



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

MAR 17 1983

Memorandum

To: Appalachian Trail Project Office, NPS
From: Acting Assistant Solicitor, Parks and Recreation
Subject: Delegation to ATC

This is in response to your request for our legal opinion concerning the authorities of the National Park Service to enter into a written cooperative agreement with the Appalachian Trail Conference (ATC) to operate, develop, and maintain portions of the Appalachian National Scenic Trail.* Pursuant to such an agreement, the ATC and its member clubs would formally agree to assume certain management functions, and the National Park Service would agree to accept ATC management in lieu of direct National Park Service control. You have asked us to define the legal limits of such a transfer and to identify those National Park Service functions that are not subject to a cooperative agreement transfer.

The National Trails System Act recognized the unique role the Appalachian Trail volunteers have played and continue to play in the life of the Appalachian Trail. The legislative history of this Act specifically provides as follows:

* As you are aware, the existing cooperative agreement between NPS and ATC (May 13, 1970) has already outlined a significant delegation of trail management authorities. Accordingly, it may only be necessary to amend that agreement slightly and to identify those NPS acquired lands that will be managed by ATC to complete the transfer in question.

APPALACHIAN TRAIL

The Appalachian Trail Conference will be encouraged to continue its role as the principal guardian of the Appalachian Trail, which has been in use for over 40 years. Thousands of volunteer members of the conference have teamed together to establish and maintain the trail. The Appalachian Trail passes through 14 States and crosses land varied in ownership. Through much of New England the trail crosses private lands. In Maine, virtually all of the 280 miles lie in tracts owned by large timber companies which have cooperated with the conference in its maintenance. In Pennsylvania, State lands predominate. From Virginia south, the ownership is largely Federal. Although member clubs of the conference have shouldered responsibility for many miles of trail, and at times have been forced to relocate segments away from the path of developments, the demands of an expanding population have multiplied in number and complexity in recent years and long stretches of the trail are seriously threatened with incompatible encroachments. These are problems which the conference has insufficient means to combat. If the trail is to survive, it is apparent that public agencies must assume a larger share of the burden of protection.

The committee recognizes that the Appalachian Trail Conference has pioneered the way for this legislation by its long-time personal stewardship of the trail, and believes that its stewardship -- in partnership with the Secretary of the Interior -- should be continued and expanded.

Senate Report No. 1233, 90th Cong. 2nd Sess., p. 425.

This Congressional intent is also reflected in the National Trails System Act itself. Section 7(h) of that Act specifically provides as follows:

(h) The Secretary charged with the administration of a national recreation, national scenic, or national historic trail shall provide for the development and maintenance of such trails within federally administered areas and shall cooperate with and encourage the States to operate, develop, and maintain portions of such trails which are located outside the boundaries of federally administered areas. When deemed to be in the public interest, such Secretary may enter written cooperative agreements with the States or their political sub- divisions, landowners, private organiza- tions, or individuals to operate, develop, and maintain any portion of a national scenic or national historic trail either within or outside a federally administered area. 16 U.S.C. § 1246(h).

This provision is unique. We are unaware of any other unit of the National Park System that has such a broad statement of authority to enter into cooperative agreements to transfer operation, development or maintenance of an NPS area to non-Federal control. Consistent with the legislative history cited above, this subsection must be viewed as a clear endorsement of the role of the A/T volunteer community and a specific grant of authority to perpetuate those efforts.

In addition, we also note that there is presently enrolled a Senate Bill (S. 271) that would further extend the provisions of section 7(h) and that clearly supports the intentions of the 90th Congress.

I Section 7(h) of the National Trails System Act.

The authorities provided by section 7(h) provide broad discretion to transfer operation, development and maintenance of portions of the Appalachian Trail to the ATC. This authority is limited in several ways, however. There are limits on the scope of functions that are subject to transfer.

