NEW DIRECTIONS FOR THE NATIONAL PARK SYSTEM: THE PROPOSED KANSAS TALLGRASS PRAIRIE NATIONAL PARK

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*A part of the title was borrowed from a very recent article by William Futrell in which many of the same points were made in a different context. Futrell, Parks to the People: New Directions For the National Park System, 25 Emory L.J. 255 (1976). Futrell’s title, however, had been borrowed from an address by Mr. McCloskey to the Third Annual Tallgrass Prairie Conference at Elmdale, Kansas, in September 1975, in which the concept of this Article originated.

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I. HISTORY OF THE MOVEMENT FOR PRAIRIE PRESERVATION

The argument over whether a national park for preservation of a segment of tallgrass prairie should be established in Kansas has continued for decades. In recent years, the issue has become one of broader importance, with partisans contending nationwide. Resolutions have been passed in the Kansas legislature, state and national studies have been conducted, editorials have been written for and against, thousands of petitions have been circulated, and a series of bills has been introduced in Congress. Organizations devoted to each side of the argument have sprung up and coalesced, but the debate by both sides has been characterized as much by passion as by reason. After forty-odd years of agitation, the idea is not much closer to reality than it has ever been.1 Because the controversy is quiescent, if not stalemated at this writing (early 1977), it is appropriate to examine the imbroglio more dispassionately, and in some depth. Both of the present writers are long time proponents

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1 See, e.g., Farney, The Last of the Tall Grass Prairie, 50 DEFENDERS 308, 311 (1973) (quoting remarks of Representative Skubitz). Recent developments may be propitious, however. See notes 71-80 and accompanying text infra.
of the tallgrass park concept. To that extent, the conclusions reached in this Article may be properly discounted somewhat for prejudice, but the facts, the law, and the policies leading to those conclusions strongly support the establishment of a Tallgrass Prairie National Park in the Flint Hills of Kansas or Oklahoma.

Most of the argument over prairie preservation has proceeded from economic, biological, or aesthetic premises. The legal ramifications and implications of the various proposals have received inadequate attention. In fact, existing provisions of law answer many of the contentions raised by park opponents, and policies underlying recent enactments and administrative developments point toward the answers to other questions. This Article will proceed from general background information on the tallgrass ecosystem and the history of the tallgrass region, to principles of public land law and their specific application to possible park creation, and then to the particular details of different proposals. The first main section will outline the need for preservation of tallgrass prairie, recount the background of prairie park proposals, and define the basic assumptions upon which this overall evaluation is grounded. The main conclusions will be that preservation of a representative tallgrass tract is a biological and societal necessity, that only some form of government control can insure preservation, and that only the federal government has the necessary resources and legal authority to accomplish the task. Part II will investigate the many forms of federal lands classifications in an attempt to determine which is most appropriate for preservation of a tallgrass prairie parcel. It will be concluded that national park status is the best suited single category; that several other federal lands categories could also achieve some of the desired aims; and that the combination of purposes to be served might best be served by a combination of legal attributes from several federal lands classifications. The third Section will take up the objections to the establishment of a park put forward by opponents. Consideration of those claims indicates that most are erroneous or ill-founded, although several of the less emphasized opponent arguments have some abstract merit. Section IV will examine National Park Service policy on acquisition of new areas for the National Park System in light of congressional directives and authorizations. The new directions in national park planning lead to the conclusion that creation of a Tallgrass Prairie National Park is the natural and logical next development in the System. The final Section will evaluate the current criteria used by the National Park Service to select the ultimate site for the tallgrass park. It will be argued that somewhat broader criteria would be appropriate, perhaps resulting in selection of a different site; that some novel features should be incorporated into the park; and that some departures from normal park amenities and planning should occur. In sum, this Article will show that a Tallgrass Prairie National Park is an ideal whose time has come.

A. Natural History of the Tallgrass Prairie

The tallgrass prairie once encompassed about a quarter of a billion acres, extending from the eastern deciduous forests in Indiana to what was then called the Great American Desert (now the Great Plains), and from Canada south to mid-Texas. The prehistoric native American Indians made little noticeable impact upon it,

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because human populations were small and agriculture was then a limited occupation, pursued with but very limited technology.8

Tallgrass prairie is distinguished from other prairie types by its unique ecosystem components, notably, but not exclusively, the taller grass species that are supported by extensive, complex root systems. Of the three main prairie types, tallgrass, midgrass, and shortgrass (called bunchgrass west of the Rockies),4 the tallgrass regions were by far the most dramatic and spectacular. The taller grasses were able to evolve and flourish because average annual rainfall is higher than in areas to the west, and the soil is capable of fostering the necessarily intricate root systems.6 It was commonly said that the grass was tall enough to hide all but the hat of a man on horseback.

The rich, dark soil that underlay Iowa, Illinois, and Kansas was the primary attraction for the early white settlers. Invention of a plow in the mid-1800s that allowed homesteaders to break up the thick sod caused the great prairie to vanish rapidly. Two consecutive plowings permanently destroy the original root system and thus the entire ecosystem.8 Within a relatively short time, the great bulk of the tallgrass terrain had been converted to millions of acres of productive cropland. Nearly a half-century ago, when the Illinois legislature was considering preservation of a representative sample of tallgrass terrain, not one single sizable patch of virgin tallgrass remained in the state.7 The only remaining large areas of ecologically stable tallgrass are in the Flint Hills of Kansas and northern Oklahoma, comprising a region of roughly 4,000,000 acres in the eastern thirds of the two states. For the most part, the Flint Hills have been heavily grazed by cattle and modified by man, but the essential ecosystem, dependent upon the root system of the big grasses, has survived because the chert underlying the topsoil makes plowing generally unproductive.8 Because the root system and ecosystem composition have not been destroyed in the Flint Hills, the area may accurately be termed “virgin” tallgrass prairie even though the landscape has been drastically altered by man in many other respects.

It is difficult to convey in words the importance and uniqueness of the tallgrass ecosystem. To opponents and proponents of a prairie park alike, the remaining prairie is now seen to have an awe-inspiring beauty in its vastness, in its vistas, and in its components. The most spectacular plant components are the grasses: big bluestem, Indian, and switch grasses can grow to eight or ten feet tall in the well-watered lowlands, and they dominate the landscape. Dozens of other species of grasses are detectable by sharp eyes. But the prairie is far more than this. The native prairie flowers abound in number, color, and variety.9 Hundreds of flora species have been identified as typical of the Flint Hill ecosystem.10 Many species of native fauna

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8 See Richmond, Early On: The Hills of the American Indian, 1975 TALLGRASS 22 (Conf. ed). See also Remarks by Dr. E. Raymond Hall, Kansas Senate Committee on Energy and Natural Resources, in Topeka, Kansas, March 27, 1975, text on file with Professor Coggins.
8 E.g., Hall, Tallgrass Prairie National Park, AMERICAN FORESTS, Dec. 1971 (unpaginated reprint) [hereinafter cited as Hall, AMERICAN FORESTS].
8 Hall, AMERICAN FORESTS, supra note 5.
8 Hall, AMERICAN FORESTS, supra note 5. After describing some exotic varieties, Dr. Hall adds that “these plants are difficult to find in heavily grazed areas.” Id.
have now been superseded in whole or in part by the nonnative cattle. Of the large herbivorous mammals that were once common, such as bison, elk, pronghorned antelope and white-tailed deer, only the latter species remains.11 Predators such as the grey wolf, the black-footed ferret, and the mountain lion have disappeared, leaving only the coyote and the bobcat.12 Birds in abundance were characteristic of the prairie ecosystem before grazing, and, while many remain, some prominent species such as the greater prairie chicken and the upland plover have difficulty coexisting with commercial grazing.13 The endangered peregrine falcon once was common in the area, but has not been seen in recent years.14 Even though the presence and activities of man have reduced the number and variety of native species, the tallgrass prairie is still marvelously diverse and scenic. Scientists have identified over 300 species of birds, some 80 species of mammals, over 1000 species of other animal organisms, and hundreds of species of plants within the typical tallgrass ecosystem, many found nowhere else.15 The rolling terrain of the typical tallgrass prairie provides vistas that give a feeling of space and serenity perhaps unmatched elsewhere.

Other writers have attempted to reduce the aesthetic value of the native prairie to words, with varying degrees of success. Walt Whitman once wrote: "While I know the standard claim is that Yosemite and the like afford the greatest natural shows, I am not so sure but that the Prairies and the Plains last longer, fill the aesthetic sense fuller, precede all the rest and make North America's characteristic landscape."16

Whitman set the tone for continuing perceptive paens to prairie beauty and importance over the next century.17 Recent ferment for the establishment of a park has led to the unexpected discovery of a certain lyricism in the bowels of bureaucracy. An unnamed writer in the Park Service recently has sought to convey some sense of the prairie's significance:

We have read the prairie wrong. It wasn't that there were no trees—although that alone should have made us careful in our claim and care of it. We made a superficial judgment, our eyes seeing only what they were accustomed to see, and understanding only in terms of past experience. But any of us could have

11 Hall, Preserving the Prairie, 47 Sierra Club Bull., June 1962, at 8.
12 National Park Service, Preliminary Environmental Assessment, Proposed Prairie National Park/Kansas-Oklahoma, Appendix F 65-69 (1975). [This document consists of two volumes and several appendices that describe in detail various aspects of the potential park sites. It will be cited hereinafter as Assessment.]
13 Hall, American Forests, supra note 5.
15 See lists included in Stout, supra note 10, at 38-44; cf. Hall, American Forests, supra note 5.
16 Quoted in Assessment, supra note 12, at Appendix H 2.
17 Dr. Hall has quoted one of the many early descriptions:
In the giant bluestem, cattle were hidden and a man on foot was swallowed without a trace. On the ridges grew the skys Indian grass, and the swales were rank with slough grass sedges, joint grass, and wiry, stubborn switch grass. In spring before the tall grasses took over, the land was starred with scarlet lily, shooting star, sweet William, yellow rosin weed, ox-eye, and Indian dye flower. Prairies of little bluestem made a velvety varicolored terrain; the hollows glazed with golden cawslips, and the ridges were glossy with pasqueflowers. In May, birdsfoot violets colored the sunward swells as blue as the ending sky.
Hall, American Forests, supra note 5. Not all early observers took so benign a view; then Senator from Kansas, John James Ingalls, confidently asserted in 1872 that native plains grasses were not only inferior to eastern bluegrass, but also nurtured inferior men in their vicinity. Ingalls, Blue Grass, The Kansas Magazine, Sept. 1872, quoted in Kollmorgen, On the Inferiority of Prairie Grass and Other Pioneer Doctrines, 1975 Tallgrass 29, 30 (Conf. ed., Sept. 1975).
looked more closely. We could have seen the trees clinging to watercourses; the buffalo trails worn deep to wallows and streams; the Indians who roamed but settled only tentatively and farmed only the river bottoms. We could have considered the impact of grasses, whose root network required a new invention to break them and even then left a generation of old, bent men to hobble down sunburnt, small-town streets. We could have tasted blowing topsoil and understood the end result of the continental climate and the plow. We would have heard the weeping of women, worn out by loneliness and withered by wind. We could still count the lives lost to lightning, wind, cloudburst, and blizzard. We could have read the clear vast sky, and sensed its closeness to the sun. We could have known this was a different land—made so not only by its poor tree cover, but by a complex and marvelous unique network of interdependent qualities—found on earth so seldom that we did not, do not, understand.18

There is widespread agreement among both proponents and opponents of the Tallgrass Prairie National Park that the tallgrass prairie is unlike any other natural system in America and should be preserved for its beauty, vastness, uniqueness, and serenity. Hundreds of dry botanical, zoological, ornithological, and other biological studies support that conclusion, but words cannot do justice to the spirit and meaning of the prairie. In addition to its ecological and aesthetic values, the prairie in general, and the Flint Hills in particular, embody an important cross-sectional slice of Americana.

B. Human History of the Flint Hills Area

Prairie park proponents have concentrated primarily on the biological and aesthetic aspects of tallgrass prairie in their pro-park propaganda.19 That is as it should be, for the bluestem ecosystem is without true parallel, and preservation of that unique diversity should be the primary goal of a prairie park. Emphasis on the grasses, the prairie wildflowers, and the native fauna should not be allowed to detract from the rich historical and cultural heritage of the area, however. In many ways, the Flint Hills represent a microcosm of western settlement and development. The historical themes encompassed within the region support the rationale for establishment of a park, and they should be incorporated into any overall interpretive plan for a park.20

Coronado’s party, in the historic exploration of the continental part of what is

18 Assessment, supra note 12, at Appendix H 3. That theme was echoed in—of all places—the Wall Street Journal:

It is a widespread misconception that prairies are always flat; most of them have a pitch and roll. Another misconception is that they are monotonous landscapes of grass and only grass. A virgin prairie sparkles with the color of from 200 to 300 kinds of wildflowers from April to October. But above all else, a prairie is an utterly open landscape, a place of lonely windmills turning in a ceaseless wind, of redtailed hawks circling in an empty sky, of endless distances receding toward infinity.

This openness tends either to invigorate people or to terrify them. “Between that earth and that sky, I felt erased, blotted out,” Willa Cather wrote in My Antonia, her classic novel on the settlement of the prairie. All through such prairie novels, and the letters and diaries of the early sodbusters, there is an eerie ambivalence: the prairie will enchant you with its solitude and its serenity—if it doesn’t devour you with its loneliness, its enerating winds, its blizzards and its broiling sun.


20 Most of the material published and disseminated by Save the Tallgrass Prairie, Inc., see notes 54-56 and accompanying text infra, reflects this approach. That material is on file with Professor Coggins.
now the United States, may have reached the site of present Council Grove, Kansas, in the heart of the Flint Hills in 1541.\textsuperscript{21} French and Spanish explorers crisscrossed the area during the next 150 years on their way to some place else.\textsuperscript{22} The American presence officially began with the Lewis and Clark expedition,\textsuperscript{23} passing to the north along the Missouri River, and the Flint Hills were crossed by Zebulon Pike a few years later on his journey to the mountain that bears his name.\textsuperscript{24} Pike, James, Catlin, Parkman, Greeley, and Twain all were familiar with the tallgrass prairie before it was given over to cattle.\textsuperscript{25}

The mountain men in the early nineteenth century generally traced a more northerly route from St. Louis to the trapping grounds in the Rockies, but by 1821 traders had discovered a profitable market in the ancient New Mexico settlement of Santa Fe. Historic trails are a dominant, if now somewhat forgotten, theme of the area. The storied Santa Fe Trail ran directly through the middle of the Flint Hills. The Oregon Trail ran parallel to the Santa Fe Trail through eastern Kansas, both starting at what is now Kansas City.\textsuperscript{26} Fort Riley, in north-central Kansas, was established in 1853 to protect travelers on both trails from marauding Indians,\textsuperscript{27} and the Old Military Road from Fort Leavenworth to Fort Riley was the first leg on the journey to the Colorado mineral strikes.\textsuperscript{28} The early Texas drovers took advantage of the nutritive qualities of the tallgrass to fatten their cattle after the long journey north. The Chisholm Trail, the most famous of the trails to the Kansas


\textsuperscript{22} Council Grove is also the spot where some of the most significant councils with the Osage Plains tribes were held, and where Custer gathered his forces for his foray to the Little Big Horn. The town is now a well-preserved living testimony to western history, worth a visit by tourists. J. Anderson, Proposed Prairie Parkway 7, c. 1965 (proposal submitted to the United States Department of the Interior and the National Park Service) (on file at the Institute for Social and Environmental Studies, 607 Blake Hall, University of Kansas, Lawrence, Kansas 66045) [hereinafter cited as Anderson].

\textsuperscript{23} W. Zornow, Kansas: A History of the Jayhawk State 3 (1957) [hereinafter cited as Zornow]. Some things do not change; see Wall Street Journal, July 18, 1973, at 11, col. 1: "Fully 400 of those [543] surveyed said they were in Kansas because its highways offered the quickest route to someplace else."

\textsuperscript{24} See generally M. Lewis, Travels to the Source of the Missouri River and Across the American Continent to the Pacific Ocean (1815).

\textsuperscript{25} Zornow, supra note 22, at 36-39. It may be that Pike also inadvertently named the Flint Hills. His diary contains this entry for September 12, 1806: "Commenced our march at seven o'clock. Passed very ruff [rough] Flint hills. My feet blistered and very sore. I stood on a hill, and in one view below me saw buffalo, elk, deer, cadrie, and panthers. Encamped on the main [Cottonwood] branch of the Grand [Neosho] river, which had very steep banks and was deep." Z. Pike, II The Expeditions of Zebulon Pike to the Headwaters of the Mississippi River, Through Louisiana Territory, and in New Spain, During the Years 1805-06-07 at 400-01 (Coutes ed. 1895).

\textsuperscript{26} See, e.g., Parkman, The Oregon Trail (1846). Catlin, while roaming desolate South Dakota in 1832, worried about the future of the prairie and its inhabitants. Even at that early date, he was able to foresee the need and the means for preservation. His lumping of the Indians with the buffalo may seem narrow-minded today, but certainly his vision was not narrow. The primeval prairie need not disappear if its components were

\textsuperscript{27} (by some great protecting policy of the government) preserved in their pristine beauty and wilderness, in a magnificent park, where the world could see for ages to come, the native Indian in his classic attire, galloping his wild horse amid the fleeting herds of elk and buffalos. What a beautiful and thrilling specimen for America to preserve and hold up to the view of her refined citizens and the world, in future ages! A nation's park, containing man and beast, in all the wild and freshness of their nature's beauty.

\textsuperscript{28} G. Catlin, I North American Indians: Being Letters and Notes on Their Manners, Customs, and Conditions ... 289-93 (1913).

\textsuperscript{29} Assessment, supra note 12, at Appendix H 5. See generally W. Ghent, The Road to Oregon, A Chronicle of the Great Immigrant Trail (1934).

\textsuperscript{30} Assessment, supra note 12, at Appendix H 5. See generally W. Pride, The History of Fort Riley (c. 1926).

\textsuperscript{31} Anderson, supra note 21, at 11-13.
railhead towns, provided a stopping place in the Flint Hills for finishing the cattle before they were sold in Abilene, one of the most famous of the rip-roaring Kansas cowtowns.\textsuperscript{29} The Butterfield Stagecoach Trail also occupies a prominent place in regional history.\textsuperscript{30} Exploits of the villainous jayhawkers, the romantic cowhands, and the deadeye lawmen gave rise to western expansion themes of mythic dimension that are without adequate representation in the present park system.\textsuperscript{31}

More subtle but equally important aspects of western settlement are also typified in the Flint Hills area. The pre-Civil War battles over slavery between Kansas and Missouri were exemplified in miniature as settlers in tiny Wabaunsee formed the Beecher Bible and Rifle Church, which still stands.\textsuperscript{32} Research has not disclosed whether another prominent expansion theme is illustrated; that is, whether the original Flint Hills settlers resorted to fraud, bribery, and perjury in homesteading the area (as their counterparts did everywhere else in the nation in those days),\textsuperscript{33} but it is noteworthy that large blocks of land, far more than the acreage allowable under the various homestead and preemption acts, ended up in the hands of single ranchers.\textsuperscript{34} Not being tillable, the area was not settled immediately upon opening, but eventually the settlement followed traditional prairie state patterns.\textsuperscript{35} Indian tribes were dispossessed and then dispossessed again as settlement and speculacion pressure increased.\textsuperscript{36} The climax and the end of large-scale homesteading occurred at the south end of the Flint Hills when the Cherokee Strip to the west in Oklahoma was opened to the Great Land Rush of 1893.\textsuperscript{37} The massive and massively fraudulent transcontinental railroad grants coincided with Kansas settlement; at one time the railroads owned more than a fifth of the Kansas land area, with their holdings concentrated in the eastern third of the state.\textsuperscript{38} Abandoned tracks in the Flint Hills are fitting memorials to those exciting days of corrupt, essentially mindless expansion. The moral for these times does not need to be made explicit to be appropriate as a sub-theme of a prairie park.

The Flint Hills region does not have the same degree of significance or solemnity as Gettysburg; it does not have the antiquity or the quaintness of Williamsburg; it does not have the prehistoric structures of Mesa Verde; it does not have the impact of the Lincoln Memorial. In historic terms, however, the area does possess a heritage that has elements and intersections of the major themes of western expansion,

\textsuperscript{29} Assesment, supra note 12, at Appendix H 6. See also S. Gard, The Chisholm Trail (1954).
\textsuperscript{30} See, e.g., W. Ormsby, The Butterfield Overland Mail (1942).
\textsuperscript{31} National Park Service, Part One of the National Park System Plan: History 43-52 (1972) [hereinafter cited as NFS Park Plan—History]. See notes 353-56 and accompanying text infra.
\textsuperscript{32} It has been entered on the National Register of Historic Places. Twenty other structures in the Flint Hills study areas have been similarly entered, and other places are eligible for inclusion. Assessment, supra note 12, at Appendix H 5, 9, 40-44. The criteria for registry are spelled out in the National Historic Preservation Act of 1966, 16 U.S.C. §§ 470-470m (1970).
\textsuperscript{33} See generally F. Gates, History of Public Land Law Development 463-94 (1968) [hereinafter cited as Gates].
\textsuperscript{34} Assessment, supra note 12, at Appendix I. The history of trends in public land law is summarized at § 11A infra.
\textsuperscript{35} See Kollmorgen and Simonette, Grazing Operations in the Flint Hills—Bluestem Pastures of Chase County, Kansas, 55 Annuals of Assoc. of Am. Geog. 260-90 (1955).
\textsuperscript{36} See generally J. Rydberg, Indian Place-Names (1968).
\textsuperscript{37} Assessment, supra note 12, at Appendix H 12.
\textsuperscript{38} Gates, supra note 33, at 371-373. It has been argued, not very persuasively, that the United States was not swindled all that badly by the railroads. Henry, The Railroad Land Grant Legend in American History Texts, in The Public Lands 121-41 (V. Carstensen ed. 1962). Articles immediately following in that volume effectively refute the thesis of Colonel Henry, who was employed by the Association of American Railroads at the time.
frequently understated but unmatched in variety and comprehensiveness. When one understands the rare combination of ecological uniqueness, scenic beauty, and historical importance encompassed in the Flint Hills region, it no longer seems strange that a strong current of sentiment for creation of a park in the area has long existed.

C. History of Prairie Park Proposals

Dr. V. E. Shelford of the University of Illinois is generally credited with originating the idea of preserving a sizable area of native grassland. With the support of the Ecological Society of America, he recommended the preservation of a representative area of the Great Plains to the National Park Service in 1930. The idea took hold, and spawned a number of federal studies between 1937 and 1953. A 1950 report from the Department of Agriculture focused on the six types of grassland existing in the West, and recommended preservation of “at least 20,000 acres” of each type. A 1960 report by the National Park Service surveyed 24 different grasslands as possible park sites. Eighteen of these were eliminated because they lacked sufficient scenic variety and appeal, because they failed to satisfy the minimum size requirements, or because they had intrusions of various types.

