions, and with the notable exceptions of campgrounds, picnic areas, and some transportation systems, the pattern on both national parks and forests has been consistent with other, more "traditional" public utilities in the sense that private ownership has been encouraged. The form and degree of regulation of these recreation utilities, however, has often differed substantially from prevailing methods of utility regulation.

Although it is rare today to refer to recreation concessions as public utilities subject to regulation, the parallels with traditional utility regulation are evident. Yet the Forest Service does not acknowledge a role in regulating prices charged by private enterprises on national forest land. In fact, as noted above, it has been contended that such regulation would be legally "indefensible." It will be shown that this policy statement is inaccurate, and that it greatly restricts the ability of agency managers to improve performance of recreation enterprises.

Beginning in 1877, a series of U.S. Supreme Court decisions established substantial legal precedent regarding the rights of the government to regulate private enterprises. The Court has consistently ruled that regulation is not only permissible but in fact necessary when the business in question is "affected with a public interest." Barnes (1942) provided the classic historical treatise on judicial rulings regarding the government's role in regulating private business. Phillips (1965, 1988), Baldwin (1989), and Crew and Kleindorfer (1986) built on Barnes' work with a more contemporary perspective. These authors have provided the basis for much of this review.

Barnes (1942) observed that the decisions of the Courts have been couched in terms of the protection of constitutional rights: "If the regulation was upheld, the business was said to be 'affected with a public interest,' and the regulation was said to be a valid exercise of the police power. If, on the contrary, the courts found that the business was not 'affected with a public interest,' the regulation was an invalid exercise of police power" (Barnes 1942: 1). The substance of the subsequent debate has centered on defining when businesses are "affected with a public interest" to a degree necessary to warrant regulation.

In the landmark 1877 case of Munn v. Illinois,[7] the Court found that the state of Illinois was within its rights to adopt a statute prescribing the maximum charges to be exacted by owners of grain elevators. In delivering the opinion, Chief Justice Waite established the oft-quoted precedent:

> . . . we find that when private property is affected with a public interest, it ceases to be "juris private" only. . . . Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

The potential of the public-interest concept was demonstrated in the German Alliance Insurance case in 1914. When the state of Kansas attempted to regulate insurance rates, the German Alliance Insurance Company appealed to the courts that fire insurance was a private business beyond the regulatory power of the state.[8] In marked contrast to recreation concessions operating on public land, in this case it was argued that the business was "in no way dependent upon the receipt of special privileges from the state; that there was no property (in the physical sense) that could be said to be devoted to a public use; and that the business was exclusively concerned with private personal contracts" (Barnes 1942: 4). Despite this compelling argument, the Supreme Court ruled in favor of Kansas, permitting the price regulation. Mr. Justice McKenna asserted that "a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to government regulation."

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[7] Munn v. Illinois, 94 U.S. 113-154 (1877).

[8] German Alliance Insurance Co. v. Kansas, 233 U.S. 389 (1914).

In the 1920s, the new majority on the Court began to sway in favor of industry in a number of regulatory decisions.[9] Even in these cases, however, the Justices' opinions provided strong arguments for those situations in which regulation is warranted. Mr. Chief Justice Taft[10] concluded that among the businesses said to be clothed with a public interest justifying some public regulation were (1) those that are "carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public;" and (2) businesses in which the owner "by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation." These conditions are clearly relevant to public-land recreation enterprises.

The 1934 ruling in Nebbia v. New York[11] once again broadened the Supreme Court's interpretation of the public interest in concluding that the rights of property were subordinate to the power of the state to regulate property and personal relations in the interests of the general welfare. The Court also dismissed the distinctions between price regulation and other forms of control as of no significance.

Since "Nebbia," the Supreme Court has been even less stringent in defining the public interest concept. In a 1950 case (Cities Service Gas v. Peerless Oil and Gas), the Court simply concluded: "Like any other regulation, a price-fixing order is lawful if substantially related to a legitimate end sought to be attained" (Phillips 1988: 108).

Barnes surmised that there are seven theories commonly applied by legislators or the courts in attempts to define the public interest. Five of the theories he classifies as "legal" and two "economic." The applicable economic theories relate to the rights of the government to limit monopoly power and to assure due consideration of the "public welfare." Two of the legal theories are of particular relevance to this paper.