There are also limits on the functions that can be transferred. Finally, there may be limits on the geographic portions of the trail subject to this authority:

1. Geographic limits. From a geographic perspective, the A/T runs through various types of areas and ownerships. Portions of the trail are within existing units of the Forest Service or the National Park System. Other portions are in State, local or private ownership or control. At your request, this opinion only addresses the scope of the authority provided by section 7(h) to transfer NPS operation, maintenance and development authority with regard to those NPS acquired lands that are outside of established NPS areas. This opinion specifically does not address the impact of section 7(h) on established units of the National Park System or the Forest System.

2. Functions that cannot be transferred. Section 7(h) does not authorize the transfer of all NPS functions with regard to the A/T. By its terms, section 7(h) refers to cooperative agreements with the States or their political subdivisions, landowners, private organizations, or individuals "to operate, develop, and maintain" any portion of the trail. In our opinion, these terms -- operate, develop, and maintain -- do not include all NPS functions. The NPS is not authorized to utilize a cooperative agreement to transfer the following responsibilities:

. Law enforcement - To the degree NPS has a duty to meet law enforcement responsibilities along the trail, this is not transferable to the ATC. The ATC can not be authorized to enforce Federal regulations nor to serve in a law enforcement capacity. It is for this reason that the question of NPS regulation of acquired lands remains a difficult issue. Of course, the National Trails System Act does not preclude, and may serve to encourage, State and local law enforcement responsibilities.

. Title to lands - Section 7(h) does not authorize the National Park Service to transfer title to any lands along the trail nor does it authorize a party to a cooperative agreement to act in a manner that could be interpreted as divesting lands or interests in lands owned by the United States.

. Authority to relocate the trail right-of-way - The authority to select the overall right-of-way for national scenic trails is established by section 7(a) of the National Trails System Act. This authority runs to the Secretary charged with the administration of the trail in question and requires notice in the Federal Register together with appropriate maps or descriptions. This is not a transferable function. The National Park Service would be permitted, however, to transfer to the ATC the authority to change the trail route within the existing A/T right-of-way. As you are aware, the A/T right-of-way was originally established in 1971 and portions of it have been relocated thereafter pursuant, once again, to notice in the Federal Register.

. Land acquisition on behalf of the United States - Section 7(h) does not authorize the National Park Service to delegate its land acquisition functions -- and the expenditure of Federal funds appropriated for this purpose, either pursuant to condemnation or otherwise -- to a party to a cooperative agreement. The authorities provided by section 7(e) with regard to land acquisition are not subject to delegation pursuant to section 7(h). This, of course, does not preclude the existing or an expanded ATC land acquisition program, nor does it preclude subsequent NPS acquisition or financial assistance to aid this ATC function. ATC simply can not be directly vested with Federal authority for acquisition.

. Use of proceeds - Section 7(h) does not generally authorize the NPS to permit a party to a cooperative agreement to utilize any proceeds from the management of the trail. Indeed, the NPS itself has no such general authority. To the degree direct authorities to permit the use of proceeds from such management are available, they must be addressed specifically. Absent such specific authority, all proceeds from the management of the A/T must be returned to the general receipts of the United States Treasury.

3. Limits on functions that can be transferred. In our view, operation, maintenance and development would generally encompass all trail management functions other than those activities that are listed above. These trail management functions can be transferred to the ATC, and thereafter to its member clubs, pursuant to a section 7(h) cooperative agreement. There are, however, outside limits on the scope of these types of activities.

The first limitation -- equally applicable to the NPS -- is that operation, development and maintenance of the trail must be consistent with the purposes for which the trail was established. These general purposes are spelled out in the National Park Service Organic Act of 1916, as it has been amended in 1970 and 1978, and in the National Trails System Act itself. In this regard, section 1 and section 1a-1 of the National Park System Act provide in pertinent part as follows:

§ 1. Service created; director; other employees

There is created in the Department of the Interior a service to be called the National Park Service, which shall be under the charge of a director. . . . The Service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified, except such as are under the jurisdiction of the Secretary of the Army, as provided by law, by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

Aug. 25, 1916, c. 408 § 1, 39 Stat. 535. 16
U.S.C. § 1.