The six remaining areas, considered suitable for inclusion in the National Park System, were all located in the Flint Hills of Kansas and Oklahoma. No other state had sizable, undisturbed tracts of virgin prairie in federal ownership or otherwise. The mean north-south location, physiographic diversity, ecological and cultural representativeness, and scenic quality of these areas were deemed to underscore the significance of the Flint Hills’ tallgrass. Based on an intensive study of these six areas, the National Park Service concluded that the most promising site for designation as the Tallgrass Prairie National Park was in Pottawatomie County, Kansas, near the City of Manhattan.

During the next session of Congress, bills to implement the Pottawatomie County proposal were introduced. The Senate Subcommittee held on-site public hearings. The Kansas Legislature appropriated 100,000 dollars to purchase park land, contingent on the availability of federal funds to meet the remainder of the cost. Formation of the Prairie National Park Natural History Association, a nonprofit organization, signaled gathering momentum for the proposed park. Despite the degree of legislative and community support, however, the Pottawatomie bill did not emerge from the subcommittee, and no subsequent congressional subcommittee that has addressed the matter has even held hearings.

The demise of the 1961 Pottawatomie proposal signaled the onset of a temporary

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11 Id.
12 Id.
13 Id. at Appendix B 3.
15 Assessment, supra note 12, at Appendix B 3.
16 Id. at Planning Directive 2-3.
17 Hall, American Forests, supra note 5.
19 Interview with Dr. E. Raymond Hall, Professor Emeritus of Mammalogy of the University of Kansas, in Lawrence, Kansas, June 14, 1976. The Park Service encourages the formation of this type of group to aid in selling new parks to the public.
lull in serious prairie national park developments. During the next several years, attention focused on alternatives to a park, such as an interstate prairie parkway linking scenic routes, places of cultural and historic interest, and recreational sites.\(^{49}\) Parkway studies directed by the National Park Service bore few tangible results and the idea, at least on a multi-state level, gradually faded away.\(^{50}\) In Kansas, however, the prairie parkway idea was eventually acted upon by the state legislature in 1975.\(^{51}\) The new parkway is far from that expensively envisioned in an early study commissioned by Governor John Anderson.\(^{52}\) It is composed of existing roads which weave through the Flint Hills. The National Park Service has concluded that "this road was not a true parkway or a ribbon-park . . . . The Kansas Highway Department has since marked the route, but little else has been done to protect the scenic quality of the corridor."\(^{53}\)

Since the early 1960s, progress toward creation of a prairie park has accelerated from the glacial to the turtle-like. The late 1960s and early 1970s were a time of great environmental ferment, and in the wake of the new tide of environmental concern came a renewed burst of energy and enthusiasm in the prairie park movement. Almost unnoticed amidst the plethora of new statutes, litigation, groups, and developments burgeoning nationwide in this period was the creation of a corporation named Save the Tallgrass Prairie, Inc. (STP). Formed by Kansans, mostly from the eastern part of the state, STP now spearheads the park movement while maintaining close contact with those national organizations that have adopted the park issue as a top priority.\(^{54}\) Although STP has been active and has significant popular support,\(^{55}\) its efforts have consistently been hampered by a lack of specificity in its proposals, inadequate understanding of political reality, and inconsistency.\(^{56}\)

The prairie park advocates are opposed by ranchers and other landowners in the Flint Hills area who have formed the Kansas Grassroots Association. The ranchers believe that the value of the Flint Hills as grazing land promotes the preservation of the tallgrass; they have expressed concern that national park status could adversely affect it through overuse.\(^{57}\) Existing organizations such as the Kansas Livestock

\(^{49}\) **Assessment**, supra note 12, at Appendix B 4.

\(^{50}\) **Id.**


\(^{52}\) **Anderson**, supra note 21.

\(^{53}\) **Assessment**, supra note 12, at Appendix B 4.

\(^{54}\) **Farney, The Last of the Tallgrass Prairie, 50 DEFENDERS** 308, 309-10 (1975) [hereinafter cited as **Farney**].

\(^{55}\) Interview with Mr. Charles Stough, Member of Prairie National Park Natural History Association, in Lawrence, Kansas, June 12, 1976 [hereinafter cited as **Stough Interview**]. In addition to the more traditional legislative and public support drives, STP has staged a series of annual Tallgrass Prairie Conferences at Elmdale in the Flint Hills. Featuring nationally prominent environmentalists and scientists, in cooperation with local and regional supporters, the events draw widespread news attention and contribute new growth and direction to the movement. Save the Tallgrass Prairie, Inc., Saving the Prairie Two Days at a Time, June 1974 (copy on file with Professor Coggins).

\(^{56}\) For example, "In Topeka last spring, trying desperately to head off the antipark resolution, some park supporters gave legislators little lectures on land use (and misuse) by the Ancient Greeks, the disappearance of the Cedars of Lebanon and other similar homilies. This rather condescending attitude didn't cut it in Topeka and it won't cut it in Washington." **Farney**, supra note 54, at 313. Farney quotes a supporter who confessed to "being too purist-oriented in our conception, and not being political-minded enough . . . ." **Id.** at 312. The efforts of STP, however, are adding members and converts to its cause. Its past defeats have fostered further experience that may result in a higher degree of political sophistication and effectiveness.

\(^{57}\) **Cook**, supra note 8, at 2. The ranchers' stated and underlying objections are examined in Part III **infra**.
Association and the Kansas Farm Bureau have joined in the anti-park efforts. Opponents have been far more successful in lobbying efforts than the more idealistic and unrealistic proponents. The idea of a scenic prairie parkway, perhaps protected by conservation easements, has been consistently espoused by anti-park organizations as the most acceptable alternative to a national park.

Caught in the middle between these two opposing sides are the Kansas congressional delegation, the state officials, and the National Park Service. The focus of attention on park legislation in Congress has been Representative Skubitz, whose congressional district includes most of the Flint Hills lands now being considered as potential park sites. As a political matter, his approval as the local member of Congress is very important to the establishment of a park; even more important has been his status as the ranking minority member of the House Interior Committee on National Parks that would consider the proposal. After unsuccessfully attempting to engineer a park compromise several years ago, Skubitz is today the most formidable obstacle the park proponents face. He refuses to take any action until opponents and proponents can reach some agreement. Representative Winn, from eastern Kansas, has introduced park bills in each of the last five sessions of Congress, and Senator Pearson has occasionally done so in the Senate, but none of the bills has yet received a hearing. Other members of the Kansas congressional delegation are favorable or not finally committed.

The position of the Kansas Legislature has shifted from enthusiastic support a decade or so ago to active opposition. In 1975, the legislature passed a wide margin House Concurrent Resolution No. 2013, calling upon the United States Congress to reject any bill authorizing the establishment of a Tallgrass Prairie National Park in the Flint Hills. The present Governor is reported to oppose

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58 Cook, supra note 8, at 2.
59 See, e.g., Kansas Grassroots Ass'n, Leave the Grasslands Alone (limited circulation) (pamphlet on file with Professor Coggins) [hereinafter cited as Grassroots Pamphlet].
61 See, e.g., Farney, supra note 54, at 311-312.
63 “as far as I'm personally concerned, the prairie park is a dead duck until the cattlemen and the park people can get together." Farney, supra note 54, at 311, quoting Representative Skubitz.
66 Telephone communication with Aide to Senator Robert Dole, Office of Senator Dole in Washington, D.C., July 13, 1977 (uncommitted until further studies have been made); telephone communication with Aide to Senator Pearson, Office of Senator Pearson in Washington, D.C., July 13, 1977 (originally favored but now opposes due to public opposition in state); telephone communication with Aide to Representative Daniel Glickman, Office of Congressman Glickman in Washington, D.C., July 13, 1977 (generally sympathetic but with some reservations); telephone communication with Bob Nelson, Aide to Representative Martha Keys, Office of Representative Keys in Washington, D.C., July 13, 1977 (uncommitted); telephone communication with Nancy Robinson, Aide to Representative Keith Sebelius, Office of Congressman Sebelius in Washington, D.C. July 13, 1977 (uncommitted but favors scenic easement approach).
67 See note 47 and accompanying text supra note 68 and accompanying text infra.

A CONCURRENT RESOLUTION memorializing the Congress of the United States to reject any bill authorizing the establishment of a Tallgrass Prairie National Park in the Flint Hills of Kansas, WHEREAS, The federal government now owns, controls or manages a vast amount of property in the State of Kansas some of which acreage would be better suited for the establishment of a Prairie National Park; and WHEREAS, The establishment of a Prairie National Park in the Flint Hills of Kansas would result
preservation by law of any but a small area.69 The negative developments in the political sphere have resulted in a conspicuous silence on prairie issues from the National Park Service until very recently.70

The recent record is discouraging to proponents, but the issue is far from settled. Pursuant to Public Law 91-462, approved October 16, 1970, the National Park Service prepared a suitability study for a proposed Cherokee Strip National Park. The proposed park was said to be "feasible and desirable . . . if combined with significant area of prairie."71 In 1972 the National Park Service published the National Park System Plan. Part II of this plan pointed out that the central-lowland and grassland landscapes must be represented, if the National Park System is to encompass the best examples of the nation's natural environments.72 In 1973 members of the Kansas congressional delegation other than Representative Skubitz requested a study on park alternatives from the National Park Service (NPS). The resulting NPS Preliminary Environmental Assessment, Proposed Prairie National Park/Kansas-Oklahoma73 was released in October 1975. In the study, the Park Service reports that it investigated seven areas and discarded four, including the formerly preferred site in Pottawatomie County.74 Publication of the Assessment inspired renewed hopes among proponents of a national park. They believed that it lends credence to their cause and curbs popular misconceptions.75

Other developments, mostly nascent, also indicate renewed interest in park establishment. The Nature Conservancy announced in 1977 its purchase of nearly 8000 acres of virgin prairie south of Manhattan, possibly as a means to retain the status quo until a park measure passes.76 The composition of the Kansas Legislature

in the taking of substantial acreages of privately owned property of ranchers and cattlemen who depend upon the preservation and improvement of the grassland for their survival; and

WHEREAS, The establishment of such Prairie National Park would result in the removal of a substantial amount of land from the tax rolls which would seriously interfere with the financing of necessary county, township and school district services; and

WHEREAS, This is an era of nationwide food shortages and the loss of the vast grazing areas in the grasslands would seriously hamper the production of beef: Now, therefore, Be it resolved by the House of Representatives of the State of Kansas, the Senate concurring therein:

that the legislature of the state of Kansas respectfully petitions the Congress of the United States to leave intact the complex relationship between man and his environment which has been so vital to the culture and preservation of the prairie grasslands by rejecting any bill authorizing the establishment of a Tallgrass Prairie National Park in the Flint Hills of Kansas.

Be it further resolved: That the legislature of the state of Kansas respectfully urges the Congress of the United States, upon finding a need for the location of a Tallgrass Prairie National Park in the state of Kansas, to establish such park upon land in which the title is presently vested in the United States government or to establish a Prairie National Parkway through the Flint Hills of Kansas, acquiring easements as necessary to provide scenic overlooks, picnic areas and rest stops along such Parkway.

Be it further resolved: That the Secretary of State be directed to send enrolled copies of this resolution to the President of the United States Senate, the Speaker of the United States House of Representatives and to each member of the Kansas delegation in the Congress of the United States.


** The advent of the Carter Administration has resulted in renewed National Park Service interest and enthusiasm, according to park proponents. See also notes 363-65 and accompanying text infra.

2 Id.
3 Id., supra note 12.
4 Id. at Planning Directive. Questions surrounding site selection criteria are discussed at § 5A infra.
5 Stough Interview, supra note 55.
6 See, e.g., Kansas City Star, Jan. 23, 1977, at 20A, col. 1. In the meantime, the parcel has been entrusted to Kansas State University for various scientific purposes. The Conservancy had owned a tract of 916 acres for many years known as the Konza Prairie. The "Dewey Ranch" of 7200 acres is adjacent to this land and likely will also be called the Konza Prairie. For details of the acquisition see Kansas City Star, April 3, 1977, at 1F, col. 1.
changed drastically in the wake of the 1976 election.\textsuperscript{77} Possibly a portent of new attitudes toward a Tallgrass Prairie National Park is the rejection by the 1977 legislature of another anti-park resolution and of an easement bill intended, it appears, to further forestall park sentiment by expanding the scope of the parkway alternative preferred by opponents.\textsuperscript{78}

Developments in Washington have also had the effect of renewing the interest and optimism of proponents. The new administration of President Carter is likely to be more active and sympathetic toward expansion of the park system than was the Nixon-Ford Administration.\textsuperscript{79} In February 1977, Representative Skubitz announced that he would retire from Congress;\textsuperscript{80} his successor may share his opposition, but cannot succeed to Representative Skubitz's ranking position on the House Subcommittee. While all of these events indicate important attitudinal changes, no concrete action has yet occurred to move the prairie park idea off dead center. All in all, the time is ripe for reconsideration and reevaluation, a task undertaken in the remainder of this Article.

D. Basic Assumptions

Even the most comprehensive evaluation of any proposal must start from somewhere. Because both proponents and opponents agree that the tallgrass prairie is a beautiful, unique ecosystem, eminently worthy of preservation, it will be presumed hereafter that this ultimate goal is beyond further contention. The extent to which it should be diluted by or combined with other purposes, such as recreation and historical interpretation, remains controversial, and will be discussed at some length in ensuing Sections.\textsuperscript{81}

The second assumption on which the remainder of the Article rests is that continuation of private ownership will not suffice to guarantee preservation of any appreciable plot of virgin prairie. That assumption deserves more detailed attention and documentation because it will be strongly disputed by park opponents; in several senses it amounts to assuming the ultimate conclusion in the entire park controversy. Nevertheless, it is inescapable that fragmented private ownership is a perilous, unaffordable gamble when the stakes are protection and preservation of a unique facet of nature for the enjoyment of future generations. That in itself should be dispositive, \textit{vide} the experience in Illinois a half-century ago.\textsuperscript{82} More than 90 percent of tallgrass prairie has been put to the plow, irrevocably destroying its character.\textsuperscript{83} That there is any true tallgrass left to save is due almost entirely to the intractable nature of the Kansas Flint Hills. The plain fact is that the Flint Hills cannot successfully resist ruination by human intrusion forever, and evidence is rapidly mounting to show that the battle is already being lost. The threats to the remaining areas of dominant tallgrass prairie come in two main forms: external forces are converting the prairie from grazing to other uses incompatible with continuation of grass

\textsuperscript{77} See, \textit{e.g.}, Topeka Daily Capital, Nov. 4, 1976, at 1, col. 1.
\textsuperscript{79} See notes 357-65 and accompanying text \textit{infra}.
\textsuperscript{80} Kansas City Times, Feb. 21, 1977, at 9B, col. 1.
\textsuperscript{81} See §§ II.B(6) and V.A(2) \textit{infra}.
\textsuperscript{82} See text at note 7 \textit{infra}.
\textsuperscript{83} See notes 2-8 and accompanying text \textit{supra}.
dominance and are defacing the landscape with modern structures; and, some ranchers are using practices inimical to the integrity of the prairie ecosystem as it is.

The Kansas Power and Light Company took by eminent domain 20 square miles in Pottawatomie County for its Jeffreys Energy Center, converting the agricultural land to plant sites, reservoirs, and coal storage areas;\(^{84}\) transmission lines stemming from it and other developments in its wake will inevitably destroy more prairie in the area. The Wolf Creek nuclear energy plant near Burlington, gas and oil drilling in most areas of the region,\(^{85}\) numerous water retention structures,\(^{86}\) and other local developments continue to eat into the limited available and suitable land. Another huge federal reservoir is being pushed for Cedar Point in Chase County.\(^{87}\) The proposed Wyoming-to-Arkansas coal slurry pipeline, if authorized, might cut across the remaining relatively undisturbed portion of the prairie.\(^{88}\) Another turnpike has been proposed for the Winfield-Galena corridor.\(^{89}\) Particularly threatening are increasing visual intrusions. The 1975 Assessment documents the existence of a myriad of power lines, transmission towers, farm structures, highways, and other manmade appurtenances that detract from the desired panorama and from the natural integrity of the land.\(^{90}\) These external developments keep shipping away at the land available for preservation. In time, they alone could effectively destroy the Flint Hills ecosystem bit by bit.

An even more immediate threat comes from the practices of some of the present landowners and lessors. The bottomlands in the area have long been farmed intensively. A few owners have attempted to till their thin soil in the wake of falling beef prices, leading some anti-park legislators to decry plowing because it supports the rationale for establishment of a park.\(^{91}\) Six thousand acres were plowed by one owner alone in 1974 for the introduction of exotic grasses to provide year-round grazing.\(^{92}\) Many owners of land in the relevant areas are absentee landlords; ranchers as well as park advocates frequently criticize the abuses that corporate, long-distance farmers allow to occur on their lands.\(^{93}\) Furthermore, there is the problem of overgrazing. While most ranchers deplore the practice,\(^{94}\) they cannot deny that a number of ranchers are prone to a weakness for short-term profit over long-term productivity by putting too many animals out to graze.\(^{95}\) The fragile ecosystems cannot cope with over-exploitation for too many seasons. Sooner or later, continued overgrazing will destroy the resource exploited. Prolonged grazing by itself gradually changes the nature of the ecosystem as nonnative species are established.\(^{96}\)

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\(^{84}\) See Coggins and Hensley, Environmental Law Creeps Into Kansas: A Commentary on the Concerned Citizens United Suit, 23 Kan. L. Rev. 421, 422 (1975) [hereinafter cited as Coggins & Hensley].

The presence of the Center was a prime reason given by the National Park Service for rejection of the site immediately south of it. Assessment, supra note 12, at Planning Directive 18.


\(^{89}\) Coggins & Hensley, supra note 84, at 427 n.30.


\(^{91}\) See, e.g., Wagner, Flowing in the Flint Hills, Save the Tallgrass Prairie, Inc. News, July 1974, at 1, col. 1.

\(^{92}\) Id.

\(^{93}\) See, e.g., Cook, supra note 8, at 3.

\(^{94}\) Conversations with Flint Hills ranchers, Prairie Park Conferences, in Elmdale, Kansas, 1973, 1974, and 1975 (unanimous opinion).

\(^{95}\) Id.

\(^{96}\) Allen, supra note 2, at 35; J. Weaver & F. Albertson, Grasslands of the Great Plains (1956).
All of these threatening factors establish that private ownership alone cannot ensure that even a single acre of true tallgrass will be seen by our children's children. The third assumption upon which this Article will proceed is that, among governmental entities, only the federal government can adequately preserve a representative sample of tallgrass prairie; state and local governments have neither the inclination nor the resources to do the job. Purchase of the thousands of acres necessary will require millions of dollars and proper development will cost millions more. As matters now stand, the Kansas legislators are on record against any park; there is no indication that the State of Kansas will purchase and protect an adequate area. To assure preservation, the federal government must assume stewardship. The form of federal ownership that would be most appropriate is the subject of the next Section.

II. THE SEARCH FOR AN APPROPRIATE FEDERAL LANDS CLASSIFICATION

Discussions of prairie preservation proposals have revolved for decades around the concept of a national park, even though it is only one of many types of federal lands classifications. It appears that neither opponents nor proponents, with few exceptions, have seriously considered preservation in the form of a wilderness area, a national monument, a national preserve, a national grassland, a national recreation area, a national resource area, a national conservation area, or another one of the other forms of federal land holdings. It is possible that the sentiment for "a park or nothing" may arise from ignorance of the options available (and from the desire for the prestige inherent in the park label). No detailed assessment of the advantages and disadvantages of the differing kinds of federal ownership as applied to tallgrass proposals has been located. Nevertheless, such an evaluation indicates that the circumstances and the law make conventional park status the preferable choice. Many kinds of lands are under the management jurisdiction of the National Park Service; they have been created and are managed for varying purposes.

Some federal lands categories are inappropriate for prairie preservation because the law governing their management requires or permits types and degrees of exploitation inconsistent with the central purpose of preservation. Other classifications are inappropriate for the reason that technical legal requirements for designation cannot be met in the Flint Hills. Other designations are geographically inappropriate, such as that for national seashores. Yet other newly created federal land categories are obviously inadequate in and of themselves for prairie preservation—wild and scenic rivers and national trails, for instance—but their attributes might be integrated into a larger, multi-faceted park concept. Examination of available

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98 For example, Dr. Hall has noted some differences in classifications of lands managed by the Park Service, Hall, AMERICAN FORESTS, supra note 5, but no one has followed up the suggested analysis. Opponents have mistakenly claimed that preservation would be better accomplished in a national preserve. Testimony of Dr. Robert F. Clarke, Kansas Senate Commission on Energy and Natural Resources, March 26, 1975, copy on file with Professor Coggins. But see § II,B(3) infra.
99 See § II,B infra.
100 See §§ II,B(3) (national preserves), II,B(4) (wilderness areas), II,B(5) (national monuments), & II,B(6) (national recreation areas) infra.
alternative classifications, founded on the premise of the necessity for federal acquisition and control, leaves park status as the single best means of achieving the desired goals.

Before examining present federal lands classifications for their suitability in relation to a tract of tallgrass prairie, the Part immediately following will first recount some pertinent high points of public land law history in general. The present variety of systems cannot be fully comprehended without at least an introduction to the ways in which they have evolved, and for what purposes, over the course of the past century.

A. Brief History of Public Lands Classification Systems

Between 1787 and 1867, the young United States took or acquired from other nations about 2,000,000,000 acres of land on the North American continent.101 Over two-thirds of those acquired lands were then given away, sold, or leased. By the end of the first third of this century, the parcels that remained in federal ownership were generally those that were deemed worthless for agricultural or other activities by successive waves of homesteaders, speculators, miners, and others.102 In this century, the pendulum of federal policy has swung from disposition to retention to acquisition: millions of acres have been reacquired by the federal government for various purposes since 1911.103 To convey an understanding of why the present 750-odd million acres of federal lands are subject to a differing, and sometimes bewildering, array of laws, criteria, requirements, and designations, it is necessary to iterate in brief the development of public land law systems.

Disposition was the dominant goal of public lands policy and management for most of the 200 years of our history as a nation.104 The Jeffersonian ideal of a country dominated by small independent farmers naturally led to a series of disposition statutes authorizing sale of federal lands, for cash or for credit, to settlers agreeing to effect certain agricultural or other improvements on the land they settled.105 Large blocks of land were also granted to the new states upon admission to the Union for purposes, inter alia, of education and internal improvements.106 Although efforts to classify differing forms of federal lands did not get seriously underway until well into this century, thousands of public lands statutes were on the federal books by the mid-1800s.107

The most notable aspects of the entire period when disposition was the national

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101 See generally M. CLAWSON, THE LAND SYSTEM OF THE UNITED STATES 36-43 (1968) [hereinafter cited as CLAWSON]. The original states ceded to the federal government an amount of land equivalent to their own territory upon entering the Union; the land area was doubled again by the Louisiana Purchase; Florida was acquired for a song in 1819; the accession of Texas, the treaty with New Mexico ending the Mexican War, and the Gadsden Purchase added the Southwest and California; an agreement with Great Britain settled the northwest border; and the purchase of Alaska in 1867 completed the outlines of the continental United States. See generally GATES, supra note 33, at 75-86.