The **implied-contract theory** holds that businesses subject to regulation are those that enjoy "rights or privileges from the government" (Barnes 1942: 14). Businesses operating under special authorizations, such as permits, franchises, or contracts, giving them the right to occupy public land with their structures and equipment are included in this category. It is noteworthy that even the more industry-oriented members of the Supreme Court have accepted this theory. In his dissent in Munn v. Illinois, Mr. Justice Field argued, "It is only where some right or privilege is conferred by the government upon the owner, that the compensation to be received by him becomes a legitimate matter of regulation. Submission to the regulation of compensation in such cases is an implied condition of the grant" (Barnes 1942: 14). Similarly, Mr. Justice Sutherland held that regulation of price and service were appropriate for services "made public because the privilege of maintaining them has been granted by the government" (Barnes 1942: 14).

Barnes astutely observed that "it would be a mistake to find in the grant of privileges the source of the public interest. Indeed, it is the **previously existing** public interest which justifies the grant of special privileges to the business" (p. 15). This is clearly

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[9] See for example Tyson and Brother v. Banton, 273 U.S. 418-456 (1927) and Ribnik v. McBride, 277 U.S. 350 (1928).

[10] In Wolff Packing Co. v. Industrial Court, 262 U.S. 522 (1923).

[11] 291 U.S. 502 (1934), quoted in Barnes (1942), p. 10.

the case for recreation enterprises that are only granted the privilege of operating on public land (often protected from competition) when the enterprise is deemed to be in the public interest.

The **government-function theory** suggests that regulation is warranted when a business is performing a public or governmental function as an agent of the state. This position was supported by Mr. Justice Brandeis in his Southwestern Bell Telephone[12] opinion stating that regulation is appropriate when "the company is the substitute for the State in the performance of a public service, thus becoming a public servant."

The government-function theory offers no clear insight into which businesses are to be considered as serving a government function. For public-land recreation enterprises, however, these would certainly include transportation systems put in place in lieu of private vehicles and those private enterprises previously operated by the government, such as campgrounds and picnic areas, that clearly are serving "as a substitute for the State" in the provision of the service.

It is worth noting that the National Park Service does not accept unsolicited business proposals, but only issues a prospectus or otherwise approves a business venture if the agency deems it is in the public interest and commensurate with park values. Although the Forest Service does review unsolicited proposals, it will similarly only approve new businesses in the national forests if they are considered to be in the public interest. This should not be surprising, given that these are publicly owned lands; it is therefore safe to conclude that recreation enterprises on public land are unambiguously "affected with a public interest."

Given the rulings of the Supreme Court, it appears the Forest Service is clearly within its rights and responsibilities to regulate prices for recreation-service enterprises, as these businesses meet many Court-established criteria defining them as "affected with a public interest."

Strategies for Performance Enhancement

The strategies suggested here focus on the fact that the lands in question are owned by all American citizens and on the widely accepted view that recreation businesses should be permitted to operate on public land if and only if they are determined to be in the public interest. As such, there are certain duties imposed on the government to ensure the protection of a broadly defined class of public interests when managing these enterprises. The following recommendations relate to those governmental obligations.

A Proposed Paradigm Shift

Fundamental change is necessary in the way many agency personnel and elected officials view public-land businesses. Debate over minor adjustments in the amount of money concessioners return to the Treasury sheds little light on the larger policy considerations. The broadest, yet most significant, recommendation offered here is that the paradigm for dealing with recreation enterprises be altered to more adequately reflect the ownership rights of the public and the utilitylike nature of many recreation businesses operating on public land. To assume that the interests of the recreation-service providers and those users of ample means are paramount is to ignore the fact

[12] 262 U.S. 276, 291, quoted in Barnes (1942), p. 16.

that these enterprises are clearly “affected with a public interest" as defined by the U.S. Supreme Court and need to be managed accordingly. Consistent with this philosophy, the following are proposed:

Strategy 1. Retention of user fees at the local level—Existing constraints, which essentially preclude direct government provision of many recreation goods and services, should be removed. Specifically, the legislated requirement that 85 percent of user fees be forwarded to the U.S. Treasury must be changed. This regulation offers no incentive for innovative, entrepreneurial thinking on the part of agency land managers and ultimately results in potential fee opportunities being turned over to private operators, often against the will of public landowners. Most agency-collected receipts (at least 75 percent) should be retained locally.