§ 1a-1. National park system:
administration; declaration of findings and
purpose

Congress further reaffirms, declares, and directs that the promotion and regulation of the various areas of the National Park System as defined in section 1c of this title, shall be consistent with and founded in the purpose established by section 1 of this title, to the common benefit of all the

people of the United States. The 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 and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress. As amended Pub. L. 95-250, Title I, § 101(b), Mar. 27, 1978, 92 Stat. 166. 16 U.S.C. § 1a.1.

Section 3(b) of the National Trails System Act states as follows:

(b) National scenic trails, established as provided in section 5 of this Act, which will be extended trails so located as to provide for maximum outdoor recreation potential and for the conservation and enjoyment of the nationally significant scenic, historic, natural, or cultural qualities of the areas through which such trails may pass. 16 U.S.C. § 1242

These basic principles, as well as other provisions of the National Trails System Act, represent a fundamental standard within which the A/T must be maintained. This standard has been established by Congress and cannot be changed, pursuant to delegation or otherwise. ATC or NPS management must be consistent with these general requirements. This approach is generally true of all units of the National Park System.

Within this general type of standard, the more specific limitations and purposes underlying a unit of the National Park System are typically established through the development of management policies for the area. This will also be true for the A/T. In this case, however, the actual manner in which the trail will be managed can be established in one of two ways. As with all other units of the National Park System, the National Park Service can articulate more specific trail

management policies. Alternatively, the NPS could transfer this function to the ATC and permit them and their member clubs to develop management policies for the array of trail issues that merit attention. NPS review could then be limited to assuring that these policies are consistent with the purposes and limitations established by Congress and the requirement of section 7(h) -- that they be "in the public interest".

We view the initiation of these policies to be a management, not a legal responsibility. In our view, however, there is at present a sufficient basis of common knowledge between NPS and the ATC to justify a cooperative agreement for the transfer of portions of the trail to the ATC, and its member clubs, subject to the development and review of specific ATC policies on each item of trail management that merits attention. In this way, the NPS acquired lands can be placed under present ATC control subject to the ATC development of more specific policies with NPS in an orderly way.

Aside from the limits and purposes established by Congress, discussed above, there are also a few other specific limits on transferable management functions that merit attention. The second limitation concerns the utilization of trail facilities for specialized use. This would include specialized public use and private uses. As suggested previously, transfer of trail management functions to the ATC would include authority for the operation, development and maintenance of existing facilities and structures. Utilization of these types of facilities by the ATC, and by the participating clubs, for trail management purposes is inherent in such a delegation and would not require special treatment. The more difficult issue concerns use of such facilities for public, non-management, purposes and possible private uses of trail assets.

. Public use of trail facilities - the basic limitation on the management of trail facilities for public use is fairness. Non-management uses of public facilities must be available in a fair and evenhanded manner for those using the trail consistent with the purposes established by Congress.

In addition, in those situations where public availability will require payment of a fee, facilities should be provided for public use consistent with an NPS concession permit. This permit can be a part of the overall cooperative agreement for delegation of trail management functions. There are two

advantages. First, an NPS concession permit will allow ATC and its member clubs to keep the revenues from the public use of these facilities. This is an exception to the general rule outlined above. Second, this provides a predictable and orderly approach to public use of these types of facilities that are owned by the United States along the trail.

. Private use of trail areas and facilities - Private use of trail areas and facilities is strictly limited. As with other areas of the National Park System, no uses inconsistent with the purposes for which the area has been created may be permitted unless specifically and directly authorized by Congress. This is the mandate of the 1978 amendment to the National Park Service Organic Act, quoted above.

Some consistent uses may be permitted on a strictly temporary and revocable basis. See, section 7(c) of the National Trails System Act. These must be managed very carefully, however, to avoid the expectation or appearance of private gain at the public's expense. Any proceeds from such activities must be returned to the General Receipts of the Treasury, absent specific authority to the contrary. Enclosed is a brief memorandum outlining the limitations on the use of special use permits within the National Park Service generally. These limitations are also of general applicability to the A/T. This is one area where we believe specific guidelines should be developed to govern trail management prior to transfer of private use authorities from NPS to ATC. This could be done by either NPS or ATC and should be subject to legal review.