102 See generally GATES, supra note 33.

103 See authorities cited notes 122-24, 135, 147-54 infra.

104 See CLAWSON, supra note 101, at 54-71; GATES, supra note 33, at 1-32.

105 See, e.g., CLAWSON, supra note 101, at 56.

106 See generally GATES, supra note 33, at 285-339. The famous Morrill Act of 1862 and its successors financed the establishment of dozens of agricultural and mechanical colleges, the "land grant" schools, including Kansas State University. Id. at 335. See also M. ORFIELD, FEDERAL LAND GRANTS TO THE STATES (1915).

107 "Congress has gone on piling land law upon land law—altogether [by 1879] 3,500 of them—frequently without consideration how later legislation might affect or be quite out of harmony with earlier laws which were not repealed." GATES, supra note 33, at 422.
policy—that is, from 1789 to the 1930s—were speculation, monopoly, fraud, corruption, and perjury. The fairly well-known story of the federal and state grants to railroads is but one spectacular instance of then common practices. It is easy to be disdainful of the leaders of the late nineteenth century for their unbridled greed and crass shortsightedness in their use and abuse of the national heritage. The various disposition acts, however, did accomplish a large part of their aims in that millions of settlers acquired their own farms, and millions of acres of arid and semi-arid western lands were reclaimed.

There were positive accomplishments, and the beginnings of new public lands attitudes and policies, and of the conservation movement, can be traced directly to the late 1800s. From the meager, bitterly fought conservation victories of those days slowly grew a new lands ethic that, in turn, would provide the impetus for creation of the federal lands systems that may offer protection to a tallgrass prairie parcel.

In 1865 the federal government granted Yosemite Valley to the State of California for use as a park, but early conservationists succeeded in getting it retransferred for inclusion in a national park. Yellowstone National Park was created legislatively in 1872, but it did not exist as a truly national, protected enclave until the Army was sent to expel the poachers and other trespassers many years later. Yosemite, Sequoia, and Mt. Rainier were also established on ad hoc bases before 1900.

Until 1891 the lands remaining in federal ownership were essentially unclassified, although some enactments distinguished among agricultural lands, forest lands, and desert lands. The Forest Reservation Amendment of the General Revision Act of 1891 opened the door for a reversal of the disposition policy. The Amendment gave the President authority to withdraw forest lands from settlement. As a result, 50,000,000 acres were removed from the exploitable public domain by 1901, and President Theodore Roosevelt withdrew 150,000,000 more acres, establishing at a few strokes what is now the National Forest System.

Although most federal lands are under the jurisdiction of the various bureaus within the Department of the Interior, the National Forests were and are administered by the Forest Service within the Department of Agriculture as a result of an historic anomaly. In the first decade of this century, the Forest Service, under Gifford Pinchot, the President’s chief advisor on conservation matters, was given

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108 Instances are documented to the point of tedium in Gates, supra note 33. A more concise (and sympathetic) account is found in Clawson, supra note 101, at 67-71.

109 The old abuses are discussed in a recent article suggesting drastic twentieth century remedies. Greene, Promised Land: A Contemporary Critique of Distribution of Public Land by the United States, 5 Ecol. L.Q. 707, 714-18 (1976). The equally notorious Teapot Dome scandal of the 1920s seems to have halted or abated at least the large-scale outright land grabs. See B. Noggle, Teapot Dome: Oil and Politics in the 1920s (1962).

110 W. Everhart, The National Park Service 10 (1972) [hereinafter cited as Everhart]. Some of the impetus during the era for retention and preservation of public lands came from the writings of George Perkins Marsh, G. Marsh, Man and Nature (1874), which were taken to heart by a few federal administrators. Gates, supra note 33, at 548-49.


113 R. Lee, Family Tree of the National Park System 9-12 (1972) [hereinafter cited as Lee].

114 The differing requirements for settling under the Homestead Act, the Timber Culture Act, and the Desert Land Act are explained in Gates, supra note 33, at 387-401.


jurisdiction over forests because it was the most "conservationist" agency of the age.\textsuperscript{117} To Pinchot, conservation meant controlled rather than unbridled exploitation of resources; the definition has since broadened elsewhere.\textsuperscript{118} One result of its unnatural segregation from the Interior Department has been that the Forest Service has been imbued to a greater extent than some other federal lands agencies with the philosophy that lands exist to be used—in multiple and commercial ways, if possible.\textsuperscript{119} Proposals for transfer of the national forests to the Department of the Interior have surfaced at least once every decade since the turn of the century, but none (including, as of this writing, that of President Carter) has yet succeeded.\textsuperscript{120}

Even though the Forest Service long ago gave up its claim to conservation leadership, establishment of the National Forest System was nevertheless an event of incalculable significance in the annals of preservation. The withdrawn and reserved lands provided a land bank out of which some national parks and most of our present wilderness areas have been carved.\textsuperscript{121} The National Forest System also saw the initial impetus toward reacquisition. Under the Weeks Act of 1911,\textsuperscript{122} and the Submarginal Land Retirement Program of the 1930s,\textsuperscript{123} about 23,000,000 acres have been added to the national forests by federal reacquisition, mostly in agriculturally depressed areas east of the Mississippi.\textsuperscript{124} Even more importantly, the then-novel practice of classification and withdrawal for purposes of conservation was the forerunner of an intricate series of developments resulting in our present system of public land laws.

Classification and designation of other specialized federal lands categories, all premised on executive or legislative withdrawal of land from availability for entry and settlement, followed shortly after establishment of the Forest System, as a new conservation ethic began taking hold. The Antiquities Act of 1906 allowed executive withdrawal of lands containing features of historical or scientific interest.\textsuperscript{125} Successive Presidents have established over 60 national monuments, some of which became national parks, under this authority.\textsuperscript{126} An area designated wilderness was created administratively by the Forest Service in 1924.\textsuperscript{127} The early years of the twentieth century also saw the establishment of more new national parks, which in turn led

\textsuperscript{117} Id. at 8-10.
\textsuperscript{118} Wood, Pinchot and Mather: How the Forest Service and Park Service Got That Way, 6 Nor Man Apart I (1976). Even before the inception of the Park Service in 1916, Pinchot was dead set against any notion of conservation that included elements of "nonproductive" preservation, whereas Stephan Mather, the first Park Service Director, looked to preservation of natural values as the single guiding standard for Park Service policy. Mather's philosophy has remained the central policy of the National Park Service. Id.
\textsuperscript{119} The point is developed in § II.B(1) infra.
\textsuperscript{120} See, e.g., GAYES, supra note 33, at 615-17.
\textsuperscript{121} ROBINSON, supra note 116, at 310-12.
\textsuperscript{124} ROBINSON, supra note 116, at 10-14.
\textsuperscript{126} A list of the monuments established by proclamation is appended to the annotation of 16 U.S.C.A. § 431 (1974).
\textsuperscript{127} COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: SIXTH ANNUAL REPORT 250 (1976) [hereinafter cited as CEQ, SIXTH ANNUAL REPORT]. Although progress toward the goal of wilderness preservation was made haltingly over the years, it was not until 1964 that an official policy and mechanism were established. See § II.B(4) infra.
to the creation of the National Park Service (NPS) in 1916. The quietly revolutionary statute creating the NPS directed it to “conserve the scenery and the natural and historic objects [in national parks] and the wildlife 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.” Management for present enjoyment and management for future enjoyment, or preservation, are not always complementary goals. More and more conflicts between present use and preservation have become evident as the mission of the Park Service has been expanded over the years, and as the popularity of federal lands for recreational activities has increased. An orientation toward preservation and education has characterized NPS since its inception, but its mission has been broadened in recent years by assignment of responsibilities for recreation areas, urban-oriented parks, cultural areas, and the like. The simple original concept of a park as a reservation for all time has remained intact concerning the 37 “natural area” parks, the “crown jewels” of the system, but NPS now administers over 31,000,000 acres that have been divided into five main categories: natural areas, historical areas, recreation areas, cultural areas, and national capitol parks. Each category is subdivided into many more subcategories. The National Park System is one of the relatively few federal lands systems that is still growing by reacquisition of private land; the direction that that growth should take is examined in Section IV.

The present National Wildlife Refuge System began when President Roosevelt set aside Pelican Island for the benefit of wildlife in 1903. Miscellaneous withdrawals and purchases for refuge purposes were made over the years until, in conjunction with the first federal endangered species law, the National Wildlife Refuge System was created in 1966. It comprised in 1974 over 32,000,000 acres, much of it in Alaska, in some 367 refuges. The System is now administered by the Fish and Wildlife Service in the Interior Department, and its expansion is financed both by special funds and by general revenue appropriations. The primary purpose of the Refuge System is, of course, the propagation, protection, and management of wildlife, and preservation of the land is a secondary concern.

A majority of federal acreage is in the “public domain” lands administered by the Bureau of Land Management (BLM) within the Department of the Interior. Until 1934, these were the “worthless” western and Alaskan lands passed over by prospective settlers and by the withdrawals and reservations that characterized

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128 See generally EVERHART, supra note 110.
131 See futrell, supra note 113.
132 COQ, SIXTH ANNUAL REPORT, supra note 127, at 258. It has been suggested that Afognak Island may better deserve the distinction, as it was created in 1892 for the protection of salmon and other wildlife. M. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 26 n.59 (1977) [hereinafter cited as BEAN].
134 COQ, SIXTH ANNUAL REPORT, supra note 127, at 256.
135 The Fish and Wildlife Service is one of four federal agencies that may expend Land and Water Conservation Fund monies for land acquisition. 16 U.S.C. § 460f (Supp. IV, 1974). See A. REITZE, ENVIRONMENTAL PLANNING: SEVEN-9 TO -10 (1974); Futrell, supra note 130, at 277 & passim.
establishment of the forests, parks, monuments, and refuges. Grazing has been the primary use for these lands, but BLM and its predecessors historically have managed the lands for multiple use, even in the absence of a governing statute. Widespread abuse and lower stock prices led to the enactment of the Taylor Grazing Act of 1934, which formally established a system of grazing districts, and had the effect of withdrawing many BLM holdings from homesteading. Not until 1976 was an organic act for the BLM passed; the Federal Land Policy and Management Act of 1976 makes a system of sorts out of the preexisting geographical and legal hodgepodge. The newly designated national resource lands are still to be managed for multiple-use, but the new Act reflects a more conservationist orientation in many of its provisions. Since 1969, BLM has created eight primitive areas totaling 170,000 acres as its functional equivalent of the Wilderness Preservation System.

The pendulum of the historical trend is still swinging. Homesteading and other modes of cheap settlement on public lands have essentially ceased for all purposes except mineral exploitation and development, although donations of federal land to states and municipalities continue in some circumstances. Conservation emphasis on federal acquisition to reclaim marginal cropland for reversion to forests has shifted to an emphasis on acquisition for scenic, recreational, scientific, aesthetic, and preservational purposes. Congressional and administrative developments between 1935 and 1964 reflected new attitudes toward types and recreational uses of federal lands, resulting in new goals and new systems. National recreation areas and national parkways are the enduring systems established in the late 1930s. The fruition of these developments was reached in 1964, when Congress enacted the epochal Wilderness Act. Thereafter, Congress officially decreed or ratified a new spectrum of public lands systems characterized by special goals. The Wilderness Act was followed by legislation creating systems of national wild and scenic rivers, national rivers, national trails, national urban “gateway” recreation...
areas,\textsuperscript{150} national seashores and lakeshores,\textsuperscript{151} a canoe area,\textsuperscript{152} conservation areas,\textsuperscript{153} national preserves,\textsuperscript{154} and lesser designations.

Federal public land law remains confusing to one not long familiar with it. The disposition statutes have largely been replaced by management statutes. The former national policy of disposition has been tacitly abandoned, and present controversies usually revolve around permitted or required uses on retained or reacquired lands. The four main lands systems (Parks and Monuments, Forests, Refuges, and BLM lands) each have governing organic acts now and are managed by four agencies, each with different missions, and various other agencies hold other lands for other purposes. In 1970 the conservative Public Land Law Review Commission recommended a series of comprehensive and possibly simplifying reforms,\textsuperscript{165} but Congress has not adopted these reforms wholesale, preferring to deal with one system at a time. The impetus provided by the impact statement requirements of the National Environmental Policy Act of 1969,\textsuperscript{166} and by other more specific statutes,\textsuperscript{167} has pushed the federal lands management agencies into more environmentally oriented land use planning on a wide and intensive scale.\textsuperscript{168} Federal land law has changed greatly in the past decade, and given pressure for energy-related development, ancient regional differences in attitude, and new forms of environmental litigation, it can be expected to change more in the near future.

B. Present Federal Lands Classifications

The number of federal laws involving public lands classifications has proliferated and no end to changing systems and requirements is in sight. The main consequence is that labels make a large substantive difference in the treatment accorded particular parcels.\textsuperscript{169} Very few categories of federal lands have preservation as a central purpose in the organic legislation creating the systems, and most public lands are still open to various degrees and types of uses that conflict with the goal of preservation.

Federal lands classifications represent a spectrum rather than a series of tight categories. Each of the following descriptions of potentially appropriate federal lands systems, roughly in descending order of exploitability, includes an evaluation of the suitability of the category for a parcel of tallgrass prairie. The inquiry must be qualified by the understanding that Congress has plenary and uncontrolled dis-

\textsuperscript{159} Cf. CONSERVATION FOUNDATION, NATIONAL PARKS FOR THE FUTURE 15 (1972).
cretion over the disposition, use, and management of public lands, and can thus change the legal requirements or restrictions for any system or system component when it is so minded.

1. National Forests, National Resource Lands, National Grasslands, and National Conservation Areas

Many of the federal lands systems described below have been created for a single dominant purpose, such as wildlife protection or wilderness preservation, but all of those “dominant use” systems together represent but a relatively small proportion of federal land holdings. The essential purpose behind the classification of lands as national forests, national resource lands, national grasslands, or national conservation areas is use of the resources they provide for economic production as opposed to preservation. Because each of these categories directly conflict with the central themes behind the drive for prairie preservation, they will be but briefly summarized.

National forests are the second largest federal holdings by acreage. Much of the forest land is used for grazing or is unsuitable for timber production in other ways, so designation of a prairie tract as a national forest is not quite so bizarre as it may at first appear. National forests are administered by the Department of Agriculture for reasons rooted in history, and that Department, of course, has strong ties with Kansas. Acquisition of private lands for national forests began long ago, and the Forest Service has been managing lands longer than the Park Service. On balance, however, national forest status for a tallgrass parcel is unnecessary and unwise. It is unnecessary because better alternative designations and better qualified management agencies are available. It is unwise because production is the ingrained basic motivation behind most Forest Service practices and positions. Its multiple-use philosophy is simply ill-suited for preservation; the Department of Agriculture is one of the least environmentally sensitive federal agencies; and its lands are suffering from overexploitation and poor management.

Both national resource lands and national grasslands are comprised of vast grazing tracts, and therefore might appear to be appropriate categories. The Forest Service manages 19 national grasslands located in eleven western states. The grasslands were rescued in the drought-stricken 1930s by Department of Agriculture emergency rehabilitation programs. Submarginal farms and depleted rangelands were acquired and placed in the hands of the Soil Conservation Service (SCS),

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101 The following discussion is limited to existing categories; the suggestion that a new category be created for prairie protection and restoration is not considered—the position of the Conservation Foundation that “the number of categories [should] be vastly reduced” has some merit. CONSERVATION FOUNDATION, NATIONAL PARKS FOR THE FUTURE 16 (1972).
103 BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS 11-13 (Table 8) [hereinafter cited as BLM 1975 STATISTICS].
104 See notes 115-24 and accompanying text supra.
105 COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: SEVENTH ANNUAL REPORT 85-86 (1976).
under the authority of the Bankhead-Jones Act of 1937.\textsuperscript{167} That Act provided for the development of a program of land conservation and land utilization, including the retirement of lands which were either submarginal or not primarily suitable for cultivation, in order to correct maladjustments in land use.\textsuperscript{168} The Land Utilization Projects were to facilitate the return of grasses to their rightful place as the dominant resource of the western plains, and included leases of public ranges to private entities under controls aimed at guaranteeing their improvement and conservation.\textsuperscript{169} In 1960, after more than two decades of rehabilitation, the Secretary of Agriculture designated the 3,800,000 acres as a system of national grasslands within the National Forest System.\textsuperscript{170} As the grasslands are by definition formerly ravaged areas, managed for production by the Forest Service, that designation for a tallgrass prairie would be a step backwards.

National resource lands, administered by the Bureau of Land Management (BLM), consist of 450,000,000 acres of rough, dry, and mountainous land located primarily in the Far West, and in Alaska.\textsuperscript{171} Those lands have been managed under multiple-use philosophy, with emphasis on grazing, for decades,\textsuperscript{172} but the policy was finally made official—and considerably circumscribed—only in 1976.\textsuperscript{173} There are only 680 acres of BLM lands in Kansas,\textsuperscript{174} and BLM management of a tallgrass preserve would be inappropriate both because of its multiple-use orientation and because BLM has not been able to prevent great abuse and degradation of the bulk of the lands it now controls.\textsuperscript{175}

In 1970 Congress created the category of national conservation areas,\textsuperscript{176} and the 1976 BLM Organic Act contained a section establishing the California Desert Conservation Area.\textsuperscript{177} Congressional findings for the latter appear equally true of tallgrass prairie: the area contains historical, scenic, ecological, etc. resources; it is a total ecosystem, but is fragile; it is now seriously threatened by various causes; it should be conserved for future generations; and the public should have a voice in its conservation.\textsuperscript{178} The Act, however, thereafter commits the tract to modified multiple-use management.\textsuperscript{179} Extension of the conservation area concept to tallgrass prairie would be a step forward, but if it is coupled with multiple-use exploitation, it might well be self-defeating. It certainly would not guarantee reversion to a more primitive landscape, and multiple-use management might well work against preservation of the existing ecosystem.

\textsuperscript{168} Ch. 517, § 31, 50 Stat. 525 (1937) (codified at 7 U.S.C. § 1010 (1970)).
\textsuperscript{170} Id. at 12.
\textsuperscript{171} BLM 1975 STATISTICS, supra note 163, at 12, 21.
\textsuperscript{174} BLM 1975 STATISTICS, supra note 163, at 21.
\textsuperscript{177} Id.
\textsuperscript{178} Id. § 602. Cf. 16 U.S.C. §§ 460y-2, y-3 (1970).
2. National Wildlife Refuge System

A fair argument could be made that creation of a sizable wildlife refuge in the Flint Hills would serve the various purposes associated with prairie preservation. Refuges are administered primarily, but not exclusively, for wildlife propagation and management by the Fish and Wildlife Service (FWS) within the Department of the Interior.\(^\text{180}\) There are now 367 national wildlife refuges comprising over 32,000,000 acres in 49 states, in addition to waterfowl production areas.\(^\text{181}\) Enlargement of the existing refuge in the Flint Hills on the John Redmond Reservoir, or establishment of another refuge possibly would generate less political opposition than the park notion. One main goal of park proponents is the reintroduction and protection of fauna and flora native to the area; certainly a wildlife refuge designation is appropriate for that purpose. Refuges also may be protected from most forms of exploitation to the extent that Congress or the Secretary of the Interior so declares.\(^\text{182}\) Visitation and recreation are commonly allowed.\(^\text{183}\) The Fish and Wildlife Service, while beset with low budgets and occasional archaic attitudes, is still far more environmentally oriented than, say, the Forest Service or the Bureau of Land Management.

The case outlined above is substantially undercut by a series of legal and practical factors that militate against refuge status. The most obvious factor is that the National Wildlife Refuge System is devoted primarily to one dominant use that is only one aspect of the overall purposes for which preservation is sought; reintroduction of some wildlife and protection of all is only a part of the rationale for government ownership, and is secondary to the goal that the entire tallgrass ecosystem be maintained and enhanced. Second, refuge designation is not necessarily forever; the Secretary has the power to transfer, sell, or exchange lands within the System.\(^\text{184}\) Third, the governing organic statute for the System grants discretion to FWS to allow more uses of the area than are consistent with preservation.\(^\text{185}\) There is more management discretion with respect to refuges than with parks, and that discretion could be used to allow activities and practices detrimental to the land. Refuge management has encouraged multiple uses, and various nonpreservation activities, including hunting, regularly take place on various refuges.\(^\text{186}\) Moreover, funding patterns in recent years have operated to deny FWS the ability to construct and maintain facilities consonant with use demands made upon the refuge areas.\(^\text{187}\) To the extent that education of as many visitors as possible is a valid goal, it would not be achieved at a refuge to the same extent as it would be in better publicized and


\(^{181}\) CEO, Sixth Annual Report, supra note 127, at 258.


\(^{184}\) 16 U.S.C. §§ 668dd(a),(b)(3) (1970). The Secretary of the Interior recently attempted to transfer several game ranges to the tender mercies of the BLM, but litigation, and then congressional reaction, forestalled the step. See Bean, supra note 132, at 136-37.

\(^{185}\) Subject to some restrictions and to management discretion, any activities may take place on wildlife refuges including the following: construction of public accommodations, 16 U.S.C. § 668dd(b)(1) (1970); mining and mineral leasing, id. § 668dd(c); hunting and fishing, id. § 668dd(d)(1); power line and pipeline construction, id. § 668dd(d)(2); and public recreation, id. § 668dd(h).

\(^{186}\) Refuge System EIS, supra note 180, passim.

managed parks. Finally, it should be noted that FWS has much closer ties with state agencies than NPS, and state agencies tend to be unsympathetic generally toward federal enclaves. FWS has neither the attitude nor the experience of NPS, one of the most respected, if consistently underfunded, federal agencies.

Creation of a large wildlife refuge or expansion of the present small unit in the Flint Hills would, to some extent, serve preservational goals. On balance, however, refuge status is an alternative far inferior to park status. Overall park objectives would not be attained, inconsistent uses might be allowed, and perhaps the halfway measures would dampen the enthusiasm and the chances for a true national park.