Implementing this recommendation would immediately improve performance in those situations where exclusion costs are relatively low and where most of the necessary facilities are already in place, including existing picnicking and camping grounds and access to developed recreation sites. In some cases, related bureaucratic constraints, such as hiring ceilings on agency personnel, also would need to be relaxed.

Since 1997, public-land management agencies have been authorized by Congress to implement (on a trial demonstration basis) local fee revenue retention. In many situations, this demonstration program has improved operation and maintenance of facilities. The future of the program is currently being debated. Of particular relevance is the contention that existing concessioner-operated enterprises should not be eligible for agency fee retention, even on expiration of the concession permit. This, of course, is not only illogical from a public interest standpoint but would eliminate many of the sites with the highest revenue-generating potential from agency fee retention consideration. Permanent fee retention legislation should make all alternatives available for evaluation, including agency operation on expiration of existing special-use authorizations.

Strategy 2. Financing for public enterprises—In conjunction with agency retention of user fees at the local level, it is recommended that a local agency-managed site be permitted to acquire financing for recreation service capital investments if appropriated funds are unavailable. Loans would be repaid through user fees. This recommendation would help move the agencies into meaningful management partnerships with the landowners. A high level of performance would be anticipated in such public utility-like services as transportation systems and educational tour services where current regulations preclude government provision when appropriations are not available for equipment purchase, as is commonly the case.

Financing could be done by issuing bonds through nonprofit entities, with bonds being paid off by a specified portion of user fees. Such a program could raise the necessary capital for providing quality service and facility management.

Strategy 3. Policy consistency—Whether the above recommendations are adopted or not, consistent policy is needed across agencies for dealing with private concessioners when it is decided to provide private public-recreation services in lieu of government provision. This point has been made repeatedly for decades, yet major differences in concessioner policy persist. Despite vague statements from the Forest

Service that their “mission” is different than that of the Park Service and other Interior Department agencies, there is simply no basis for significant philosophical variation in land-management-agency policies regarding concessioners. Of course, there is even less justification for major variation in policy **within** an agency, as has too often been common. Accepting the public utility paradigm would be an important step toward achieving policy consistency.

Strategy 4. Regulation of pricing—It is not popular to be seen as an advocate of government regulation of private enterprise. Goldberg (1976) recognized this in labeling his essay on the subject “The case **against** the case against regulation.” However, this paper has shown that public-land recreation enterprises often fit the mold of businesses for which regulation is both legal and appropriate. The recommendation that agencies regulate concessioner prices is not new. For instance, a report from the Bureau of the Budget (forwarded to agency heads by President Johnson in 1967) declared that “agencies have the **responsibility** of assuring the public of fair and competitive pricing policies by concessioners. Prices for the facilities and services offered generally must be within the reach of as much of the public as possible. Regulation of concessioner operations constitutes a **necessary and appropriate** protection of the public interest” (U.S. Bureau of Budget 1966:16, emphasis added). It is difficult to reconcile the Forest Service's laissez faire position with this Executive Office statement of federal policy. Given the current emphasis on establishing concessions for traditionally government-provided recreation services, the recommendation to regulate prices is more valid than it was in 1967.

This is not a “one-size-fits-all” prescription. Several variables distinguish the degree to which regulation is appropriate, including the extent of potential monopoly power, the availability of true substitutes, local supply-demand relations, the nature of the clientele, and the terms and privileges granted by the operating permit.

If selling products for which a clear market is established and for which truly comparable substitutes are available (e.g., T-shirts or hot dogs), pricing should be based on readily identifiable market prices. However, for unique public-land recreation experiences, where the land and facilities are owned by the users, price comparability to “similar” services on private land with entirely different cost structures is illogical. At a minimum, if such a policy is continued, it should be assured that any revenue in excess of average total costs (with an allowance for profit) is retained by the local agency and not by the private concessioner.

Strategy 5. Franchise bidding—To avoid the potential pitfalls of traditional rate-of-return regulation,[13] land management agencies could consider franchise bidding for recreation concessioners. Although not applicable in all cases, this approach (discussed in detail in Demsetz 1968 and Quinn 1996) could greatly mitigate the ill effects of natural monopoly situations without resorting to agency price regulation. When the presence of multiple competing firms providing a public service is neither efficient nor environmentally sound, franchise bidding introduces competition **for** the market in an effort to simulate the effects of competition **within** the market. With due

[13] Reviewed in Quinn (1996) and addressed in detail in Sherman (1989) and Berg and Tschirhart (1988). See U.S. General Accounting Office (1988, 1991a, 1991b, 1992a, 1992b, 1993a, 1993b, 1996).

attention to quality service, the bidding procedure awards the franchise to the firm willing to provide the service at the lowest price to users. This has been most effective in situations involving enterprises with low and mobile capital assets. Such situations are common on public land. Management of existing campgrounds, picnic areas, or transportation systems are examples.