The third limitation concerns implementation of the NPS/ATC Cooperative Management System for the trail. Obviously, delegation of authorities to the ATC is not, by itself, going to manage the trail. There is a need for ATC to redelegate to its member clubs. This presents no problem. We believe, however, that at least initially it may be wise to limit the ATC authority to redelegate to only those member clubs. While further delegations to others, including States, local governments, or others may be appropriate, we believe NPS should also be a signatory to such additional section 7(h) agreements until further guidelines have been developed for this purpose.

II Provisions of S. 271 -- pending amendments to the National Trails System Act.

Our conclusions concerning section 7(h) of the existing law are also supported by S. 271 -- an enrolled bill that would amend the authorities provided by the National Trails System Act. Additional authorities would also be provided by this legislation. Under this proposed legislation, the statement of policy section of the trails law would be expanded to include a new subsection (c), as follows:

(c) The Congress recognizes the valuable contributions that volunteers and private, nonprofit trail groups have made to the development and maintenance of the Nation's trails. In recognition of these contributions, it is further the purpose of this Act to encourage and assist volunteer citizen involvement in the planning, development, maintenance, and management where appropriate of trails.

Similarly, subsection 7(h) would be amended to include the following:

Such agreements may include provisions for limited financial assistance to encourage participation in the acquisition, protection, operation, development, or maintenance of such trails, provisions providing volunteer in the park or volunteer in the forest status (in accordance with the Volunteers in the Parks Act of 1969 and the Volunteers in the Forests Act of 1972) to individuals, private organizations, or landowners participating in such activities, or provisions of both types. The appropriate Secretary shall also initiate consultations with affected States and their political subdivisions to encourage --

(A) the development and implementation by such entities of appropriate measures to protect private landowners from trespass resulting from trail use and from unreasonable personal liability and

property damage caused by trail use, and
(B) the development and implementation
by such entities of provisions for land
practices compatible with the purposes of
this Act,

for property within or adjacent to trail
rights-of-way. After consulting with States
and their political subdivisions under the
preceding sentence, the Secretary may
provide assistance to such entities under
appropriate cooperative agreements in the
manner provided by this subsection.

Finally, a new sentence 11 would be added with regard to
Volunteer Assistance, as follows:

VOLUNTEER ASSISTANCE

Sec. 11. (a)(1) In addition to the
cooperative agreement and other authorities
contained in this Act, the Secretary of the
Interior, the Secretary of Agriculture, and
the head of any Federal agency administering
Federal lands, are authorized to encourage
volunteers and volunteer organizations to
plan, develop, maintain, and manage, where
appropriate, trails throughout the Nation.

(2) Wherever appropriate in furtherance
of the purposes of this Act, the Secretaries
are authorized and encouraged to utilize the
Volunteers in the Parks Act of 1969, the
Volunteers in the Forests Act of 1972, and
section 6 of the Land and Water Conservation
Fund Act of 1965 (relating to the develop-
ment of Statewide Comprehensive Outdoor
Recreation Plans).

(b) Each Secretary or the head of any
Federal land managing agency, may assist
volunteers and volunteers organizations in
planning, developing, maintaining, and
managing trails. Volunteer work may
include, but need not be limited to --

(1) planning, developing, maintaining,
or managing (A) trails which are
components of the national trails system,

or (B) trails which, if so developed and maintained, could qualify for designation as components of the national trails system; or

(2) operating programs to organize and supervise volunteer trail building efforts with respect to the trails referred to in paragraph (1), conducting trail-related research projects, or providing education and training to volunteers on methods of trails planning, construction, and maintenance.

(c) The appropriate Secretary or the head of any Federal land managing agency may utilize and make available Federal facilities, equipment, tools, and technical assistance to volunteers and volunteer organizations, subject to such limitations and restrictions as the appropriate Secretary or the head of any Federal land managing agency deems necessary or desirable.