3. National Preserves

Further along the exploitation-to-preservation spectrum, but not as far along as its name implies, is the newly created category of national preserves. After the Nature Conservancy recommended establishment of a nationwide system of ecological reserves in 1972, the Department of the Interior backed the creation of biological reserves for two unique ecosystems, the Big Thicket in Texas and the Big Cypress in Florida. Congress rejected the limited nature of the Interior proposals, and enacted legislation establishing larger national preserves for the two areas. That portion of the Senate Report explaining the congressional reasoning deserves to be quoted at length:

The description of the Big Cypress area as a national preserve will establish a new category which can serve as a feasible and desirable vehicle for the consideration of other nationally significant natural areas which differ from the qualities attributed to national parks and national recreation areas. . . . Reserve refers to stock—a commodity held for future use. Preserve refers more definitively to the keeping or safeguarding of something basically protected and perpetuated for an intended or stated purpose, as with the specific objectives for Big Cypress provided by this legislation.

In general, national preserves will be areas of land and/or water which may vary in size, but which possess within their boundaries exceptional values or qualities illustrating the natural heritage of the Nation. Such areas would often be characterized by significant scientific values, including, but not limited to, ecological communities illustrating the process of succession, natural phenomena, or climax communities. In addition, they could be characterized by a habitat supporting a vanishing, rare or restricted species; a relict flora or fauna persisting from an earlier period; or large concentrations of wildlife species. Other scientific, geologic, geomorphic or topographic values might also contribute to the purposes for which an area might be recognized.

The principle thrust of these areas should be the preservation of the natural values which they contain. They might differ, in some respects, from national parks and monuments insofar as administrative policies are concerned. Hunting, for example, subject to reasonable regulation by the Secretary, could be permitted to the extent compatible with the purposes for which the area is established. Other

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186 See. e.g., New Mexico Game Comm’n v. Udall, 410 F.2d 1197 (10th Cir.), cert. denied, 396 U.S. 961 (1969).
activities, including the extraction of minerals, oil, and gas could be permitted if such activities could be conducted without jeopardizing the natural values which the area seeks to preserve. Management of the watershed resources might also be appropriate if that would enhance the value of the preserve as it serves other needs.

All management activities within these areas should be directed toward maintaining the natural and scientific values of the area, including the preservation of the flora and fauna and the reestablishment of the indigenous plant and animal life, if possible. . . .

National preserves may accommodate significant recreational uses without impairing the natural values, but such public use and enjoyment would be limited to activities where, or periods when, such human visitation would not interfere with or disrupt the values which the area is created to preserve. Construction of physical facilities of any kind would be minimized and would be limited to those developments which are essential to the preservation and management of the area and the safety of the public. 102

In essence, the national preserves will resemble wilderness, parks, and multiple-use lands in some legal particulars. Less recreational facility development will be tolerated in preserves than parks, thus keeping visitation levels relatively lower. On the other hand, the managing agency has broader management prerogatives in that several kinds of uses may be permitted if "compatible" with the preserve purpose. In that sense, preserves will not preserve as well as parks, but will take more account of future enjoyment than will multiple-use designation. All three of these categories are less efficacious than wilderness designation for purposes of basic land preservation.

Except for the approval of exploitive activities found in the third quoted paragraph, the natural preserve idea seems closely suited to prairie preservation. The tallgrass prairie has "exceptional values or qualities illustrating the natural heritage"; it could support endangered species and "relict flora"; and it contains other "scientific, geologic, geomorphic, or topographical values." A Big Tallgrass Prairie Preserve in the Flint Hills would certainly achieve many of the goals of park proponents, as they seek preservation, not reservation, at a minimum.

Certain aspects of national preserve criteria suggest possible problems for the preservation of tallgrass prairie. Many of the exploitive uses technically permissible in preserves would be incompatible with this basic purpose. 103 The foremost difficulty is whether these resource use decisions can be entrusted to an agency unfettered by strict legal standards. Whether these uses or practices would actually be allowed on a prairie preserve is problematical, but perhaps the guiding rationale for preserves is not as well tailored to the tallgrass region as it might appear. The tallgrass prairie has already experienced intensive human use; it will likely have to be fenced; it should be managed for reversion as well as preservation; it will probably draw more visitors than a preserve (it will be located on a more beaten track); and


103 Would hunting be an appropriate use of a prairie preserve? Can a preserve coexist with oil drilling rigs? Just what exactly does "management of the watershed" entail? Would a prairie preserve retain modern dwellings or power lines or railroads? The National Park Service, which manages the Big Thicket and Big Cypress Preserves, would probably not build a dam in the middle of the Preserve for purposes of "watershed management," but it would do no harm to have the enabling legislation obviate even remote possibilities of inconsistent developments.
it will have sizable herds of large beasts, perhaps including large predators.\footnote{194} All of these factors could conceivably militate against national preserve status unless specific management restrictions are imposed by statute. Should preserve status be agreed upon, Congress should set the basic management guidelines, and limit administrative flexibility to those measures directed at ecosystem enhancement. Most of the uses authorized for the other preserves appear unsuitable for the tallgrass prairie, and the designation is inappropriate as long as the same degree of administrative leeway is authorized. A preserve in the true sense of the word, however, might be appropriate as a core area of a national park in accord with the zoning concepts developed in Part V.

4. Wilderness Preservation System

Wilderness is as much a state of mind as a matter of legal definition. Its essence is being left alone. Writers, naturalists, and a part of the human psyche provided the impetus, but it took the United States Congress to transform the new ideal into reality.\footnote{195} The evolution of public attitudes from hostility to enthusiastic approval culminated in the Wilderness Act of 1964.\footnote{196} The Act set aside some areas as wilderness, and provided a review system for eventual designation of others from existing federal lands, primarily national forests.\footnote{197} By 1976 there were 12,700,000 acres in wilderness areas, and hundreds of parcels under study.\footnote{198} An area designated as wilderness is entitled in some respects to the highest degree of protection from human exploitive activities accorded by federal law to any lands category, but that protection remains far from absolute. Private parcels existing within the boundaries of a new wilderness area were not disturbed, and the managing agency was not given condemnation power to end these nonconforming uses.\footnote{199} Hunting is not forbidden, preexisting motorized uses may continue, multiple uses of adjacent federal tracts are not affected, existing grazing rights continue for some time, and mineral entry, exploration, and exploitation may continue until 1984.\footnote{200} The Wilderness Preservation System is superimposed upon several other federal lands systems; a wilderness area can be created from lands in several other systems and will be managed by the agency previously in charge.\footnote{201}

The legal characteristics distinguishing wilderness from other classifications are the prohibitions against all other types of commercial exploitation. A wilderness area is by definition roadless, and all other new uses involving the internal combustion engine are forbidden.\footnote{202} No large concessions or commercial enterprises are allowed, but trails, bridges, and primitive facilities are permitted.\footnote{203} In many areas, quotas are imposed on the number of persons allowed to enter at any one time and permits are required. Visitors must come on foot and carry whatever they need.
eat or use. To the extent possible, the land is to be left in its primitive, natural state, and its management is to be directed at protecting its integrity from human uses.204

It is doubtful whether any area in the Flint Hills would qualify technically for wilderness status, even disregarding the usual precondition of existing federal ownership. Wilderness, for purposes of the 1964 Act, is defined as:

an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of underdeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.205

Large blocks of land in the Flint Hills are essentially uninhabited; features of ecological, scientific, educational, scenic, and historical interest are found there or thereabouts; solitude is possible; in some places man's imprint is barely noticeable. Nevertheless, roads, power lines, pipelines, microwave towers, and fences are present; the land has been and is being altered for human purposes; and, unless the land is allowed to revert to a prehistoric condition, man's imprint will remain in many areas.

Reasons other than definitional pose barriers to wilderness designation for an entire tract of prairie. The concept of wilderness contemplates very limited access, little management, no motorized transport, and carefully circumscribed permissible uses and activities. Those strictures are entirely consistent with a goal of preservation, but are probably too rigid for adequate prairie management. There are broader purposes, including recreation, research, education, and ecosystem reestablishment, that should be served in a tallgrass reservation without impairing the basic resource—a point to be developed further in Part V below,206—which cannot be served by simply leaving so many acres of tallgrass alone. Additionally, of course, even wilderness is commercially exploitable to a degree; the allowable mineral exploration conceivably could result in new oil or gas locations in the designated area by 1984, unless the wilderness area is within a national park, where mining is forbidden.207

Even with these legal and practical disadvantages, wilderness designation for at least a portion of the proposed prairie reserve should not be rejected out of hand. Congress has recently authorized studies leading to designation of certain existing national park areas as wilderness.208 If the thesis that a prairie park should encompass recreational and educational as well as preservational purposes is accepted, intra-park zoning will be required.209 It would be compatible with central park

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204 See, for example, the judicial construction of the Wilderness Act in Parker v. United States, 448 F.2d 793 (10th Cir. 1971), cert. denied, 405 U.S. 989 (1972).
206 See § V.A(2) infra.
209 See § V.B(2) infra.
purposes and with recent preservation-oriented trends to set aside a central portion of a prairie park as wilderness, thus closing it to all developments, even those normal in parks. The outlines of a park plan incorporating this notion are developed at the end of this Article.  

5. National Monuments

The Antiquities Act of 1906 authorized creation of national monuments out of existing federal lands. Under the Act, the President can designate a monument unilaterally, by proclamation, if the area contains “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest.” The President’s discretion to designate a monument is restricted in that only the smallest area compatible with preservation of the landmark may be designated, and the designation may be made only from present federal land holdings. In this manner, such national treasures as Death Valley, Glacier Bay, and Rainbow Bridge have been set aside; the former two are sufficiently sizable to show that areas large enough for tallgrass preservation could be created. Various exploitive activities are still allowed on some monuments, however, and judicial protection of them has in some instances appeared less than enthusiastic in the face of competing economic considerations. Congress, of course, can undo what the President has done. In fact, Congressional resistance to unilateral designation in recent decades has been sufficiently severe that very few “Presidential” national monuments have been created since the administration of Franklin Delano Roosevelt.

The primary differences between national parks and national monuments lie in the methods by which they are created, the purpose for their creation, and the degree of care and management accorded them thereafter. The National Park Service manages monuments as well as parks, but monuments usually receive far less attention from both the public and NPS than do parks. Congress could authorize the creation of a tallgrass national monument out of lands now privately held; but little purpose would be served. There is no good reason for making a prairie preserve a monument instead of a park.

It has been suggested that designation of a relatively small (20,000 to 30,000 acres) monument be sought as the opening wedge to a tallgrass prairie park, on the premise that experience with the limited plot would lead eventually to a demand for more acres and higher status. The difficulties with that argument are that the federal government has no suitable holdings from which the initial effort could be made, except perhaps the environmentally ravaged Fort Riley, and that gradualism is a dubious strategy in the face of a clear and present danger to a diminishing natural asset, as experience with Redwood National Park illustrates. Because a

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210 See §§ V.B,C infra.
212 Id.
213 Id. Congress, too, can establish national monuments whenever and however it chooses.
216 See Everhart, supra note 110, at 174-75.
218 See, e.g., Futrell, supra note 130, at 285-87.
monument can be managed by the Park Service for preservation, monument designation would be better than many federal lands categories, but it has no inherent advantages over park status.

6. National Recreation Area Systems

The perceived demand for recreation in general, and recreational opportunities near urban centers in particular, has resulted in the evolution of a series of recreation-oriented federal lands systems over the past forty-odd years. The ad hoc creation in the 1930s of a few parkways, national recreation areas, parks in close proximity to cities, and national seashores\(^\text{219}\) started a movement toward recreational lands that culminated in the recent designation of “gateway” recreation areas in and near San Francisco and New York.\(^\text{220}\) Intensive recreation alone is, to some degree, antithetical to the central purpose of tallgrass ecosystem preservation, because hordes of people with their vehicles and unregulated habits can destroy the tallgrass terrain as completely as plowing and herbicides. Careful design and management, however, can avoid degradation or destruction of the area by controlling access and activities. The development of recreational lands systems deserves further discussion because it may be desirable to incorporate recreational features in a prairie park general management plan.

After the Park Service reorganization in 1933,\(^\text{221}\) Congress set in motion studies that would lead in time to the creation of extensive new systems, each devoted as much to recreation as to preservation and other uses. The policies then asserted for preservation of historic sites,\(^\text{222}\) for meeting national outdoor recreational needs,\(^\text{223}\) and for creation of new types of reserves\(^\text{224}\) were further documented by a series of studies over the last two decades.\(^\text{225}\) The policies, the studies, and new public enthusiasm, even in the face of severe budgetary constraints, led more or less directly to the creation of systems of national parkways, national seashores, national scenic trails, national rivers, national wild and scenic rivers, national lakeshores, and several varieties of national recreation areas. Seashores, lakeshores, and probably scenic rivers are for various reasons not deserving of further commentary in relation to prairie preservation, but the other categories could well be relevant.

a. National Recreational Areas (NRA). The idea of creating recreational opportunities for urban populations close to home was realized in 1936 when Catoctin Mountain Park and Prince William Forest Park were deemed “Recreational Demonstration Areas.”\(^\text{226}\) In the same era, battlefields and historic areas were set aside, Cape Hatteras National Seashore was established, and Lake Mead National Recrea-

\(^{219}\) See Lee, supra note 113, at 37-60.
\(^{221}\) See Everhart, supra note 110, at 30-33; Lee, supra note 113, at 21.
\(^{226}\) Lee, supra note 113, at 21.
tion Area was created.\textsuperscript{227} Most of these areas are administered by the National Park Service even if concocted out of lands formerly managed by other agencies. The new "gateway" NRAs indicate that open space preservation near urban areas is now frequently being achieved through this designation. The NRA concept has become increasingly popular. As Futrell recently concluded:

The National Recreational Area designation by the end of the 1960s had become the catch-all classification of the National Park Service. Beginning as a technique for protecting sea coasts with large undeveloped open spaces, it evolved to include intensive use parks and then an alternative type of wilderness preservation similar to the more traditional national parks and monuments.\textsuperscript{228}

Many NRAs have been developed in conjunction with and around the shores of federal reservoirs, such as the Lake Mead NRA. These reservoir-related NRAs serve the function of providing water-related recreation in conjunction with the aesthetic appreciation and other opportunities typically available on reserved federal lands, and thus satisfy a popular, deep-seated public demand. The Kansas City metropolitan area has not been so blessed. There are many streams and reservoirs within a day's drive from Kansas City, but overall recreational opportunities in natural settings are unduly limited for citizens in the area. A prairie park would be a natural attraction for this sizable population, and the new park would be more attractive if some broader form of recreation should be made available in conjunction with it. Integration of a reservoir recreation area, whether or not so denominated, would greatly increase the visibility and popularity of a tallgrass park, and need not conflict directly with preservational aspects if adequately planned or zoned. There are several federally owned reservoirs in the Flint Hills area, and one, Tuttle Creek, is immediately adjacent to the park site tentatively chosen in 1961 and later rejected by NPS.\textsuperscript{229}

b. National Parkways, Trails, and Rivers. Also included in the recreational category of lands managed by NPS are the parkways, trails, and river systems. The National Parkway System has not been expanded lately,\textsuperscript{230} probably for the reason that vehicles and parks are frequently thought to be in inherent and irreconcilable conflict.\textsuperscript{231} While a parkway might be feasible in conjunction with a park, it is inadequate by itself. Coupled with conservation easements (which might in themselves be very costly),\textsuperscript{232} a parkway could, to a limited extent, forward the goal of


\textsuperscript{228} Futrell, supra note 130, at 274. Whether NPS should be involved in recreational management, especially if it detracts from the traditional Park Service mission, is a matter of great controversy within the agency. Id. at 276. Both critics and proponents of Park Service NRAs appear to have assumed to some degree that the situation necessarily requires an either/or choice between recreation and preservation, but that may not be so. Whether accommodation could be reached by such means as intra-park zoning deserves the further consideration it will receive immediately below and in Part V.

\textsuperscript{229} The criteria by which these choices were made are recounted and criticized in § V.A infra.

\textsuperscript{230} Creation of the Blue Ridge and Natchez Trace Parkways in the 1930s, 16 U.S.C. §§ 460 to 460a-11 (1970) (originally enacted as Blue Ridge Trace Parkway Act, ch. 833, 49 Stat. 2041 (1936); Natchez Trace Parkway Act, ch. 251, § 1, 52 Stat. 407 (1938)), led to the formation of the Wilderness Society in protest of the concept.

\textsuperscript{231} LEE, supra note 113, at 52-56.

\textsuperscript{232} Restricting development of a strip one mile deep on either side of a Parkway 100 miles long would require purchase of easements of over 128,000 acres. If the easement or development right was worth one quarter of the fee value, then the easements alone would cost about $13,000,000, assuming an average fee value of $400 per acre. With other necessary costs, that would be a lot of money for very little result.
preservation by forbidding development of selected lands. A parkway might also contribute to the destruction of the resource to be protected, however. A designated, well-publicized parkway perhaps would attract many tourists, but it would be impossible to police their activities. Trash accumulation, trespass harmful to the lands, and destruction of the areas near the roads would be well nigh inevitable. A parkway would, in the end, please no one, especially adjacent ranchers.

It is unlikely that any sizable stream in the Flint Hills area would qualify for inclusion in the National System of Wild and Scenic Rivers, as there are few undammed streams of any size within the areas now being considered as park sites. National trails, on the other hand, embody a concept that could (and should) be incorporated into an overall park master plan. Some of the most famous trails in American history ran through or around the Flint Hills. If at all possible, the park site chosen should encompass a segment of the original Oregon, Santa Fe, or Butterfield Trails, and further, an additional segment of the trail outside the park should be acquired by NPS as one form of access to the park. The trails envisioned by the Act are much longer than could be encompassed in any single park, and the Trails System is a device for recreation, not land preservation, but coordinating the purposes in a limited sphere has attractive possibilities.

7. National Park System

More uses are allowed in national parks than in wilderness areas, but the legal constraints governing park management, the flexibility accorded park managers (carefully subordinated by law to the goal of preservation), and the tradition of the National Park Service make park status the most appropriate category for designation of a representative segment of tallgrass prairie. National parks have been created both out of existing federal lands and out of primarily private lands. There are no statutory criteria for park classification or designation, but criteria have been developed by the Park Service over the years. Establishment of a park requires an act of Congress, and each park has its particularized legislation, in addition to the more general guidelines of the National Park System Act. The criteria are listed in the National Wild and Scenic Rivers Act of 1968, 16 U.S.C. § 1273(b) (1970).

See the National Trails System Act of 1968, 16 U.S.C. §§ 1241-49 (1970). Studies have been commenced but no final actions taken with respect to the Oregon, Santa Fe, or Chisholm Trails, all of which ran through or near the Flint Hills.

Further discussion of this idea is found at § V,B infra. The Santa Fe Trail does not go directly through any of the three sites remaining after the 1975 NPS survey, see notes 392-96 and accompanying text infra, but the Butterfield Trail ran a few miles south of the Pottawatomie site, id., and the Oregon Trail went through its northeast corner.

NATIONAL PARK SERVICE, MANAGEMENT POLICIES 1-7 (1975) [hereinafter cited as MANAGEMENT POLICIES]:

Nationally significant areas are those which have exceptional values or qualities illustrating or interpreting the national themes of our Nation. Broadly stated these are:

—Outstanding geological formations or features significantly illustrating geologic processes and natural phenomena.

—An ecological community significantly illustrating characteristics of a physiographic province or biome.

—A habitat supporting a uniquely outstanding, highly concentrated, rare, endangered, or relict flora or fauna.

—Examples of the scenic grandeur of our natural heritage.


latter statute lays down the governing rationale for park management: the Department of the Interior shall manage the parks

by such means and measures as conform to the fundamental purpose of the said parks . . ., which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.240

This means in effect that the Park Service could manage the area in such a way that it could revert to a prehistoric state, NPS could provide facilities and interpretive centers for visitors, and it could make available opportunities for recreation and enjoyment, but it is prohibited from doing any of these in a way that detracts from the stated essential purpose.241 Recent judicial pronouncements have given substance to these salubrious sentiments. The National Park System Act, a court has held, creates a trust relation between NPS and its areas; that relationship requires NPS to do its utmost to preserve and protect parks; and private citizens can, through the courts, force NPS to take necessary steps within its power if its performance is shown to be lacking.242 Judicial initiatives for park protection can go only so far, however, because the Office of Management and Budget (OMB) and Congress control the pursestrings on which protection often depends.243

Other reasons support park status over other classifications. The National Park Service has by far the best record among federal agencies in resisting demands for exploitation of its lands and in managing them in the most "natural" manner, even though it has been buffeted time and again by political pressures and drastically inadequate budgets.244 Overwhelming increases in visitsation have forced NPS into

240 Id.
241 For example, timber cutting and wildlife management may be allowed, but only for the purpose of protecting or conserving the basic resource. Id. § 3.
242 Sierra Club v. Dept of Interior, 398 F. Supp. 284 (N.D. Cal. 1975) (Redwood National Park I). At issue was the adequacy of the steps taken by Interior to protect the new Redwood Park from adjacent logging activities. Studies had been undertaken and negotiations with timber companies commenced, but the damage to the area was obvious. In this first reported opinion, Judge Schweiker seized upon the novel provisions of the Redwood National Park Act of 1968, § 5 of et seq. (1970), to make some novel law. He concluded: [T]here is, in addition to these specific powers, a general trust duty imposed upon the National Park Service . . . by the National Park System Act.
With all due respect for the narrow limits of judicial intervention in matters entrusted primarily to executive agencies, the Court concludes that, in light of the foregoing findings, the defendants unreasonably, arbitrarily and in abuse of discretion, have failed, refused and neglected to take steps to exercise and perform duties imposed upon them by the [two Acts] and duties otherwise imposed upon them by law; and/or that defendants have unreasonably and unlawfully delayed taking such steps.
398 F. Supp. at 287, 293. As it turned out NPS was not the true villain. See note 243 infra.
243 Sierra Club v. Dept of Interior, 424 F. Supp. 172 (N.D. Cal. 1976) (Redwood National Park II). From this subsequent opinion, it appears that OMB torpedoed every effort of Interior to obtain funds and authority for Park protection, and other obstacles intruded. For reasons unexplained, the court refused to join OMB as a party defendant, and, finding that Interior had done all it could, dismissed the suit. 
244 Park advocates for decades have decried the low priority accorded the Park Service in the budgetary process. Bernard De Voto in 1953 called for the closing of the System in light of its dilapidated condition. De Voto, Let's Close the National Parks, Harper's, Feb. 1953. Twenty years later the same theme was echoed in more muted tones. See, e.g., 76 Audubon 113 (1974); 72 Audubon 113 (1973); 50 Nat'l Parks & Conservation Mag., Feb. 1976, at 11.
As Congress yearly entrusts more lands to NPS management under a variety of designations, conflicts over particular uses of particular tracts continue to increase. E.g., Futter, supra note 130, at 269-82. At the same time, visitation to the areas NPS administers have increased almost geometrically while its budget has diminished proportionally;
The Service is pressed to maintain its current level of operations. Although visitation to national parks has tripled since 1960 and other responsibilities have increased with the addition of new areas, funding has remained almost constant. While in 1960 there was one employee for every
new visitor restrictions in many areas, and its concessions policy is in the process of drastic revision. It has been criticized with some justification for proceeding too slowly with reforms, but many problems were caused by the penuriousness of Congress and past Administrations. The Park Service has its faults, but its record in preserving its lands for the enjoyment of the people is unmatched. The law governing park management is also favorable. Parks are the only federal areas where hunting is completely forbidden (although the Park Service itself can manage the herds), and hunting would likely be detrimental to the reintroduced fauna on the prairie reservation. Other forms of exploitation, including mining and grazing, are also forbidden on park lands, in contrast with most other categories. Park designation also carries an element of prestige in the popular mind possessed by no other classification, and the prestige associated with national park status is important in mobilizing support and in attracting visitors.