Despite the potential benefits of franchise bidding, this system has not been implemented for recreation services on federal land. Although recent agency rhetoric, government reports, and the NPS Concessions Management Improvement Act of 1998 emphasize the need to generate greater competition for concessioner permits, the clear focus (in addition to assuring quality service) has been on awarding the permits to those bidding the highest return to the government. In fact, it has been shown that agency direction has at times explicitly prohibited using proposed price as a criterion for evaluating concessioners. The effect of this skewed approach to selecting service providers is to actually encourage pricing above average costs, the very result that franchise bidding is designed to prevent.

Franchise bidding is workable even in the presence of misguided policies, such as requiring that public campgrounds charge no less than “competing” private-land campgrounds. If, based on flawed reasoning and political pressure, the agency insists on charging the landowners more than the lowest bidder is willing to charge (in order to keep the price artificially high), then a surcharge could be added to the price of the service and that portion of the total fee would go directly to the government. Although questionable from both an efficiency and equity standpoint, such a procedure at least returns the monopoly rents to the public (the owners) and not to the concessioner at the expense of the owners.

Strategy 6. Public provision of recreation services—Strategies 1 and 2 propose modifications to existing policies that preclude satisfactory performance under government provision in many situations. Contingent on adoption of these recommendations is the proposal that direct government provision be evaluated as an option for providing recreation services.

Federal recreation appropriations are insufficient to maintain the open access areas of the parks and forests and also manage the recreation services for which fee collection is possible; therefore, the services that can command a fee are now routinely being transferred to the private sector. The ironic result is that in some cases the recreating public-owners are charged more and the government receives less than it would if it operated the facilities directly and retained the receipts locally. In addition, under private operation, the agencies must continue to monitor quality and administer the permits and, theoretically at least, control prices to assure the public is charged at a “reasonable” level. Historically, none of the transactions costs associated with this administrative oversight are reimbursed from concessioner receipts.

Governmental provision of services would help resolve conflicts among segments of the public over the appropriate amount of development on public land. The political implications of impacting concessioners’ income would no longer influence decision-making. Furthermore, nonfinancial goals, such as environmental protection, experience quality, and minimizing congestion, could be pursued much more readily than

with a for-profit operator. At a minimum, the public, the agencies, and the Congress could focus on the relevant tradeoffs and more easily address the question of whose interests count.

Admittedly, the government provider could exploit monopoly power much like the for-profit operator. However, although cases do exist of publicly operated facilities being run so as to capture monopoly profits, these are rare. Sherman (1989: 63) has observed that the lack of profit motive by the government can sometimes be beneficial, "for it allows publicly responsible attention to non-financial goals, as is expected of a bureaucracy, and it might avoid the distortions caused by monopoly pricing."

Despite the potential benefits, enterprises are often transferred to private hands because administrative rules constrain public providers from achieving specified goals, such as collecting revenue sufficient to cover costs. These administrative constraints can cause substantial inefficiencies. Jones and others (1990: 184) observed that rules often determine the outcome: "If the public enterprise can successfully mimic the behavior of the firm after divestiture, then divestiture does not pay in terms of net benefits." If postdivestiture policy will permit monopoly profits, then there is every reason to collect these rents under public provision and return them to the public coffers. If such pricing is deemed inappropriate under public provision, it is equally inappropriate after transfer to a private provider.

There is strong support among agency land managers for direct government provision of many recreation services, including picnic areas, campgrounds, and general access control (see Quinn 1996 for survey results). With the adoption of recommendations 1 and 2, it is suggested here that these services, at a minimum, can be efficiently operated by the agencies. Additional analysis is needed to determine the costs and benefits of government provision of other services more commonly provided by the private sector.