Obviously, S. 271 is supportive of the role of the volunteer community and would reenforce our conclusions concerning the scope of section 7(h). Section 2 of the National Trails System Act -- the Statement of Policy -- has been specifically amended to further recognize the role of the volunteer and "to encourage and assist volunteer citizen involvement in the planning, development, maintenance and management ..." of trails. Similarly, a new section 11 has been added to expand assistance to volunteers. In addition, the amendments to section 7(h) are also directly in point.

Equally important, however, are the new or expanded opportunities provided by these amendments. If enacted, these authorities should be carefully considered in defining the future relationship between the NPS and the ATC and its member clubs. These provisions include:

. additional authority to provide limited financial assistance to encourage ATC participation in the acquisition, protection, operation, development, or maintenance of the Appalachian Trail;

. expanded authority to provide VIP protection to the ATC and its member clubs, as well as to individual volunteers;

. a responsibility on behalf of this Department to initiate consultations with State, local and private property interests concerning trail protection for those areas within or adjacent to the trail right-of-way. Implementation of this study responsibility could be delegated to ATC. Authority is also provided to the Secretary to provide planning grants to States and their political subdivisions to implement this provision, following initial consultations. Utilization of the Land and Water Conservation Fund SCORP process (Statewide Comprehensive Outdoor Recreation Plans) is also encouraged;

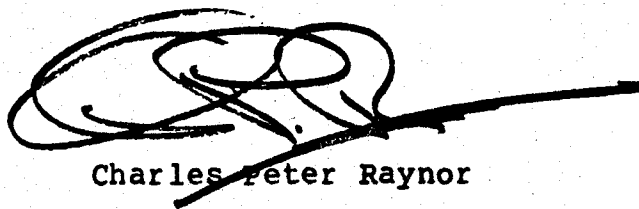
. additional authority to make available Federal facilities, equipment, tools, and technical assistance to volunteers and volunteer organizations necessary or desirable to assist volunteers and volunteer organizations in planning, developing, maintaining, and managing trails.

Subject to final enactment of this enrolled Bill, we would be happy to further consider the specific impacts these provisions may have on the trail.

III Conclusion -

The role of the ATC and its member clubs has been well established in the legislation concerning the Appalachian Trail. There is clear authority for NPS to delegate management of the trail to ATC pursuant to section 7(h) of the National Trails System Act. There is also authority to provide liability protection, limited financial assistance, and federal facilities to support a volunteer trail. These authorities would be reemphasized or expanded by enactment of S. 271. In our view, the next step is 1) for NPS to establish an orderly process for transfer of trail management functions and 2) for ATC to establish a timetable for the further development of

trail mangement criteria or guidelines with regard to major trail management functions. We would be happy to assist in these effort, as appropriate.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Charles Peter Raynor

cc:
A/S FWP
Director, NPS
Regional Solicitor, Northeast
Regional Solicitor, Southeast

Special Use Permits

It is the purpose of this memorandum to discuss briefly the limits within which the National Park Service is authorized to use special use permits in administering areas of the National Park System.

It should first be noted that the term "special use permit" as used in this memorandum does not refer to the special use permit form, which is apparently used for a number of purposes by the Service, nor does it refer to permits for activities within the parks which are specifically authorized by statute or regulation, but which may be popularly referred to as special use permits. Rather, a special use permit as discussed in this memorandum is a permit to allow activities to occur on National Park Service lands which is not specifically authorized by Congress, and, which absent a permit would be a trespass.

Special use permits have a long history in the Executive Branch. Numerous opinions of the Attorney General have declared such permits valid, even though they permit occupation of government land not specifically authorized by Congress. See 22 Op. A.G. 204 (1898); 25 Op. A.G. 470 (1905); 34 Op. A.G. 320 (1924). Some general guidance was provided in an opinion of the Attorney General dated November 27, 1928, involving the power of the Secretary of War to issue revocable licenses or permits for use of Government property for railway purposes. In part, that opinion provides:

The essential thing is to preserve unimpaired the title of the United States and its right at any time -- to occupy and use its property and to prevent any use by the licensee which would permanently damage or destroy the property for governmental use. If the permit is revocable at will by its terms, and if the structures which the licensee proposes to erect are capable of being removed in case of revocation, and if upon revocation the land may be left in suitable condition for Government use, the fact that the licensee expects that the United States

may not soon find it to its interest to revoke the license has no real bearing on the legal situation.