The National Park System is best suited for prairie preservation. NPS has recently commenced acquiring private lands on a large scale. Its governing statutes and its philosophy emphasize preservation as the main focus of stewardship. NPS experience in managing diverse areas, in controlling visitation and development, and in providing educational guidance to visitors would all be invaluable. All in all, the creation of a Tallgrass Prairie National Park is the most preferable alternative.

Within the National Park System, the Tallgrass Prairie National Park should be a natural area with portions devoted to other compatible uses. The amalgam of various uses within a single park would not be foreign to the NPS. The Park Service has responsibility for more than just the 37 "crown jewels" of the National Park System. The NPS also manages a large number of parcels other than true parks, classified as natural areas, historic areas, recreational areas, cultural areas, and national capital parks. On maps, these appear as national parks, national monuments, national recreation areas, wilderness areas, national scenic rivers, national trails, and national parkways. The true parks, save Mesa Verde, are all designated natural areas. The historic areas are those reflecting nine major themes dealing with various periods in America's past.

The tallgrass prairie park would be for the most part a natural area, but there is good reason to incorporate historical elements in its design. There is only one cultural area, and it has been strongly suggested that the cultural mission is not

27,000 visitors, in 1972, the ratio had risen to one for every 44,000 visitors. The Council on Environmental Quality has stated that the very popularity of the national parks has caused overcrowding and a gradual, subtle loss of environmental quality. Id. at 277-78 (Footnotes omitted).

An intriguing notion that has received no known study is that the National Park Service should be made an independent agency outside the structure, politics, and budgetary constraints of the Interior Department. Advantages and disadvantages readily suggest themselves, but will not be explored as the topic is outside the scope of this piece.

See § V.C(3) infra.

See generally Furell, supra note 130.


See generally LEE, supra note 113. But see COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: THIRD ANNUAL REPORT 312 (1972).

The nine designated themes are: The Original Inhabitants; European Exploration and Settlement; Development of the English Colonies, 1700-1775; Major American Wars; Political and Military Affairs; Westward Expansion; 1763-1898; America at Work; The Contemplative Society; Society and Social Conscience. NPS PARK PLAN—HISTORY, supra note 31, at v.

See § I.B supra, and § IV.B(3) infra.

in keeping with central NPS objectives. The recreation area concept has also been criticized, but a good case can be made for the proposition that a Tallgrass Prairie National Park should incorporate and integrate various elements now existing independently under the jurisdictional umbrella of the National Park Service. There is no insurmountable barrier to preserving an area and at the same time providing needed recreational opportunities by meshing it with national trails (the Santa Fe, for example), with a parkway inside and outside park boundaries, and with a recreational area, preferably associated with a body of water (such as Tuttle Creek Reservoir). That sort of integrated concept has not yet received study by NPS or much public attention, but finds abundant, if scattered, precedent and rationale in the Park System's historical development.

That case will be made in Part V, where it will first be argued that a park should be designed for more than preservation and then explained how that might be accomplished. Before doing so, however, two other main topics must be discussed. Part III will deal with the objections typically raised by anti-park forces. Part IV will proceed from the premise established in this section—that tallgrass prairie preservation and restoration would best be accomplished by reservation of a tract as a national park to be managed by the National Park Service—and go on to consider the complementary question whether prairie preservation in this manner is an appropriate mission for the NPS.

The foregoing discussion can be summarized in three points:

1. All reasonably available federal lands designations other than that of national park are seriously deficient in several major respects for tallgrass prairie.
2. National park status for a representative parcel of tallgrass prairie is uniquely appropriate because the governing law both requires that NPS actions are first and foremost to be consistent with preservation and allows sufficient flexibility to accomplish the various other purposes to be served.
3. Attributes and purposes of several other categories, however, notably wilderness and NRAs, could well be meshed with preservation in creating a suitable park for the people.

III. Meeting Objections to Prairie Park Establishment

Objections to the creation of a Tallgrass Prairie National Park have proceeded on various grounds over the years. The stated arguments can be categorized under the headings of economic detriment (e.g., it will remove land from county tax rolls), managerial problems (e.g., buffalo diseases will infect cows), undesirability (e.g., who wants tourists anyway?), and lack of necessity (e.g., the present system is best for preservation). Along with these specific objections, a pervasive and often unstated concern exists among opponents of a park; many potentially affected Kansans dislike the federal government generally, abhor the power of eminent domain, and fear that their particular parcel will be taken. This Section will respond to the primary opposing arguments by category, demonstrate that most are without foundation, and indicate ways in which planning can avoid the potentially detrimental effects that opponents rightly claim.

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262 The Conservation Foundation, National Parks for the Future 14 (1972) [hereinafter cited as Conservation Foundation].
263 See § V,B infra.
A. Argument: Present Practices Assure Prairie Preservation, or There Is Plenty of Prairie in Federal Ownership Already, or the Federal Government Is an Incompetent Steward

Arguments that establishment of a reservation in the Flint Hills is unnecessary come in several forms. Most frequently raised is the contention that preservation is best assured by present use in private ownership. The evidence does not support this contention. As discussed in more detail in Section I above,\textsuperscript{264} physical and visual intrusions continue to proliferate, developments destroy more prairie yearly, and the practices of some owners are inimical to the tallgrass ecosystem.\textsuperscript{266} A variant of the argument is that existing federal lands in Kansas are available and suitable for a prairie reservation, rendering unnecessary the condemnation of private holdings.\textsuperscript{268} The fundamental weakness of this argument is that there are only two sizable federal reservations in the state, the Cimarron National Grassland and Fort Riley.\textsuperscript{267} The Cimarron is obviously inappropriate as it consists solely of re-planted shortgrass. Fort Riley will not suffice for a variety of reasons: it is a mixed grass area; it has been developed extensively for over a century by the Army; and it has been deemed an essential component of military holdings by the Department of Defense.\textsuperscript{268}

One objection to park establishment, roughly within this genre, cannot be dismissed so easily. Some opponents have claimed that federal agencies typically misuse and abuse the lands entrusted to their management in manners worse than most intelligent private managers would ever contemplate. Opponents point to Fort Riley as an example of poor stewardship, perhaps forgetting that the National Park Service is not a division of the Department of Defense, and that preservation is not the main goal of an armored battalion. Even so, the objection contains more than a grain of truth. The overuse of parks, the underfunding of the Park Service, and the honky-tonk developments near some parks lend credence to their concern. There is no gainsaying that many federal lands have been exploited and abused shamelessly, but the worst abuses have occurred on lands managed by agencies other than NPS, notably the Bureau of Land Management.\textsuperscript{269} The difficulties experienced on NPS lands differ in origin from the causes of declining quality on other federal lands. The dire state of BLM lands is due to overemphasis on commercial grazing, while parks are in trouble because of their rising popularity. The Park Service has been planning for mitigation of those adverse effects and is taking active steps toward more stringent protection at the risk of offending the automotively inclined public.\textsuperscript{260} Solutions to overuse problems are evolving as experience with vehicle restrictions, reservation and permit systems, and visitor limitations

\textsuperscript{264} See § I.D supra.
\textsuperscript{265} Id.
\textsuperscript{266} Grassroots Pamphlet, supra note 59.
\textsuperscript{267} No other state contains a sizable federal tallgrass reservation either. See studies cited at § I.C supra and discussion at § IV.B infra.
\textsuperscript{260} See generally Council on ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: SEVENTH ANNUAL REPORT 91 (1976); MANAGEMENT POLICIES, supra note 237; § V.C infra.
grows.\textsuperscript{281} The budgetary difficulties of the Park Service should give pause to the park proponents, but that problem does not overshadow the two main facts: if a virgin tallgrass ecosystem is to be guaranteed a continuing existence, an organ of the federal government must undertake the job; and, within the federal government, the National Park Service is by far the best bureau for prairie park management because its record for preservation is superior to that of any other agency. Park Service planning need not be superhuman to obviate most of the problems pessimistically contemplated in maintaining the tallgrass ecosystem.\textsuperscript{282}

B. Argument: A Park Would have Adverse Economic Consequences for the Flint Hills Region

The entire guiding purpose of the national park system for over 100 years has been the uneconomic ideal that public preservation of some lands far outweighs the economic benefit in exploiting them for commercial purposes. Much of the opposition to a park in the Flint Hills is premised on economic considerations, and while these arguments miss the point, they should not be ignored. According to opponents, a park would harm the Kansas economy by taking lands out of beef production;\textsuperscript{283} this contention is grossly overemphasized. Further, opponents argue that local units of government would suffer from reduced revenues;\textsuperscript{284} this contention is incorrect. Even without consideration of the unquantifiable, intangible benefits that a park would provide to all citizens in the nation, conventional economic analyses have indicated that a Tallgrass Prairie National Park would be an economic boon to the Flint Hills region and to the state as a whole without financially harming any individual rancher.\textsuperscript{285} After demonstrating the invalidity of the economic detriment arguments, this Section will summarize the monetary benefits that the region could reasonably expect from park creation. This discussion does not pretend to encompass sophisticated economic analysis; mere common sense consideration more than suffices.

1. Asserted Loss of Beef Production

The claim is frequently made that a park would cause the annual loss of anywhere from 250,000 to 3,000,000 pounds of beef, all to the detriment of the beef industry, the Kansas economy, and the world food crisis.\textsuperscript{286} It is more likely that total production will be unaffected, but in any event, the beef production mentioned is miniscule in proportion to the whole.

Kansas has an area of approximately 52,500,000 acres, of which nearly 21,000,000


\textsuperscript{282} See § V infra, where it is argued that the need for recreation should be served to the extent compatible with other purposes, and some ways in which planning can result in compatibility are explained.

\textsuperscript{283} See, e.g., H.R. Con. Res. 2013, quoted in note 68, supra; Grassroots Pamphlet, supra note 59.

\textsuperscript{284} See infra note 263 supra.


\textsuperscript{286} See, e.g., H.R. Con. Res. 2013, supra note 68; Grassroots Pamphlet, supra note 59.
acres are grasslands. A Tallgrass Prairie National Park encompassing 60,000 acres (the number used most often by opponents and proponents alike) would amount to less than one-third of one percent of the grasslands in Kansas alone. According to the Ruppert Study, a single steer or heifer requires a minimum of four to five acres of prime bluestem pasture for grazing, and cows with calves require even more. For a park of 60,000 acres, the maximum number of cattle removed from pasturage would be 15,000 (at four acres apiece) or 12,000 (at five acres apiece). These figures are inflated because the acre per cow figures are “Average Acreage Guaranteed Per Head.” The cattle frequently have more acreage apiece. Moreover, the lands taken for a park would not all be prime grazing lands. Even conceding that pasturage for as many as 10,000 head will be eliminated by a park, there is no evidence that all other existing pasturage in the state, or even in the region, is filled to capacity. The most probable effect upon beef production is, therefore, nil, as operators will shift beef production to lands now idle. Even if that were not true, the loss of 10,000 or less beef carcasses will make no discernible impact on overall Kansas production or on national production.

A final factor should also be considered in relation to this point. The optimum methods of tallgrass range management are not well understood. One facet of most park proposals is a commitment to scientific research into the bluestem ecology with the aim of assisting ranchers in reaching the highest productivity consistent with continuing yield and a healthy ecosystem. The School of Agriculture at Kansas State University is felicitously located, endowed, and experienced for such work, and some research is already in progress. This potential use of a portion of a new park could ultimately be of great value to the ranchers now adamantly opposing its creation.

2. Asserted Loss of Local Tax Revenues

The opponents claim that county and local government units would be hard hit by reductions in their tax bases when thousands of acres are taken off the property tax assessment rolls. That claim would have had some validity in prior years. It is now wholly without merit, because Congress has provided not only for

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267 See, e.g., Bohling, Tallgrass Prairie Park, 45 NAT'L PARKS & CONSERVATION MAG., March 1971, at 7, 10.
268 If only the tallgrass areas of 3,000,000 to 4,000,000 acres are counted, a park of the size given would take about one and one-half percent of the state's tallgrass grazing area.
269 Ruppert, supra note 265, at 4-9.
270 Id. That, too, is exaggerated because the grazing, not the carcass, will be lost. Summer grazing of steers, the most common practice in the Flint Hills, adds less than half the market weight, so the “loss” is a good deal less than 10,000 even if grazing space for that many is taken.
271 The physiographic land use patterns in the areas studied are shown in the maps included in Assessment, supra note 12, at Planning Directive.
272 See note 270 supra.
273 Save the Tallgrass Prairie, Inc. estimates that the beef produced on a 60,000 acre tract in the Flint Hills amounts to less than one one-thousandth of production in Kansas alone. Save the Tallgrass Prairie, Inc., An Answer to Opponents of the Tallgrass Prairie Park (1974) (on file with Professor Coggins).
274 The areas in which scientists wish to pursue research into tallgrass prairie ecosystem management are summarized in L. Wagner, The Tallgrass Prairie National Park: Could It Be of Value to the Livestock Industry? 4-6 (undated paper on file with Professor Coggins).
275 Id.; Hall, AMERICAN FORESTS, supra note 5. See also Hubert, Fire and Litter Effects in Undisturbed Bluestem Prairie in Kansas, 50 ECOLOGY 874 (1969); Kuehne, Dahman, & Koelling, Total New Productivity and Turnover on an Energy Basis for Tallgrass Prairie, 48 ECOLOGY 536 (1967). Preservation of gene pools for future research and seed stock would be another not unimportant goal.
276 That University has already commenced management and research on the Konza Prairie. See Kansas City Star, April 3, 1977, at 1F, col. 1.
277 H.R. Con. Res. 2013, supra note 68; Grassroots Pamphlet, supra note 59.
payments to local governments in lieu of or to match former real estate tax receipts from reacquired lands, but also for a whole panoply of special payments to local schools and other local governmental units that pay for the burdens of additional federal personnel using local facilities.

Parenthetically, it should be noted that agricultural land in Kansas is not grossly overassessed. In a four county area in the heart of the Flint Hills, the average tax per acre was about one dollar and 35 cents in 1971. Ruppert calculated that a 60,000 acre park in those four counties would reduce tax revenues by 81,000 dollars, as compared to total revenues approaching 21,000,000 dollars. Even without in-lieu-of-taxes payments by the federal agency, it is far more likely than not that just a few of the private developments that will occur in the wake of a park would recoup most or all of the lost rural assessed valuation.

3. Asserted Loss of Lease Income

One further item of loss, seldom mentioned by opponents, is potential loss of leasing revenues to absentee owners. Much of the Flint Hills land is not owner-occupied and ranched; instead, most occupants are tenants. Again according to Ruppert, reduction in total lease income to the owners and to the local economy could run as high as a half million dollars if a 60,000 acre park were established. Perhaps this loss item is not argued because it is offset by income to other owners when the tenants relocate, because it emphasizes the degree of corporate and other absentee ownership in the Flint Hills, and because the interest alone that the present owners would reap from the sale proceeds would, even at insured savings account rates, exceed the lost income by several multiples. Present lessees might have to pay increased prices for leases elsewhere, but their marginal cost increase would not approach the magnitude of the gains to the owners.

To the nation, to the present owners, and to the local governments, it is apparent that the factors cited by opponents as detriments to the region’s financial foundation are at worst a standoff and more probably represent a net economic benefit to each of those entities by themselves. When the positive overall economic effects of park establishment are added to the formula, the region will inevitably benefit financially.

4. Proponents’ Economic Benefits Argument

New tourism, new payrolls, new capital construction, new facilities, new scientific research, and new increases in land values will result from the creation of a Tallgrass Prairie National Park in the Flint Hills. All of these elements will stimulate the economy in the region and in the state, and increase it in a beneficial, relatively nonobjectionable fashion. Economists have conducted elaborate studies of average park visitations, traffic increases, and so forth, conservatively concluding

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\[77\] See, e.g., Mays, supra note 160, at 332-33.
\[78\] Ruppert, supra note 265, at 16.
\[79\] Id. at 14-17.
\[80\] Id. at 7-9.
\[81\] For example, in the Waubaunsee study area, 78 of 167 properties are owner-occupied; in the Chase study area, 22 of 126; and in the Osage study area, 25 of 105. Assessment, supra note 12, at Appendix I 13, 25, 37.
that net growth in the Kansas economy would exceed 1,000,000 dollars. The appearance of a national park on the Kansas map will inevitably increase tourism. The number of people visiting national parks—all of them—in recent decades has increased enormously, and the Flint Hills are almost precisely in the center of the nation’s largest parkless area. Tourists spend money made elsewhere, and their spending has a multiplier effect upon the local economy.

In concrete terms, this means increased sales for gas stations, motels, restaurants, grocery stores, and other businesses up to hundreds of miles away from the site itself. The Kansas Turnpike revenues will go up, and visitation to other tourist attractions in the area will rise. Construction activity in the state is also bound to rise. The park itself will require facilities, and the immediately surrounding areas will experience new construction of tourist-oriented developments. It is also probable that ancillary construction will occur in other areas. These new facilities may be an irritant to some local residents, but they are essentially nonpolluting and in economic terms will add jobs and assessed valuation. A variety of other economic benefits, such as new federal payrolls, will also accrue to the state. All in all, it is strange that the Kansas Economic Development Department has not actively endorsed and supported the proposal.

C. Argument: Difficulties in Management Will Make the Park a Menace to Surrounding Ranchers

Many arguments, some internally inconsistent, are made concerning deleterious effects of park management, even before a master plan has been conceived. Some say that hordes of tourists will degrade the region, while others claim that no one will wish to visit a mere prairie. Some profess worry over bison-borne diseases, others purport to fear park-originated insects, and yet others fear that park managers will or will not allow burning. Some of these arguments go to park attractiveness, but most relate to park management. These contentions are premature, given the lack of a concrete proposal.

Managerial problems should not be insurmountable. Because the park will probably contain large, hoofed quadrupeds (bison, elk, etc.), it will almost certainly be fenced. A fence could be a visual nuisance at the perimeter, but careful planning should minimize its impact without great difficulty; fences are no innovation in the tallgrass region. Brucellosis, a disease thought to be transmittable from buffalo to cattle, should not be a problem because of the fence and because disease-free animals will be chosen for the initial herd. Controlled burning will almost certainly be utilized as a prairie management tool because fires originated by lightning and by Indians helped maintain the ecosystem. Periodic fire serves to prevent shrubs and hardwood forests from replacing the grasses and forbs, and may stimulate the growth of some grasses. These are all relatively minor details to be decided upon when the master plan is drafted.

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284 Ruppert, supra note 265, at 9-19. Professor Ruppert has indicated in conversations that his interim study did not purport to include all beneficial economic effects readily foreseeable, and was, indeed, conservative.
285 The arguments are raised and answered in Save the Tallgrass Prairie, Inc., Tallgrass Prairie National Park—Local Problems and Possible Solutions—Questions and Probable Answers (undated) (pamphlet on file with Professor Coggins).
287 MANAGEMENT POLICIES, supra note 237, at II-2, 5-6. Methods and techniques of park planning are discussed at §§ V,B, C infra.
Whether establishment of a park would lead to degradation of the region is a more serious question. It can be argued with some force that Kansans enjoy the state because there are few tourists, and that the pace and quality of life in the Flint Hills would be altered for the worse by congestion and development. To those who sincerely abhor the prospect of more visitors, there is no good answer. It may be surmised, however, that the great majority of people in the region are not wholly averse to the benefits that a park would bring. Because of its location and because of recent public fascination with various terrain, flora, and fauna, the park would be certain to draw an appreciable number of visitors. Nevertheless, it is unlikely that the effects on the whole region would be cataclysmic. Tourist congregation would necessarily be localized, once a site was agreed upon.

Careful design and planning of the park should alleviate many of these and other problems. A succeeding section will suggest that control over entrance routes is possible and desirable if innovative means such as conservation easements are used. Spillover and strip-developments could be prevented by these methods, particularly if exercised in conjunction with judicious use of local zoning and comprehensive planning powers.

D. Argument: The Federal Government Should Not Be Able to Eject Landowners From Their Property

The underlying reason for the depth of feeling against the park proposal may be fear of the eminent domain power. As the landowners occupying the areas desired by utility corporations have found to their sorrow in recent years, it is a wrenching experience to be ejected from one's land when one does not want to go.

Hostility to the park in general has been fueled by the failure of proponents or NPS to specify one particular site, leading to rancher fears that "it could be me" all through a 200 mile belt.

It is difficult to respond to an argument that is felt more than expressed, but the ranchers' concern for their individual futures is nonetheless real. Not only should proponents not ignore it, they should also make every effort to have written into law measures to ensure that no rancher is treated unfairly or arbitrarily. Fortunately, the means are at hand to eliminate nearly all facets of rancher concern.

Designation of a particular site will reduce the number of persons who feel threatened from hundreds or thousands to dozens or less. In whatever site chosen, the number of landowners will be fairly small, as the land is typically held in large chunks. Those persons who hold land in the area as an investment will receive an excellent return. Recent sales indicate that the value of land in the area has at least tripled in the past five or six years. The crux of the matter is that very few landowners will be directly and personally affected by the park establishment.

The problem boils down to the ranchers and tenants who live in or near the chosen site. Normal acquisition policies of the Park Service will result in equitable treatment financially, for NPS must, of course, pay at least fair market value, but

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288 Professor Coggins admits to a great deal of sympathy with this position.
289 See § V.B infra.
290 This point will be elaborated upon in § V.B(2) infra.
291 A Flint Hills controversy of that nature was analyzed in Coggins & Hensley, supra note 84.
292 Assessment, supra note 12, at Appendix 7-10, 19-22, 31-34.
293 See, e.g., Kansas City Star, April 3, 1977, at 1F, col. 1 (Manhattan doctor received the equivalent of $3,600,000 for an eleven mile square tract purchased in 1971 for $1,000,000).
that is not enough. The Park Service rarely institutes formal condemnation proceedings. Virtually all of its land acquisitions for parks are handled by voluntary sales and purchases or by donations or exchanges. The ranchers will admit that there can be no valid objection to any particular rancher selling or giving his land to whomever he desires for whatever consideration he deems adequate. As most, if not all, of the park acquisition would be accomplished in this manner, the scope of the problem is further reduced. There have been problems in obtaining appropriations for acquisition costs from Congress after general authorization for a park, but increased appropriations from the Land and Water Conservation Fund should help avoid the difficulty of owners on the fence in the future. Those ranchers living on the park perimeter would, if the greenline concept discussed below is adopted, receive compensation for the development rights to their property through conservation easements or similar devices and could continue their ranching without change.