Strategy 7. Nonprofit organization partnerships—If administrative constraints and lack of capital investment funds prohibit agency provision, partnerships with some nonprofit organizations may be an option. Baumol (1980: 300) disputed the frequently argued allegation that for-profit firms are by nature more "efficient" than nonprofits. He noted: "It seems important to distinguish situations in which there is some special basis for reliance on idealism, on social pressure, on special enthusiasm. In such cases a non-profit-making enterprise may operate with noteworthy efficiency." Clearly, recreation services provision on public land fits the criteria. However, if the motives of the nonprofit in question are to generate revenue for other purposes, including expenses for sustaining a large administrative staff, the result can be similar to that of for-profits. The recommendation here is that agencies should foster relations with local, "grass-roots" nonprofit organizations whose primary goal is to improve local conditions and local recreation opportunities; in Baumol's words, the organization must have "idealism and special enthusiasm for the local area."

As with government provision, exploitation of monopoly power is still possible with a nonprofit organization if this is permitted by the land-management agency. In such a case, the profits from the operation could be used to improve facilities in the area, to minimize environmental impacts, to improve user security through support of agency patrol officers, and to provide for some income redistribution through support of social

programs in the community or through fee reductions for low-income groups. On the other hand, if monopoly profits were considered by the agency and the nonprofit to be inappropriate, fees could be lowered to levels approaching average costs. In the case of the Forest Service, such a cooperative relation with the enterprise would keep the local agency personnel in line with current agency policy, which contends that fees of recreation enterprises should not be regulated; all decisions regarding whose interests count could be based on bilateral agreement with the operator.

As noted above, some critics have suggested that the management of nonprofit enterprises may be less cost efficient than for-profits. If there were local evidence of this, salary incentives could be offered to the operation's management staff to improve efficiency. There is no reason to believe, however, that a nonprofit enterprise with a salaried operating staff governed by a board will not be at least as cost efficient (and likely more user-oriented) than a for-profit monopolist.

Strategy 8. "Corporate" nonprofit provision—When it has been decided that operating a large, capital-intensive recreation facility is in the public interest despite potential environmental impacts, it is recommended that nonprofit provision be evaluated by using a "corporate" nonprofit approach.

This recommendation is consistent with that proposed by Sax (1981), who suggested the possibility of "reviving in modern guise Mather's scheme of recruiting major enterprises to provide minimum profit, or even nonprofit showcases." The idea certainly is worth considering. Given the precedent of large corporations providing substantial sponsorship of public television, radio, the arts, and the Olympics, support for quality public-land recreation services is not farfetched. Nonprofit corporations, supported by private grants, could manage the facilities in cooperation with the agencies to minimize environmental damage and emphasize activities that are congruent with the public goals for the area.

Certainly, the above strategies are not intended to exclude for-profit private enterprises on public land. There will always be a role for this management option. The point is that all available options should be carefully evaluated before implementation and whenever permits are up for renewal.

Conclusions

Public-land recreation opportunities in the United States are quickly evolving toward a loosely regulated network of private entrepreneurial ventures. The movement away from direct agency provision and the loss of early National Park Service recognition of private concessioners as a form of public service utility has shifted the "rights" away from the user-owners of the public land to those who stand to profit from controlling access to this land. It is suggested that this shift was not based on any carefully crafted, thoughtful policy analysis but is simply the result of the agencies' inability under existing law and policy to manage recreation facilities effectively. Those that feel good about for-profit concessions as the solution to public facility operation problems have often not paused to consider the broader policy issues that this "solution" has brought to light: most notably, or at least most succinctly, Whose interests count?

Schmid (1978: 40) observed that "to have a right to an aspect of a resource is to be able to deny its use to another or possibly to extract a payment in exchange for your consent . . . **ownership** influences whose interests are realized and whose are

foregone." This is an essential concept for recreation policymaking. To state that a concessioner should be permitted to charge whatever the "market" will bear is to imply, or more accurately, to grant ownership.

If, as a matter of informed public policy, it is agreed by the landowners that an operation should be permitted on their land to provide a needed public utility, the service provider should be regulated accordingly. On the other hand, if the owners do not agree that the operation is functioning as a utility in providing a needed public service yet they permit the operation nonetheless, the only possible motivation would be to maximize the revenue this enterprise could bring to the **landowners'** coffers.

For public-land recreation enterprises, a case has been made that neither the public utility nor the rent maximization approach has been adopted. Indeed, in some instances, a laissez faire policy has been endorsed, effectively transferring a portion of the property rights to the enterprise.

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