* * *

If an effort were made to evolve from the prior opinions of the Attorney General, a rule which may be reconciled with all of them, it would be that the Secretary of War has power to grant revocable permits for occupancy of parts of military reservations for railway purposes provided (1) the permits are made expressly revocable at will, (2) the structures which the licensee proposes to erect are capable of being removed in case of revocation, and the use to which the licensee proposes to put the land will not permanently damage or destroy it for Government use, (3) the granting of the permit and the use of the property under it will be of direct benefit to the United States. 35 Op. A.G. 485 (1928) at 489.

These principles were determined to be applicable in a Decision of the Department of the Interior of February 15, 1933, to the proposal to construct approaches to a bridge within the Colonial National Monument. 54 I.D. 155 (1933). Also see 22 C.G. 563 (1942) and 59 I.D. 360 (1947).

Of more significance in providing guidance on the proper definition or application of special use permits is the decision in Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), concerning special use permits issued by the Secretary of the Interior for construction of the Trans-Alaska Pipeline. Essentially two classes of permits were reviewed by the court: one class to allow occupancy of land for pumping stations, the second class to allow construction rights-of-way for the pipeline. The first class was upheld, the second class was invalidated. The determining factor in each instance was section 28 of the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1970).

The court found that a special land use permit for pumping stations did not conflict with the Act, while a special land use permit for a construction right-of-way did.

In examining the special land use permits issued by the Secretary, the court reviewed the history of special use permits in general. 479 F.2d at 867-879. After reviewing the Attorney General's Opinions cited above, the court concentrated on the revocability requirement of a special use permit, citing two tests for revocability. One focuses on the actual likelihood that the permit could or would be revoked, as opposed to the mere legal right to revoke. The second focuses on whether the permitted use would permanently damage or destroy the property for governmental use. In finding that the permits in question failed both tests, the court concluded:

For the historic authority to issue permits applies only if the uses to be made thereunder are really temporary and revocable. If the use is really not temporary or occasional, but is permanent (or at least long-lasting), the matter cannot be papered over merely by designating it as "revocable" when it is not intended to be revocable and, in the nature of things, is not in fact revocable. 433 F.2d at 875.

In addition to the revocability requirement, the court noted that "it is obvious that SLUPS [special land use permits] cannot be used as a means of avoiding the provisions of Section 28." 433 F.2d at 875. Thus, special use permits cannot be used to permit that which is prohibited by statute.

In summary then, the Secretary may in his discretion, issue special land use permits under certain conditions. The permit must in fact be revocable, the use must be temporary, and the permitted use cannot violate or circumvent any relevant statute.

Since special use permits are used to authorize activities within the National Park System not specifically authorized by the statute or regulation, determining activities which may be authorized by special use permits is controlled by the

following provision, limiting activities occurring with the National Park System:

The 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 and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress. 16 U.S.C.A. § 1a-1.

Specifically, section 1a-1 of Title 16 of the United States Code places affirmative obligations on the Secretary to exercise his delegated authority in a manner that will protect against the derogation of park values, as well as requires that all the Secretary's regulatory and management decisions be consistent with maintaining park values. The legislative history of this section indicates the extent of this responsibility. Some relevant legislative history, discussing this section is quoted below.

This section imposes a requirement that the Secretary exercise his discretion consistent with protecting the established values and purposes of National Park System areas. All affirmative actions of the Secretary are covered by this duty.

The. . . management of these areas shall not compromise these resource values. . . House Report 95-581, 95th Cong., 1st Sess., at 9 (August 5, 1977).

No decision shall compromise these resource values. . . Senate Report, supra, at 14.

It insures that management decisions affecting our park system must square with this standard and that competing interests not consistent with the first section of the act of August 25, 1916,