For those who do not wish to sell voluntarily, other acquisition methods are available to ease the transition, and any act of Congress establishing the park should contain those and other safeguards. One method that should be specifically written into the park enabling legislation is acquisition by exchange. NPS could then purchase from willing sellers equivalent parcels for sale elsewhere in the Flint Hills and exchange them for parcels within the site area to ranchers who desire to continue ranching or to hold a similar investment property. It is conceivable that the 8000-odd acres now held by the Nature Conservancy could be used for that purpose, but the Conservancy has not announced any intention to do this. If handled with attention to legal details, the exchange method has the advantage of being tax-free, an important consideration in light of the enormous inflation of land values in the area. Immediate dispossession of all is by no means necessary, however, and is, in fact, highly unlikely. The park will be permanent, and a gradual, phased transition from private to public is tolerable, desirable, and in line with usual NPS practices. Residents will not be ejected as soon as a park bill is signed into law. Instead, it has been standard NPS practice, frequently dictated by statute, to phase out private ownership over a period of years, and owners frequently are given a choice between life estates or a term of years; that is, owners

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305 Of course, it may be misleading to term a sale voluntary if the Park Service has the threat of condemnation behind it, but the infrequency of its use testifies to NPS's fundamental fairness. From the ranchers' viewpoint, it is desirable to sell under the threat, however remote, of eminent domain because of the tax consequences. See note 300 infra.

306 See, e.g., Furett, supra note 130, at 265.


308 By "green-line concept" is meant the acquisition of less than fee simple interests within an area bounded by a "green line." See § V.B(1) infra.

309 The usual park acquisition statutes authorize exchanges of existing federal lands within described boundaries. See, e.g., Redwood National Park Act of 1968, 16 U.S.C. §§ 79c(b)(2)(B), 79e (1970). The only change embodied in the instant proposal is the authorization for outside purchases to be used then for exchange purposes.

310 Exchanges or sales under threat of condemnation with re-investment of proceeds avoids the capital gains tax. Int. Rev. Code of 1954, § 1231.


The owner of improved property . . . may, as a condition of such acquisition, retain for himself and his heirs and assigns a right of use and occupancy of the improved property for non-com-
may elect to receive at once the value of the fee less the value of the occupancy right retained, and if they choose the life estate, they can remain as long as they desire. Those who prefer to sell out completely are eligible for a variety of relocation assistance benefits. Those who prefer to stay can receive both a large part of the value of their lands in cash and remain upon it.

Because the eminent domain power will seldom be used, and because all owners and tenants will be very fairly treated and allowed to remain for reasonable periods of time, the objections to acquisition methods should fade upon examination. If opponents and proponents were able to sit down and thrash these matters out, compromises and provisions acceptable to both sides could be found.

The foregoing establishes that creation of a Tallgrass Prairie National Park is a Good Idea, and that many of the objections to it commonly raised are not supported factually or legally. Potential problems can be eased by foresight and by consideration of the rights of the present landowners and tenants. All of this assumes that a prairie park would be a valuable and harmonious addition to the National Park System, but the need for preservation and the historic mission of the Park Service are not always necessarily the same. The following Section will examine the assumption by analyzing directions of growth in the National Park System.

### IV. A New Direction for the National Park System

Establishment of a Tallgrass Prairie National Park will be the forerunner of a whole new thrust for the National Park System. It will pioneer a basic breakthrough in the evolution and rationale for the whole system, and all pioneering is at best a trying process. The time is ripe for a new direction in the National Park System, and a prairie park is the logical first step in setting a new course.

#### A. Trends in National Park System Expansion

From the outset, the National Park System in this country has been oriented toward preserving outstanding natural scenery—the so-called wonders. Many of these were geological—hot springs at first, and later caves and the features formed by glaciers and volcanoes. Yellowstone and Yosemite, the first national parks, encompassed natural wonders unparalleled in the world. The original instructions of the Secretary of the Interior in 1918 to the first Park Director, Stephen Mather, set the tone of selectivity: "In studying new park projects, the Service should seek to find scenery of supreme and distinctive quality or some natural features so extraordinary or unique as to be of national interest and importance." As a conse-

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NPS has already calculated approximate relocation costs for the three sites studied in 1975. *See Assessment*, *supra* note 12, at Appendix I.

To some extent, the early choices were limited by circumstance; by the time the movement toward park establishment had gotten underway in earnest, many lands having park values, including nearly all lands in Kansas, had passed out of federal ownership.

quence of this thinking, the implicit working standards for new projects became requirements that a national park needed three qualities: (1) outstanding natural scenery, (2) a unique feature of national scientific interest, and, belatedly, (3) opportunities for outdoor recreation—the idea persisted that parks were “pleasuring grounds.” In contrast, national monuments only needed some unique or extraordinary features of scientific interest; they were limited to existing federal lands, however, and were further limited by the statutory requirement that the area reserved be the minimum necessary for preservation.

In the early years the scientific features selected tended largely to be geological ones, and biological features were not prominent in the selection process. Sequoia National Park in the Sierra of California was an early exception, as one purpose of its establishment was protection of the spectacular stands of trees. More exceptions developed in the 1930s, particularly with the establishment of Everglades National Park in Florida. Everglades was the first full national park established that did not have classic mountain or desert scenery, though it is not, of course, without scenic qualities. It represented an intellectual breakthrough because it was created and exists to preserve the biological components (or biota) of a unique and interesting ecosystem. It does not exist simply because the combination of scenery, science, and recreation produced a high enough qualifying score. A scientific feature was clearly dominant, and it was a biological feature. Other biologically oriented national monument designations were made, too, particularly in the southwestern deserts: Saguaro, Organ Pipe Cactus, and Joshua Tree National Monuments all preserved examples of a dominant and interesting type of desert vegetation. Being relatively unknown national monuments, they failed to embody as much of a new departure as the Everglades.

The broadening of the standards to include biological values, even subtle ones, as natural features meriting inclusion in the System came slowly. A reformation of Policy Guidelines for the System at the end of Stuart Udall’s regime as Secretary of the Interior in the 1960s recognized the change: “The National Park System should protect and exhibit the best examples of our great national landscapes, riverscapes, and shores and undersea environments; the processes which formed them; the life communities that grow and dwell therein; and the important landmarks of our history.” This reformation was ambiguous, however. It implied that life communities were only eligible for inclusion if they were present as part of a great national landscape. Even at this relatively late date, and even in then existing

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See notes 211-16 and accompanying text supra.


Everglades National Park Act of 1934, 16 U.S.C. § 410(c) (1970): “[N]o development . . . shall be undertaken which will interfere with the preservation intact of the unique flora and fauna . . . now prevailing in this area.”

Id.

See National Park Service, Part Two of the National Park System Plan—Natural History 41-42 (1972) [hereinafter cited as NPS, Natural History].

proposals, NPS planners were not quite willing to assert or admit that life communities in and of themselves were worthy of national park status.

NPS ambivalence was expressed as well in the pattern of park expansion over the last 15 years. Of the more than 80 units added, most have focused on landscape scenery—mountains, canyons, and shorelines—some remote, but many nearer population centers. Only three units have really been biologically oriented: the Redwood National Park, the Big Thicket Preserve in Texas, and the Big Cypress Preserve in Florida. Even so, the Redwood Park was rationalized as bringing 30 miles of rugged shoreline into the System, and the Big Cypress Preserve represented primarily an effort to protect the water supply for an existing park, the Everglades. Only the Big Thicket Preserve represented a biologically oriented project that could stand by itself. It is too soon to tell whether it represents a trend.

The successes in the Big Thicket and Big Cypress are significant, however. Congress has produced a new category to cover those large biological complexes that may not possess spectacular scenery nor topographical relief and in which recreational opportunities may be limited. Interestingly enough, these later parks have not been accorded the same degree of protection from various exploitive interests; Congress has not attempted to ban hunting in these areas and has allowed some limited utilization of natural resources to the extent deemed compatible with their protection. This naturally leads to a surmise that mere biological diversity is not as high on the priority list as are other natural categories of interest.

With all the successes of the 1960s and early 1970s in expanding the National Park System, the tallgrass prairie proposal is still waiting in the wings. Of the projects arising out of National Park Service studies in the late 1950s, only it and the Channel Islands proposal for California have not yet been enacted into law by Congress. A few other proposals that came to prominence in that period have also been dropped from consideration because of lack of interest—the Sonoran Desert proposal in Arizona and the Great Basin Park proposal in Nevada. The constituency for these proposals never developed adequately because the rationale for each was poorly developed. Not even conservationists could see what purpose they served, or where they fitted into a larger plan for future development of the System. It is important to develop carefully the rationale for the tallgrass prairie project to fully mobilize a national constituency—even among conservationists.

B. Sorting Out Priorities Among Pending Competing Prairie Park Proposals

A tool is now available to put projects of this sort in perspective. In 1972 the National Park Service completed a plan for expansion of the park system. It divided the country into physiographic regions and listed a variety of natural history themes that should be found throughout the system, with variations in different regions. The natural history themes that the Service laid out not only embrace

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\[\text{\footnotesize \textsuperscript{a\textsuperscript{4}}} \text{Lists by category can be found in Lee, } \textit{supra} \text{ note 113, \textit{passim.}}\]

\[\text{\footnotesize \textsuperscript{a\textsuperscript{5}}} \text{Redwood National Park Act of 1968, \textit{16 U.S.C.} §§ 79a-79j (1970).}\]

\[\text{\footnotesize \textsuperscript{a\textsuperscript{6}}} \text{Big Thicket National Preserve Act of 1974, 16 \textit{U.S.C.} §§ 698-698e (Supp. V, 1975).}\]

\[\text{\footnotesize \textsuperscript{a\textsuperscript{7}}} \text{Big Cypress National Preserve Act of 1974, 16 \textit{U.S.C.} §§ 698-698m (Supp. V, 1975).}\]

\[\text{\footnotesize \textsuperscript{a\textsuperscript{8}}} \text{3 \textit{U.S. Code Conc.} \& \textit{Admin. News} 5598-69 (1974).}\]

\[\text{\footnotesize \textsuperscript{a\textsuperscript{9}}} \text{16 \textit{U.S.C.} §§ 698-698m (Supp. V, 1975). See \textit{§ II,B(2)} } \textit{supra.}\]

\[\text{\footnotesize \textsuperscript{a\textsuperscript{10}}} \text{Even so, the Conservation Foundation recently compiled a list of 63 areas recommended or studied for inclusion in some Park System category. The list is reprinted in Putrell, } \textit{supra} \text{ note 130, at 275-76 n.63.}\]

\[\text{\footnotesize \textsuperscript{a\textsuperscript{11}}} \text{NPS, \textit{Natural History}, } \textit{supra} \text{ note 312.}\]
landforms and geologic history but also ecosystems on both land and water. The plan suggested optimum levels of representation from each of these regions and themes in the system. It found that the Great Plains had only 34 percent of the representation it should have in the system; it found that the grassland ecosystem had only 30 percent of the desired representation, and it found that the landform characterized by "plains, plateaus, and mesas" had only 25 percent of the needed representation. In putting these factors together, the Park Service concluded that the Great Plains represented one of the most significant gaps in the plan for regional themes in the System. Eastern Kansas is shown in the lowest category of representation. The Park Service said: "The National Park System includes no unit with significant amounts of either tallgrass prairie or mixed-grass prairie in this large region."

The Service did list eight units of the National Park System in the region having significant natural features, however, among them being Badlands National Monument in South Dakota and Theodore Roosevelt National Park in North Dakota. This reference to other units in this System raises questions that should disturb prairie park proponents. If a primary goal is to develop a pattern of preserving significant samples of different biomes (e.g., grasslands, deciduous forests, boreal forests, chaparral, desert, tundra, etc.), why look only to the National Park System? Why not look to the lands administered by other agencies to see what opportunities for preservation exist therein, and to see whether transfers are possible? The Forest Service has been restoring the lands it administers as national grasslands, including the Cimarron in Kansas, the Ogallla in Nebraska, and three such areas in both South Dakota and North Dakota, to say nothing of other states. The Cheyenne National Grassland in North Dakota is in the eastern part of the state where tallgrass is found. These states also harbor a variety of national wildlife refuges: there are three in Kansas including one in the Flint Hills; two sizable ones (Valentine, consisting of 71,000 acres, and Crescent, consisting of 46,000 acres) exist in Nebraska; six are found in South Dakota; and 27 exist in North Dakota, with three or four of them in a tallgrass area. The Wichita Mountain Wildlife Refuge in Oklahoma may have both mixed and tallgrass prairie. Some limited preservation may also be possible on military reservations such as Fort Sill, Oklahoma, and Fort Riley, Kansas. Indeed, one consistent theme of park opponents has been: why should the federal government take more Kansas grasslands when it already owns the Cimarron and Fort Riley?

If these other grassland reservations are examined, problems will be quickly found: the areas do not contain sufficient true tallgrass; they have been highly disturbed; they are too small; or they are managed for other purposes. It is no accident that repeated NPS surveys and studies over several decades have rejected all of them. Even so, the ecological facts will not quell opponents' reliance on

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222 Id. at 14 (Figure 4), 16 (Table 1).
223 Id. at 15 (Figure 5), 17 (Table 2).
224 Id. at 17 (Table 2), 18 (Table 3).
225 Id. at 12-13.
226 Id. at 67.
228 UNITED STATES FISH AND WILDLIFE SERVICE, FINAL ENVIRONMENTAL STATEMENT—OPERATION OF THE NATIONAL WILDLIFE REFUGE SYSTEM, Appendix A (1976).
229 See § 1, supra.
political and budgetary factors associated with present federal grassland holdings. Proponents must be able to answer the inevitable questions convincingly, for those other concerns are far more than hypothetical. They affect, of course, decisions more fundamental than merely settling upon a particular site in Kansas.

1. Competing Proposals

In 1974 Senator Henry Jackson published the suppressed 1970 report of the Bureau of Outdoor Recreation (BOR) that supposedly set forth the outlines of a future National Outdoor Recreation Plan. In it, the BOR calls for establishment of a Lewis and Clark Prairie Preserve of 13,840 acres of mixed-grass prairie in South Dakota, as a particular designation within the Fort Pierre National Grasslands. The new unit would probably continue to be managed by the Forest Service, and it would cost little or no money. The BOR also called for establishment of the Great Prairie Lakes National Recreation Area in South Dakota along such reservoirs as Oahe Reservoir. It asserts this NRA would protect some natural values in the bankside zones, which include grassland.

Another scheme that distracts from the concept of a Flint Hills site emerges in the Conservation Foundation's 1972 report entitled National Parks for the Future. One of its study groups called for the expansion of the Theodore Roosevelt National Park in North Dakota by inclusion of part of the Little Missouri National Grasslands. The group also recommended establishment of a Great Plains National Park in Eastern Montana out of BLM lands adjoining the Charles Russell Game Range. The group felt that establishment of two new units—one for shortgrass and one for mixed-grass—would suffice for the entire grassland job, again at little cost. Yet another prestigious conservation organization is also deemphasizing preservation in Kansas. The journal published by the National Parks and Conservation Association carried a call in 1973 for giving priority to establishing a national park in Nebraska around the two wildlife refuges there, or in the Bessey Division of the Nebraska National Forest. This park would exemplify the type of mixed grass that grows in the sand hills of western Nebraska. The author called for a park of 200,000 acres there, while an earlier article on the subject in that journal said a midgrass prairie national park should embrace at least 1,000,000 acres. In addition, other proposals have been directed at locations in Colorado, Montana, and perhaps elsewhere.

The varied nature of the proposals leads to confrontation with three fundamental planning problems. How many grassland preserves are needed for the various forms of grassland? How large should the units be and who should manage them? Finally, what are the priorities in addressing this work?

2. Optimum Size and Number

According to Victor Shelford, the originator of the idea of preserving examples

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830 The Recreation Imperative, supra note 225, at 322.
831 Id. at 314.
832 Conservation Foundation, supra note 252.
833 Id. at 106.
of prairie ecosystems, there are five distinct forms of the “North Temperate Grassland Biome” in the United States: (1) The inland tallgrass prairie (in two forms—sub-climax and true prairie); (2) the coastal tallgrass prairie of Texas; (3) the mixed-grass prairie (in two forms—that in sand hills and the regular form); (4) the shortgrass prairie; and (5) the bunchgrass prairie found west of the Rockies.\(^{337}\) Accordingly, some persons might well conclude that the nation should seek to preserve at least one representative sample of each form of this biome. A recent Forest Service study goes even further; it suggests that we should aim at preserving no less than three examples of each habitat type.\(^{338}\) As the Forest Service is not normally oriented toward preservation, the study is respectable authority for arguing that between five and fifteen samples of this biome should be preserved.

The Forest Service report also suggests that the average size of each sample of this kind be no less than 5000 acres.\(^{339}\) As a planning matter, the size should vary according to what is available and the number of public purposes to be served. It must also reflect judgments about what is needed to safeguard the area and ensure its perpetuation. Obviously, size ultimately will be determined, too, by the political climate affecting a proposal as well. Nonetheless, one might envision an approach along this line. The National Park Service might aim at preserving at least one large reservation of each of the five subtypes of the biome, with other agencies playing a role in preserving additional, and perhaps smaller, examples of the same subtypes in somewhat different locations.\(^{340}\)

Selection of the size of the reserves to be managed by the National Park Service involves consideration of many factors. These include an effort to make the most of whatever scenic and recreational opportunities the local situation affords. Nevertheless, the prime rationale for a large reservation should be rooted in ecological factors and the need to facilitate public understanding of them. It is difficult, if not impossible, to determine in the abstract whether the size of the Tallgrass Prairie National Park should be 30,000 acres, 60,000 acres, 200,000 acres, or 1,000,000 acres —proposals advocating all these sizes have been made.\(^{341}\) Certainly the park needs to be large enough to meet at least the following criteria:

1. The park should be large enough to include as many varied forms of the subtype as possible; e.g., some biologists apparently speak of both subclimax and true tallgrass prairies;

2. the park should be large enough to provide a habitat for all of the animals that were originally characteristic of the subtype; in particular, there should be enough space to restore the more widely roaming mammals and ungulates; it would be a singular achievement to see the bison, wolf, elk, and antelope together on the prairie again;

3. the park should be large enough to give the visitor visual impressions that suggest the spaciousness, variety, and extent of the original prairie;

4. the park should be large enough to embody the built-in strengths of di-

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\(^{339}\) Id.

\(^{340}\) Several thousand acres of tallgrass are now held by the Army Corps of Engineers around Melvern, Milford, Redmond, Council Grove, Fall River, and Tuttle Creek Reservoirs, but no preservation techniques have been applied.

\(^{341}\) See authorities cited notes 330-36 supra.
versity that will help ensure its survival against varied threats; its boundaries should afford enough depth to deal with drifting herbicides, accidental hybridization, and other problems; and

(5) the park should be large enough to provide a hedge against uncertainties such as shifting species composition with drought and other weather changes, and failures in experiments in restoring conditions, whether it be renewed burning to keep down woody vegetation or attempts to simulate the effects of bison trampling and droppings. When all of these factors are applied to a given situation, in all probability they will generally result in reserves far in excess of 5000 or 10,000 acres, though they will probably be less than 1,000,000 acres.

Those criteria are suggested for consideration (and undoubtedly there are others too) because a clear rationale for the size of these preserves is needed. It is not enough to suggest preserving an ecosystem on land that is more or less flat—there may be no practical way to define boundaries in terms of the simple concept of an ecosystem alone. It is also crucial to provide a rationale for reservations that are appreciably larger than those typical of natural areas that are fostered by organizations such as the Nature Conservancy, the Society of Range Management (it has identified representative grassland areas in five states), the Society of American Foresters, and the Forest Service. Typically, their reserves vary from a few hundred to a few thousand acres.

3. Deciding Upon Priorities

Even if one accepts the premises explained above—that representative grasslands should be preserved and that there is a sufficient rationale for large preserves in the National Park System—one must face the question of where to start. From the conservationist viewpoint alone, which of the proposals should have priority? Some might suggest the mixed-grass prairie should command priority because bison numbers reached their greatest abundance in that habitat, or the shortgrass prairie should take precedence because pronghorn antelope reached their greatest abundance on it. Others undoubtedly have different priorities, and still others regard grassland preservation as an unnecessary, uneconomic frill.

Consideration of the various possible starting places leads to the conclusion that the proposal for a Tallgrass Prairie National Park in the Flint Hills of Kansas should have priority for a number of reasons. First, the tallgrass prairie is more visually and botanically spectacular and is likely to engender greater public enthusiasm for extending the idea of preserves into other grassland types. Second, the surviving tallgrass prairie in the Kansas Flint Hills is probably exposed to more threats. By being in a more humid zone in proximity to greater human population, it is subject to more pressures to convert the surviving unplowed grassland to other uses. Thousands of acres have been lost in the Flint Hills to plowing in recent years, to say nothing of power lines and other developments. Visual intrusions by communications towers and other high rise structures have been particu-

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342 The Nature Conservancy’s proposal to establish a nationwide system of Ecological Reserves, The Nature Conservancy, The Preservation of Natural Diversity: A Survey and Recommendations 40 (1975), would be fostered and furthered by the Prairie Park idea; the natural interrelationship of the concepts needs only further definition. The Conservancy’s new Konza Prairie study area is already the largest known tallgrass preserve.

343 Forest Service, supra note 338, at 130.
larly destructive.\textsuperscript{344} Third, this proposal is well advanced and is ready to move. It has substantial local support, impressive sponsorship in Congress, and an impeccable pedigree of favorable studies by scientists and the National Park Service, which go back many years.\textsuperscript{345} Three Secretaries of the Interior in the last decade have supported the proposal (Seaton, Udall, and Hickel).\textsuperscript{346} National conservation organizations have endorsed it and are ready to work for it now.\textsuperscript{347}

Fourth, Federal land law to date has passed Kansas by. Although all of Kansas was once in federal ownership,\textsuperscript{348} there are now no parks, monuments, wilderness areas, scenic rivers, recreation areas, or forests owned by the United States in Kansas. The Cimarron National Grasslands in the southwest corner and Fort Riley, south of the City of Manhattan, are the only sizable federal enclaves in the state. There are some relatively small wildlife refuges, reservoir areas, military reservations, and similar miscellaneous federally owned lands. Only 1.3 percent of Kansas land is in federal hands now, compared to 86 percent in Nevada and lesser percentages in other states, making Kansas forty-fourth in terms of federal ownership.\textsuperscript{349}

Patterns of settlement in Kansas were typical of the Plains states, but more land went into private ownership for agriculture under the homesteading statutes in Kansas than elsewhere because of the statewide productivity of the soil. The dominance of agriculture in Kansas has led to a hostility toward federal ownership more typical of heavily federal lands states in the West, an attitude reflected in the agricultural opposition to a prairie park.

Because few federal lands remained in Kansas, and because Kansas lacks the spectacular geologic formations and scenery thought desirable in earlier federal preservation efforts,\textsuperscript{350} the state now has fewer of the recreation opportunities typically available on federal lands than perhaps any other state. Other than the miniscule reservations mistakenly called national parks in Platt, Oklahoma, and Hot Springs, Arkansas,\textsuperscript{361} there is no national park within 500 miles of the center of Kansas in any direction. Opportunities for recreation and aesthetic appreciation on other federal lands are similarly limited. As a consequence, Kansas is widely if unjustifiably regarded as both a breadbasket and a place one must go through to get where one prefers to go.\textsuperscript{382} One theme of this Article is that there are lands in Kansas worth preserving and worth seeing.

Finally, the situation of the Flint Hills as a crossroads in western expansion of the United States affords the opportunity to develop important historical themes

\textsuperscript{344} See § 1 D \textit{supra}, and authorities cited therein.
\textsuperscript{345} J. ISET, OUR NATIONAL PARK POLICY 516, 526 (1961).
\textsuperscript{346} Udall, \textit{One Last Chance}, 36 NAT'L PARKS \& CONSERVATION MAG., June 1962, at 7.
\textsuperscript{347} E.g., Billings, \textit{The Tall Grass Prairie: Vanishing Landscape or National Park?}, 62 SIERRA CLUB BULL., April 1977, at 19.
\textsuperscript{348} Most of the land area was bought from France in the Louisiana Purchase, and the remainder was acquired from Texas after the Texas Revolution and the Mexican War. The entire land area was occupied by Indian tribes, most of whom were resettled when white pressure for more land grew too great. When Kansas was opened for settlement in 1854, the pattern of wide-scale disposal was followed, and the land went into private ownership very rapidly. BLM, 1975 STATISTICS, \textit{supra} note 163, at 5. \textit{See} CLAWSON, \textit{supra} note 101, at 5-18; GATES, \textit{supra} note 33, at 77, 82, 398-403, 463-4.
\textsuperscript{349} BLM, 1975 STATISTICS, \textit{supra} note 163, at 10 (table).
\textsuperscript{350} See § 4 IV of \textit{A supra}.
\textsuperscript{361} Both feature “medicinal” hot springs. According to Lee, \textit{supra} note 113, at 15-16: Hot Springs is a health resort and spa rather than a scenic or wilderness area . . . . When the National Park Service was established in 1916, the Hot Springs Reservation and Platt National Park were placed in the National Park System. They provide an interesting though somewhat tenuous link to the long history of spas and the ancient custom of “taking the waters.”
\textsuperscript{382} See poll quoted in note 22 \textit{supra}.
in conjunction with park establishment. Part I above included a brief human history of the area that illustrated the rich historical and cultural themes available in the Flint Hills region. The need for historical theme representation in the National Park System was documented in a 1972 NPS study. Of the nine major national themes studied, that concerned with “Westward Expansion, 1763-1898” is most in point, and represents perhaps the largest gap in historical theme representation. No unit of the Park System incorporates or commemorates the early Mountain Men, the great scientific surveys (such as Pike’s), the Santa Fe Trail, the beginning of the Oregon Trail, the Plains cowtowns, or the great trail drives. Other relevant subthemes, such as the settlement of the Great Plains and southern Plains ranches, are poorly represented, and the military-Indian conflicts theme is memorialized in this area only by Fort Larned. Creation of a prairie park in the Flint Hills would partly make up for those deficiencies. The Park Service, through an interpretational center, could recount and illuminate the important trends and events and places that occurred in the region for the elucidation of visitor and native alike. Such an attraction should be a strong selling point to all Kansans interested in the truly colorful history of the state.

All of these reasons argue for starting on a new Park System path now, but there has been no indication whether the Administration of President Carter will look with favor on the prairie park project. With the exception of Alaska, the Ford Administration’s policy had been one of “no growth” or “little growth” for the National Park System in the last few years. The situation in Alaska is the exception; because of planning programs launched by the Alaska Native Claims Settlement Act—major proposals for 30,000,000 acres or more of new parkland have been broached there. Elsewhere, however, the climate had been increasingly negative; the previous Administration spoke at one point of rounding out the National Park System Guidelines were issued in 1973 that suggested that most new projects were really the responsibility of state and local governments. The Ford Administration opposed the Cayuhoga National Park and Recreation Area in Ohio, the Channel Islands National Park, the Santa Monica Mountains Urban Park proposals in California, and the expansion of the Indiana Dunes Lakeshore.

President Carter’s campaign statements, however, indicate that he would not be averse to new directions and new expansions in the National Park System. Incoming Secretary of the Interior Andrus has been briefed on that need, and recent appointments to positions in the federal government with environmental responsibilities indicate that those areas are being given higher priority in general

984 NPS PARK PLAN—History, supra note 31.
985 Id. at v.
986 Id. at 44-46.
987 Id.
988 Id.
989 Staff Report, Closing the Door on the National Parks, 49 Nat’l Parks & Conservation Mag., Jan. 1975, at 23 [hereinafter cited as Staff Report].
991 See, e.g., CEQ, SIXTH ANNUAL REPORT, supra note 127, at 256.
992 NPS, NATURAL HISTORY, supra note 312, at Foreword. See also Futrell, supra note 130, at 280.
993 See Staff Report, supra note 357.
994 Futrell, supra note 130, passim.
than in previous Administrations.\textsuperscript{383} President Carter’s record as Governor of Georgia lends support to the notion that a new day for the Park System has dawned: “Carter prodded the backward legislature to enact measures protecting the state’s outstanding rivers, marshes, and other natural areas;”\textsuperscript{384} he pushed through funding to acquire natural areas for the Georgia Heritage Program, and he supported wilderness and national seashore proposals.\textsuperscript{385}

One further consideration in setting National Park System priorities must be confronted. The burgeoning of urban populations in recent decades has resulted in a cry to “bring parks to the people in the East and quit creating national parks in the West.”\textsuperscript{386} To the Nixon Administration, only the second demand was acceptable. When Walter Hickel announced his proposal to spend 6,000,000,000 dollars for urban parks in 1970, the Nixon Administration went into shock and embargoed his report (BQR’s National Recreation Plan, in the works since 1963).\textsuperscript{387} Even greater shock arose from Hickel’s observation that as much as 25,000,000,000 dollars was needed to buy more urban parkland so that there would not be less of this parkland per capita for a growing population over a ten-year period.\textsuperscript{388} Efforts to play off conservationists against urban recreationists over the cost and necessity for providing urban parkland and recreation areas have not succeeded because both groups recognize the need for reservations of differing orientations. Established conservation groups such as the Sierra Club did much of the political spade work necessary to get the Gateway East and West bills passed, and urbanites from the Kansas City area are the leading forces pushing for the prairie park. It will always be claimed that a dearth of funds requires giving precedence to one or another park type, but the fact is that both (or all) types are needed more every passing year, and a great deal of money will be required in any event.

C. The Future of National Park System Expansion

Efforts will continue to expand both urban parkland and to extend the nature reserves in the National Park System. A whole new strain of parks and preserves may follow in the wake of the Tallgrass Prairie National Park. These will be units that represent the most characteristic occurrences of major biomes in their most interesting expressions. It will no longer be necessary to look for scenery first and foremost, or justify units in terms of recreational loads. Establishment of future parks should be aimed at preserving a mosaic of native America. National parks will be sought not only for grasslands, but for the various types of tundra, and for the different types of deciduous forests—Beach-Maple Forest in Indiana, Maple-Basswood Forest in Wisconsin, and Oak-Hickory Forest elsewhere in the Midwest. In the West, new park units to represent ponderosa pine, pinyon pine, and palm

\textsuperscript{383} At this writing, for example, several prominent environmental attorneys, including Gus Speth of the Natural Resources Defense Council, and James Moorman of the Sierra Club, have been appointed to or nominated for high positions in the Council on Environmental Quality and the Department of Justice, respectively.


\textsuperscript{385} Id. at 49.

\textsuperscript{386} Secretary Hickel said in 1970: “Many of our people cannot get to the parks; therefore, we must get parks to the people.” U.S. Dept. of the Interior News Release (Sept. 14, 1970), \textit{quoted in} Futrell, \textit{supra} note 130, at 264. \textit{See generally} \textbf{Man and Nature, supra} note 305 at 20.

\textsuperscript{387} \textit{The Recreation Imperative, supra} note 225. See \textit{Futrell, supra} note 130, at 267 n.41.

\textsuperscript{388} \textit{The Recreation Imperative, supra} note 225, at 298.
trees should be created. Wherever a plant is the dominant one in shaping a living community, it should be represented in the National Park System. The urgency of this effort is underscored by the Smithsonian Institution's recent report that 100 plant species in this country have probably become extinct, that 750 are endangered, and that 1200 are threatened. Spacious reserves for plant communities in the National Park System can do much to stem this tide of attrition, and can do the same for rare and endangered animals.

The proposal for a Tallgrass Prairie National Park is breaking the way for a new evolution in the direction of the National Park System. This proposal deserves to succeed because it embodies a basic idea that will not die, because its success will also carry with it the hope that countless other native living communities can also survive, and because too much is at stake not to succeed.

Once it has been decided to establish a Tallgrass Prairie National Park, its location and the appropriate management criteria remain to be determined. The Section that follows will analyze the existing proposals for park location and proceed to discuss some aspects of park planning.

V. LOCATING AND CONCEIVING A TALLGRASS PRAIRIE NATIONAL PARK

One reason for the lack of success of tallgrass prairie proposals has been the absence of specific plans identifying a preferred site. Consequently, only innocuously general bills have been introduced in Congress, opponent witnesses are able to point out the vagueness and inconsistencies of the proponents, and the ranks of the opponents swell because of uncertainty. Further, the proponents have been at times unknowingly insensitive to rancher concerns and fears. On the other hand, ranchers have been adamant in opposition. There have been sporadic discussions between the opposing sides over the years, but to no avail. The best opportunity for resolution of the controversy came at the time Representative Skubitz published his proposal in 1973, but neither side took up his offer of compromise. The Skubitz proposal contemplated a combined natural/historical park in northern Oklahoma. It envisioned that a relatively small core area would be owned in fee by the Park Service, with a perimeter band left in private ownership but subject to scenic or conservation easements. Visitors would thus experience the prairie as it was and as it is, for normal grazing operations on the perimeter would not be affected. The compromise idea essentially incorporated the green-
line concept,\textsuperscript{576} to be discussed below, and would have encompassed many recreational and commercial uses. The more zealous park proponents rejected the Skubitz proposal out of hand,\textsuperscript{577} but more mature consideration in light of political and human reality might have led them to a more favorable view of it as providing an acceptable framework for compromise. One can easily disagree with specific aspects of the Skubitz proposal, but its general outlines have considerable appeal.

This Section will examine how the park should be located and conceived. The first part will analyze NPS criteria for site selection and will recount the past application of those criteria to specific areas of tallgrass prairie. It will thereafter be argued that broader criteria are appropriate, which, if applied, might result in different priorities among the remaining possible sites. The second part will evaluate strategies for achieving a diverse reservation with the harmonious mix of component parts that the park should contain. Section C will examine certain planning strategies that might be used to deal with foreseeable problems.

A. The Site Selection Process

1. Present and Past National Park Service Site Selection Criteria for a Tallgrass Prairie Park

Years of study and politicking resulted in the 1961 Park Service study entitled \textit{A Proposed Prairie National Park}, that advocated establishment of a 57,000 acre reservation in Pottawatomi County, north of the City of Manhattan.\textsuperscript{578} By today's standards, it is both primitive and lyrical. Its purpose was simple preservation, its findings were brief and general, its descriptions were poetic and to the point, and its plans were merely preliminary. It did not purport to respond to detailed, stated objectives, nor did it apply formal criteria. It is, nevertheless, a persuasive document. It described the terrain, the ecology, the flora and fauna, and the threats to each.\textsuperscript{579} It called for a park devoted to restoration and preservation and noted that the adjacent Tuttle Creek Reservoir would provide complementary recreational opportunities.\textsuperscript{580} A few other relevant points were left unstated. Ecologically, the Pottawatomie County site was not the best in terms of representative tallgrass prairie because it was more hilly and closer to a population center than tracts further south; politically, however, it was the superior choice because Secretary of the Interior Seaton wanted it there, and most of the vocal opponents lived further south.\textsuperscript{581}

The site chosen by NPS in 1961 was dropped from consideration by NPS in its 1975 \textit{Assessment}.\textsuperscript{582} Selection procedures, objectives, and criteria had become much more detailed, formal, and verbose in the interim. As noted in the preceding Section,\textsuperscript{583} the 1972 Park Service Plan and other studies had further documented the need to preserve representative grassland ecosystems, and tallgrass preservation was among the unfulfilled objectives.\textsuperscript{584} The \textit{Assessment}, undertaken in response to a

\textsuperscript{576} See generally Futrell, supra note 130, at 295-99; § V,B(1) infra.
\textsuperscript{577} Farney, supra note 54, at 311-13.
\textsuperscript{578} \textit{National Park Service, A Proposed Prairie National Park} (1961).
\textsuperscript{579} Id. at 14-19.
\textsuperscript{580} Id. at 20-21.
\textsuperscript{581} Interview with Dr. E. R. Hall, National Parks Advisory Board Member, in Lawrence, Kansas, July 7, 1976.
\textsuperscript{582} \textit{Assessment}, supra note 12.
\textsuperscript{583} See notes 322-26 and accompanying text supra.
\textsuperscript{584} See notes 321-29 and accompanying text supra.
request from the Kansas congressional delegation, is very detailed, yet it is only preliminary. The Park Service used an abundance of words to describe its specific park objectives, but their generality does not add a great deal to the simpler expressions in 1961. The objectives recited in the Assessment were: (1) to restore and/or preserve a portion of the tallgrass prairie ecosystem; (2) to interpret the prairie environment, emphasizing the interrelationship of natural and cultural events; (3) to establish cooperative intergovernmental programs, in conjunction with private organizations, in order to properly manage the park and capitalize on the rich cultural and recreational attributes of the Flint Hills region; (4) to offer opportunities that are uniquely relevant to the prairie and that emphasize the prairie’s historical significance, scenic attributes, and spaciousness; and (5) to identify and preserve cultural resources.

The Assessment did not consider or specify the exact size of the proposed park. The report did note that: “To preserve a grassland ecosystem of high integrity is the major concern, and additional analysis of the regional environment will be required before the boundaries of study areas can be precisely determined.”

The NPS thereafter defined six criteria by which proposed sites would be evaluated:

The criteria for prairie parklands reflect and synthesize both the National Park Service’s general criteria—applicable to all national parks—and the purposes, objectives, and concepts that relate specifically to a Prairie National Park. Six primary criteria must be met if the study area is to qualify for further consideration as a Prairie National Park. These criteria require that the study area be:

1. A representative tallgrass prairie ecosystem illustrating characteristic topography, vegetation, drainage patterns, and wildlife.

2. A tallgrass prairie community that is relatively stable, or in the process of succession to a natural condition, as demonstrated by a relative lack of disturbances and invader species, vigor of plant communities, and predominance of climax vegetation.

3. An area that manifests the scenic attributes of the prairie—spaciousness, expansive grasslands, riparian woodlands, and rolling topography.

4. A manageable unit that permits effective control and protection of resources, that encompasses either complete watersheds or headwaters, that encloses an area with more or less equal dimensions, and that lacks interruptive features.

5. A site that can be adapted to provide numerous and diverse opportunities for visitor enjoyment of natural, cultural, and scenic values within a natural tallgrass prairie setting.

6. A land area that is relatively free of adverse manmade intrusions or disturbances.

NPS then formed from those criteria an evaluation matrix to inventory sites on the basis of physical characteristics: topography, hydrology, vegetation, vegetative disturbances, and physical intrusions. Each characteristic of each site was graded

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385 Assessment, supra note 12, at 2.
386 Id. at Planning Directive 5.
387 Id.
388 Id. at Planning Directive 7-8.
389 Id. at Planning Directive 7-12.
on that basis and composite scores compiled for each of the seven sites evaluated. The NPS investigators declared that the most desirable prairie park would feature a predominantly rolling topography, complete watershed control, major streams, wooded growth in drainages, and no vegetative or physical intrusions. The least desirable sites would be characterized by predominantly hilly terrain, no watershed control, no streams, extensive wooded growth outside drainages, widespread cultivation, intensive grazing, and many roads, railroad tracks, power lines, reservoirs, and the like.

Previous studies had narrowed the search area to the Flint Hills region. All of the sites considered in the Assessment were on a rough, north-south line in that region from Pottawatomie County, Kansas, to Osage County, Oklahoma. The Osage site, a 93,000 acre area along the Kansas-Oklahoma border, was given a high rating (by inference, the highest) as it was found to be essentially free from utilities, has diverse vegetation and terrain, and is manageable. NPS downplayed the extensive oil drilling activities in and around the site. Two sites, Wabaunsee West and Chase South, were recommended for further study, and four were rejected for various reasons. Among the sites rejected by the Assessment was the Pottawatomie site, a tract of some 86,000 acres located near Manhattan, Kansas, discussed in detail below. This site was rejected because its hilly topography was considered atypical, because it would pose management problems, because portions had undergone cultivation, and because manmade intrusions such as the reservoir, a highway, and the City of Manhattan itself “mar the natural landscape.”

Assuming the validity and applicability of the NPS site selection criteria, little quarrel can be had with its evaluations. One may suspect that the known predilections of Congressman Skubitz may have influenced the favorable analysis of the Osage site, and the careful reader can detect some seeming inconsistencies in the application and interpretation of the criteria. On the whole, the NPS evaluations are comprehensive and persuasive on their face, even if merely preliminary, and NPS choices appear documented and reasoned. It may be argued, however, that the NPS criteria are too narrow in that they fail to take several essential factors into account. If, as the following Section attempts to demonstrate, a wider range of uses, objectives, and criteria are considered, the site selection process might lead to different conclusions.

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See note 390 supra. Cf. note 390 supra.
2. Further Criteria: A Park for the People?

The discussion of federal lands classification systems in Section II raised several points that bear repeating with respect to site selection criteria. Different attributes and uses characterize different classifications, and there are no insurmountable barriers to creating an area devoted to preservation but encompassing other recreational, nonexploitive activities to increase the visibility, popularity, usefulness, and salability of the park. These Sections will develop that concept in the more concrete context of specific site selection.

The NPS Assessment was undertaken, somewhat grudgingly, in the face of mixed political and budgetary pressures, and does not purport to be the final word. It avoids, intentionally or otherwise, any mention of public acceptability, political compromise, recreation possibilities, service accommodations, and human desires. The Assessment is “pure” on its face—it deals only with topographical, hydrological, biological, and ecological factors, to the exclusion of all others, but other considerations realistically cannot be ignored. The NPS criteria are directed only at locating the best and most representative sample of a tallgrass ecosystem, an approach both above reproach and unduly narrow. As there are no statutory criteria for park site selection to apply, a broader NPS evaluation is not legally inhibited. The NPS is certainly aware that park creation is as much a political as a scientific process, and it is aware that people use parks. These basic facts justify a somewhat larger view of site selection, dictating in turn the use of more expansive selection rationales. Broader NPS criteria would have taken into account such factors as recreation possibilities, concessions placement, and accommodations availability, consideration of which might have drastically changed the emphasis placed on the presence or absence of some topographical and other features. A broader view might have acknowledged that some sites are politically more feasible than others. Moreover, a broader evaluation would have looked at acquisition policies other than full fee ownership. Had these considerations been given explicit treatment, the Pottawatomie County site might well have fared better in the preliminary NPS evaluation.

a. Topography and Developments. The Park Service treated the presence of reservoirs, towns, and hilly terrain in or near the park site as entirely negative considerations.\(^{400}\) Insofar as the only object of the study was the typicality and pristine condition of the prairie investigated, this treatment was justifiable, but it is arguable, if people are added to the equation, that those things should be deemed desirable.

Those of unremitting “natural” bent would agree that a manmade reservoir does not belong in a natural preserve, but they have not been able to get a single prairie park bill out of congressional committee. Both in political and human terms, a major reservoir on or adjacent to a site could easily be considered a very positive attribute. As a practical matter, any proposed park must offer more than just preservation for the benefit of scientists and a few others; it must appeal to a wider spectrum of the populace. To be so appealing, it must contain amenities beyond a patch of prairie with a visitor center. The waterborne recreational opportunities that would be available if a large reservoir (Kansas has no natural lakes of any size) were incorporated into park planning and site selection would be

\(^{400}\) Assessment, supra note 12, at Planning Directive 7-12.
powerful attractions, both for attracting political support and for attracting visitors to the new park. The NPS did not explain its aversion to large water bodies, but it can be surmised that NPS planners considered any departure from historically “natural” aspects to be adverse.\(^{401}\) This rationale is plausible, perhaps even compelling, but it is not wholly realistic. Not only does the presence of a lake add political appeal, but it is also not possible to reestablish a tract in a manner precisely identical to its pre-development condition, because no detailed ecological descriptions of that condition survive, and too many fundamental changes in the regional landscape have taken place.\(^{402}\) Fifteen years ago, the Park Service perceived virtue in the recreation opportunities offered by a reservoir.\(^{403}\) Nothing has changed except that the need is now greater.

For much the same reasons, the location of a site near a population center should not be deemed wholly negative. People will visit the park, and people feel the need to eat, sleep, drink, and be entertained. The Pottawatomie site could be enhanced by its proximity to the City of Manhattan. Artful zoning by the local authorities\(^{404}\) in cooperation with the Park Service could insure that the city’s tax base rose substantially, while the road near the park remained relatively free of strip-development neon ugliness. Traffic congestion in the park might be avoided if many visitors stayed overnight in the City and visited via a public transportation system. To the extent an urban area represents a visual intrusion, it is properly labelled negative, but its values as a visitor service center should receive recognition.

Rolling terrain was also considered important by the NPS planners. The Chase North site was rejected because it was too flat, and points were subtracted from the Pottawatomie site because its more hilly terrain was thought atypical.\(^{405}\) The Park Service did not balance typicality against interest. Higher hills are more dramatic and offer better vistas for viewing, an element high on a visitor’s list of preferred amenities. Granted typicality is desirable, but it is submitted that the difference between rolling and hilly is not sufficiently important in itself to disqualify an area for park status.

These points do not amount to an argument for Disneyland-on-the-Prairie. Park planners and proponents should never lose sight of the main purposes of a prairie park, that of preservation and restoration. On the other hand, parks are for people and it takes people to create them. There is a need for recreation and for servicing the physical needs of people as well as for preservation and education. In the end, a park offering a wider range of uses to a wider range of interests, while true to its central purpose, is superior to an idealistic concept that never gets off the drawing board.

b. Politics. It has become a truism that no park can be established over the strong objections of the local member of Congress. Even though Representative Skubitz will retire,\(^{406}\) it is quite likely that his successor will oppose a park in the

\(^{401}\) One may wonder whether the Park Service has silently reversed its policy in this regard. Parks have often been created around or near lakes, reservoirs, and recreation areas. Lake Mead NRA is just downstream from Grand Canyon National Park, two water-oriented NRAs adjoin North Cascades, and Shadow Mountain Reservoir is next to Rocky Mountain National Park.

\(^{402}\) See § 1D supra.

\(^{403}\) NATIONAL PARK SERVICE, A PROPOSED PRAIRIE NATIONAL PARK 21 (1961).

\(^{404}\) See KAN. STAT. ANN. §§ 12-707 to 715d, 12-716 to 724 (1975).

\(^{405}\) ASSESSMENT, supra note 12, at Planning Directive 14, 19.

\(^{406}\) See text at note 80 supra.
Fifth District. Things are somewhat different to the north, where Martha Keys was elected for a second term in 1976. Representative Keys’ district includes Pottawatomie County; she has not been a prairie park proponent, but some constituents in the area feel that she might respond favorably to a well-defined, economically sound park proposal. Support for a prairie park has had a long and active history in the area, in contrast with the substantial opposition that exists further south. These factors have nothing to do with ecological justifications, but they may have everything to do with establishment of a park.

c. The Case for the Pottawatomie County Site. If the premises developed above are accepted, it follows that the Park Service may have made a mistake in rejecting the Pottawatomie site for further study. The criteria dictating rejection were too narrow, and several features thought negative by NPS are to some degree positive if broader purposes are contemplated. Further study may prove that visual intrusions have become unmitigable, or that it is too late to preserve or restore the Pottawatomie prairie, but further study into these problems is warranted. Each of the three sites selected as finalists would be adequate choices, and it is imperative to designate one site as soon as possible. It may be unwise to suggest further study of a rejected area, a step seemingly backwards. Nevertheless, if the Pottawatomie site were studied and eventually chosen, the entire process might be both more rapid and more successful.

It cannot be claimed that the Pottawatomie site is necessarily better than the three finalist sites if the objective is preservation of representative, prehistoric tallgrass prairie. Even so, it may turn out to be the best site in several senses because several of its attributes are unique. First, it appears to be more feasible politically. Second, it could offer more to more people by virtue of its proximity both to the Tuttle Creek Reservoir and to the City of Manhattan. Third, it will be more spectacular in the scenic sense because its elevations provide wider vistas. Fourth, it is as rich in historical attributes as any area studied. Fifth, it is located near a major interstate highway, facilitating visitor access. Sixth, a large area immediately north of the study area is virtually vacant, which could be included in an original plan or used for expansion if necessary. Seventh, all of the land along the shore of the reservoir is already owned by the federal government. Eighth, and most important, it is a beautiful area containing excellent samples of representative tallgrass prairie.

B. Prairie Park Acquisition and Planning

The 1975 NPS Assessment did not deal with what a park would be or would encompass. Even though site plans and planning concepts were outside the scope of the Assessment, it appeared to be pointed toward total fee ownership of a rectangular plot of 70,000 to 100,000 acres. Further studies to investigate those and other questions were anticipated but have not yet begun. This Section will dis-

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Footnotes:

407 Farney, supra note 54, at 313.
408 Of particular concern in this regard is the Jeffrey Energy Center with its 600 foot smokestacks, southeast of the site.
409 Proponents are now pondering the political feasibility of recommending that all three “finalist” sites be incorporated into a multi-unit park. That creative notion has several obvious advantages to recommend it, but will face even tougher political sledding than the usual, more orthodox, single site proposals.
411 Id. at Planning Directive (maps).
412 Assessment, supra note 12, at 7.
cuss several moderately innovative ways in which the Park Service might proceed in planning a park. The potentially optimal proposal would serve a variety of uses without undue conflict by means of creative acquisition methods and intra-park zoning.

1. The Green-Line Concept vs. Fee Ownership

The Park Service has estimated that acquisition of 80,000 to 100,000 acres in the three site areas would cost $40,000,000 to $50,000,000 dollars, including related acquisition costs such as those for relocation.\(^{418}\) While cheap as parks go, that is an appreciable amount of money. One way to reduce acquisition costs, reduce the impact on those who own property or live within the affected area, and retain some control over adjacent areas is through use of conservation easements, sale-leaseback arrangements, and similar devices on a wide scale, a notion now known as the green-line concept.\(^{414}\) Great Britain has pioneered the practice of drawing a “green line” around an area deemed worthy of preservation in its current state, and in essence, purchasing the development rights from private owners in the area.\(^{415}\) The resulting “national park” has relatively small visitor facilities owned and operated by the government, but the visitor has access to a fairly large area that, by being impressed with conservation easements and similar devices, retains its scenic character although owned privately. “The English experience suggests that the key to the success of mixed private/public parks may turn on an enforceable land use plan controlling the uses of neighboring lands.”\(^{416}\) In the American system, should the private owner threaten to commence nonconforming developments, not only the recorded restrictions but also the threat of fee condemnation thwarts unwanted development, commercial or otherwise.\(^{417}\) In this way, a far larger portion of the countryside can be kept in the state publicly desired than the area that the government would be willing to buy by outright fee purchase.

Some aspects of the green-line idea appear well-suited for tallgrass preservation from a variety of viewpoints. Members of Congress are interested because political attractiveness tends to rise in inverse proportion to cost; consequently, there is considerable legislative support for the concept.\(^{418}\) Ranchers should favor the notion because fewer acres will be taken in fee, adjacent landowners will receive compensation for their right to develop the property, and dispossession and relocation of present owners and tenants would be minimized. As Congressman Skubitz has noted, the visitor could see both the prehistoric and the modern prairie.\(^{419}\) Proponents should view the concept more favorably than they have,\(^{420}\) because con-

\(^{418}\) Id. at Appendix J 12, 24, 36.
\(^{419}\) See generally W. JOHNSON, PUBLIC PARKS ON PRIVATE LANDS IN ENGLAND AND WALES (1971); Futrell, supra note 130, at 295-97.
\(^{419}\) That already is the policy of the National Park Service with respect to existing private inholdings in existing parks. “[C]ondemnation [is] not to be used except where there is an immediate threat of irreparable damage.” MANAGEMENT POLICIES, supra note 237, at IX-2.
\(^{420}\) See STAFF OF SENATE COMM. ON INTELLIGENCE AND INQUIRY, 94TH CONG., 2D SESS., GREEN-LINE PARKS: AN APPROACH TO PRESERVING RECREATIONAL LANDSCAPE IN URBAN AREAS (Comm. Print 1975); Futrell, supra note 130, passim.

\(^{420}\) Proponents are coming around to this view. Letter from Larry Wagner to Professor Coggins, May 10, 1977, on file with Professor Coggins.
servation easements could control the unesthetic developments that sometimes cluster around park entrances, and a larger area could come under a protective umbrella.\footnote{\textit{\textsuperscript{22}}} On the other hand, the green-line concept has its limitations, and for a tallgrass park, it would not be an unalloyed blessing. It would not work for an entire park site, and probably not for the major part of it. Many of the areas in England are to be kept as they are, but one goal of a prairie park is, to the extent possible, re-establishment of the landscape as it was 400 years ago. A checkerboard pattern of inholdings is similarly inappropriate and would likely be opposed by the Park Service on the basis of its unfortunate experiences with unplanned inholdings in other parks.\footnote{\textit{\textsuperscript{22}}} The incompatibility between commercial grazing and use as a natural area cannot be reconciled internally—they cannot coexist on the same plot. The best use for the green-line concept, therefore, would be in the creation of a buffer zone around the park proper, and in controlling the developments around entrance ways. The latter use especially would be crucial, for parks in general have suffered greatly from the spillover emanating from uncontrolled adjacent developments.\footnote{\textit{\textsuperscript{22}}} On balance, the idea of a central core area, owned in fee and managed for preservation by the Park Service, surrounded by a privately owned zone (further radiating outward along park access routes) on which development is forbidden or stringently controlled, has considerable appeal from many perspectives. The preservation purpose would be enhanced by protection from spillover, broader vistas would be available, more land would be included in the park area, and the affected ranchers would benefit financially.

2. Intra-Park Zoning

Creation of a perimeter buffer zone within the green line would have the effect of zoning the park to some extent, but further zoning of a more specific and rigorous character will be required if the park is to serve several purposes. Zoning in this context refers more to a management tool of segregating uses than the use classifications usually authorized under municipal zoning ordinances. In other words, zoning of a park would dictate the allowability and extent of use for recreation or otherwise within a designated area, while more normal zoning practices allow private parties to use the land for any purpose up to the intensity of the activity permitted in the zone. Statutes creating parks do not refer specifically to zoning, but the management discretion typically accorded the Park Service in this type of legislation ordinarily is broad enough to allow the agency to accomplish use limitation and designation.\footnote{\textit{\textsuperscript{24}}} Because the power is nowhere spelled out, enabling legislation for prairie park creation expressly authorizing the Park Service to set aside certain areas within the park for certain purposes would be helpful but not essential.

Even without this authorization, park planners in preparing a master or general management plan should devise an area-use scheme that ensures preservation of the central ecosystem value, whatever the ultimate visitation level, by zoning an

\footnote{Futrell, \textit{supra} note 130, at 291-93, discusses the Cape Cod and similar experiments involving checkerboard inholdings. While he finds considerable success in its implementation, he concluded that "the Cape Cod experience must be characterized as negative: it is an attempt to prevent private development until public land acquisition of the large number of inholdings is possible." \textit{Id.} at 292-93.}

\footnote{E.g., Farb, \textit{The New Parks That Aren't}, 72 \textit{A"udubon} 28, 34 (1970).}

\footnote{See, e.g., Futrell, \textit{supra} note 130, at 283-88.}

\footnote{See, e.g., Sequoia National Park Act, 16 U.S.C. § 43 (1970).}
area out of bounds for all human uses. That is, a certain portion of the park should be set aside as an inviolable wilderness area. Other uses can then be accommodated in other areas specifically designated for those uses. Part II illustrated the spectrum of uses generally allowable on federal lands and pointed out attributes of other systems that could by incorporation contribute to the success of a prairie park.⁴²⁵ As argued above, the park goals should go beyond preservation and restoration to encompass educational, scientific, and recreational ends to the extent possible and compatible.⁴²⁶ Details of any resulting master plan will necessarily differ depending upon the location, terrain, and amenities of the site chosen, but sufficient studies have been conducted and there has been sufficient experience in park planning and management to outline in general how a park might be zoned internally.

Three areas of uncertain (but possibly concentric and probably irregular) shape, with longer and narrower branches leading out of the park along foot and vehicle access routes, might constitute the basic arrangement, the size and configuration of each area depending upon individual site requirements. The innermost, or central, zone should be zoned for inaccessibility and comprise the largest of the three areas. Whether denominated a wilderness area or a preserve, no human intrusion other than necessary park management operations by park personnel should be allowed in this area, and any traces of human use or occupation should be removed. It would be roadless, trailless, and trackless, where the native and reintroduced fauna and flora would be as free as possible from all forms of manmade disturbance. Limited human use would be tolerated in the second area. It, too, would be owned in fee by the United States. Hiking and horseback trails, bicycle paths, observation points, and possibly a primitive road could be established around the perimeter, but each of these developments must be planned to minimize possibilities for terrain destruction. The idea of putting a silent monorail system in the second zone, perhaps parallel to the outer fence, deserves study and consideration, but cannot be advocated without further knowledge of operational details in a concrete context. The concept is attractive as a means of allowing people to see more of the park without trampling on the tallgrass en masse, but it should be discarded if the obvious possibility that it would itself be a severe visual disturbance cannot be surmounted. The visitor center with extensive interpretive displays, other necessary park facilities (restrooms, employee offices, etc.), natural and historical museums, and several special areas could be located on the perimeter of the second area. Roads should be kept to an absolute minimum. If the Pottawatomie site is chosen, the terrain immediately adjacent to the reservoir would be an excellent location for camping grounds. Several thousand acres could be zoned for this more intensive use, to be coupled with fishing, swimming, hiking, and tightly controlled boating in the immediate area. The latter use would require agreement with the Corps of Engineers on a plan for zoning the entire lake to keep raucous powerboats well away from the park area, but that should pose little difficulty inasmuch as the Corps is already engaged in such zoning on other reservoirs.⁴²⁷ Camping facilities

⁴²⁵ See § II.B supra.
⁴²⁶ See § V.A(2) supra.
⁴²⁷ For example, the new Clinton Reservoir, near Lawrence, Kansas, will be subject to a three zone “water use” plan forbidding certain uses in certain areas at certain times. Telephone communication with Victor Counts, United States Army Corps of Engineers, Clinton Lake Project, in Lawrence, Kansas, July 13, 1977.
will be more difficult to locate and segregate in other sites, but it will be far more desirable to concentrate camping areas and other visitor facilities in one area, rather than scatter them throughout the site.\textsuperscript{428} Far removed from the campgrounds, but also on the perimeter of the park proper, could be an area set aside for scientific research into the nature of tallgrass ecosystems.

This kind of intra-park zoning is a fairly common practice,\textsuperscript{429} and, if policed, will allow recreation and education in defined areas as well as compatible, high-level preservation and restoration efforts in the inner core. The plan proposed thus greatly resembles a normal park, but would go beyond usual park establishment practices in several respects. The surrounding buffer zone within the green line would offer protection from private spillover by establishing a third concentric ring. In addition, several entrance trails radiating out of the park proper should be established by fee or easement acquisition, preferably along the route of historic trails in the area. The Oregon Trail, the Butterfield Stagecoach Trail, and the Old Military Road once passed through or near the possible park site in the Pottawatomie region. A small segment of such a trail from a roadhead into the park would make for more interesting ingress and would reduce traffic congestion. It would also be necessary to establish a parkway into and out of the park to accommodate, in limited fashion, those of irredeemable vehicular persuasion.

Forethought and broad perspectives on what a park ought to be will allow accommodation of a wide range of uses that would conflict if they are not foreseen and planned around. A master plan along the lines envisioned above would truly create a park for the benefit of the people and the prairie. Other problems of lesser magnitude must also be faced by park planners.

C. Prairie Park Planning on a Smaller Scale

Some planning measures for internal and external problems that can be foreseen in the creation of a prairie park will be summarized under the headings of activities, transportation, concessions, and education. If a park is to serve several functions, those areas, among others, must receive considerable attention in the initial planning.

1. Activities

A recent task force study on outdoor recreation in the national parks defined the term recreation as meaning “to recreate the individual by exposing him to direct participatory experiences of the natural environment. . . .”\textsuperscript{430} Current Park Service management policy reflects this philosophy by generally limiting recreational activities to those dependent upon park resources for their realization.\textsuperscript{431} Exceptions to the guideline are permitted only if the activity does not

- interfere with normal park usage;
- constitute a consumptive form or use;

\textsuperscript{428} Camping areas could also be completely disassociated from the park itself, perhaps located along streams in wooded valleys below the park proper. The suggestion is little more than semantic, for however the camping grounds are termed, in park or out of park, NFS ownership will be necessary and the same planning considerations will apply.

\textsuperscript{429} For a discussion of zoning mechanisms used by the Park Service along the Buffalo National River see Turner, The Preservation of Rivers as Wild and Scenic, in A. Reitz, Environmental Planning Eight-6 (1974).

\textsuperscript{430} Conservation Foundation, supra note 252, at 48.

\textsuperscript{431} Management Policies, supra note 237, at VII-6.
—have an undesirable impact on park resources;
—compromise the historic or natural scene; or
—present a danger to the public welfare and safety, including the safety of the participants.\textsuperscript{432}

Acceptable activities that would be particularly suitable for the proposed Tallgrass Prairie National Park include hiking, camping, bird-watching, horseback riding, and fishing (water permitting). Although these activities seem very innocuous, park planners know that thousands of hikers descending upon a delicate ecosystem can be as destructive to the prairie as a bulldozer. The task force study previously alluded to has suggested that each park be assigned a physical, ecological, and psychological carrying capacity.\textsuperscript{433} These figures would be reached by observing the effect of visitation on nonliving aspects of the environment (e.g., soil erosion), on park ecosystems, and on the minds of other visitors. Use quotas would then be established for each unit of the park system, so that recreational land use might be carefully directed and controlled.\textsuperscript{434} Intra-park zoning, whereby some areas are set aside from normal park uses (a concept discussed in more detail above), will greatly assist other means of avoiding overuse and degradation.

Safeguards such as these will enable recreation and preservation to coexist peacefully. Activities ranging from day hiking and backpacking deep into the prairie to primitive overnight camping near the perimeters of the park should ensure both the enjoyment of a visitor and the future of the park.

2. Transportation

Transportation to, from, and within the national parks has become a major problem. Increasing numbers of park visitors have meant a greater influx of automobiles and recreational vehicles. In addition to the various forms of pollution that accompany the internal combustion engine, large numbers of cars mean more roads, more parking lots, and in general more orientation toward traffic than nature.

Current national park management policy on traffic management questions is not settled. The Park Service is attempting to choose methods of access and circulation that feature minimum visual impact and minimum physical and biological disturbance on park resources.\textsuperscript{435} Emphasis will be placed, “wherever reasonable,” on nonmotorized means of transportation.\textsuperscript{436} The task force study by the Conservation Foundation recommended the abandonment of all vehicles at the park’s edge, and an immediate moratorium on road construction, parking lots, and other automobile-related improvements.\textsuperscript{437} Recent draft master plans (now called General Management Plans) are going far in that direction.\textsuperscript{438}

One obvious solution to intra-park travel problems lies in the expanded use of public transit systems. The use of pollution-free, propane-powered buses at Yosemite National Park is an example of how a well- planned transport system might work.\textsuperscript{439} Once such a plan is in operation, visitors could be required to leave their

\textsuperscript{432} Id.
\textsuperscript{433} CONSERVATION FOUNDATION, supra note 252, at 35-37.
\textsuperscript{434} Id.
\textsuperscript{435} Id.
\textsuperscript{436} MANAGEMENT POLICIES, supra note 237, at III-1.
\textsuperscript{437} Id.
\textsuperscript{438} CONSERVATION FOUNDATION, supra note 252, at 16-17.
\textsuperscript{439} See, e.g., Irving, supra note 261.
\textsuperscript{439} CONSERVATION FOUNDATION, supra note 252, at 16-17.
cars outside of the park. A monorail system would allow similar prohibitions against traffic in the park.

Circulation to and from the parks offers a more difficult challenge as the family automobile is solidly entrenched in modern American life. Park planners must create strong incentives for travelers to leave their cars at home. One partial remedy might lie in package services offered by park concessionaires including access transportation from nearby railheads, airports, and tourist accommodations.\textsuperscript{440} This, in combination with expensive parking fees, restricted private intra-park auto travel, and a cheap, efficient mass transportation system should eliminate the worst problems experienced in other parks.

3. Concessions

Although the National Park System Act\textsuperscript{441} restricts the Service to relatively low-key development concepts, many parks today appear festooned with lodges, gift shops, service stations, and other endeavors more appropriate to a weekend resort than to a cherished public resource. These concessions have become a matter of deep concern to those who view the relationship between concessionaires and park visitors as parasitic and destructive to the park.\textsuperscript{442} Concessionaires have an inherent conflict of interest with park preservation because they directly profit from the increasing numbers of tourists and from the expansion and growth of their facilities, all of which may degrade or detract from the natural resource.

The Concessions Policy Act of 1965\textsuperscript{443} recognizes the necessity of limiting the number of facilities and ensuring their compatibility with the environment,\textsuperscript{444} but encourages development of the private business sector.\textsuperscript{445} As an incentive to business, the Act provides protection against loss of investment,\textsuperscript{446} condones monopoly enterprises, grants a “possessor interest” in park structures to concessionaires,\textsuperscript{447} and directs the Secretary of the Interior to manage concession matters in a manner consistent with the profitability of concessions.\textsuperscript{448}

Contemporary complaints concerning the concession system generally focus upon two areas. First, it is alleged that concessionaires wield a disproportionate amount of influence in park planning and policy making.\textsuperscript{449} Second, some park enthusiasts believe it is inappropriate to clutter the landscape with too many civilized amenities in an area established to preserve natural values.\textsuperscript{450} One conservation organization has recommended that private enterprise be located outside of park boundaries and that a long-term program of concessionaire relocation be initiated to accomplish this end.\textsuperscript{451} Current park management policy partially incorporates this line of thought and emphasizes out-of-park placement of commercial services.\textsuperscript{452} The

\textsuperscript{440} An Amtrack line now runs close to the Chase County site and a Kansas City-Denver route has been proposed that could provide easy rail access to the Pottawatomie and Wabunsee sites.

\textsuperscript{441} E.g., \textit{Conservation Foundation}, supra note 252, at 22.


\textsuperscript{443} Id. § 20.

\textsuperscript{444} Id. § 20a.

\textsuperscript{445} Id. § 20b(a).

\textsuperscript{446} Id. § 20b(e).

\textsuperscript{447} \textit{Conservation Foundation}, supra note 252, at 22.

\textsuperscript{448} \textit{Everhart}, supra note 110, at 125.

\textsuperscript{449} \textit{Conservation Foundation}, supra note 252, at 45.

\textsuperscript{450} \textit{Management Policies}, supra note 237, at VII-2.
means of control are available; Congress should either amend the Concessions Act or write explicit guidelines into the Tallgrass Prairie National Park Act to ensure that those means achieve the end. As suggested above, location of a park near a fair-sized town might allow NPS to dispense with many concessions altogether.

4. Education

Some view the National Park Service as an educational institution boasting the nation’s largest and most generously endowed campus without walls. Since the institution of park rangers in the early days of the Service, NPS has assumed an educational and informational mission. The proposed Tallgrass Prairie National Park would offer an opportunity to better integrate environmental education and interpretation into park policy and fulfill its clear, albeit implicit, responsibility.

Park education programs have traditionally been centered around a visitor station, undoubtedly an important feature of the proposed park. One park planner has envisioned the following:

Opportunities could range from displayed material to electronic programs to live seminars to participation in crafts to hiking or primitive camping; all requiring a choice by the visitor as to the amount of time and effort that he would want to spend. Within the visitor center, exhibits and programs could interpret the historical and ecological significance of the tallgrass prairie. With the exception of the uncharacteristic historical activities of white man, interpretation could be extended outside the visitor center and into the park, providing real application and experience.453

The tallgrass park could serve as an example of environmentally sensitive approaches to land and water use, to the development of mass transportation modes, to recycled water and solid waste, and to the construction of facilities that are compatible with nature. Thus, even the casual and unprepared visitor could receive a variety of environmental messages, for good or ill.

VI. Conclusion

The reasons for establishment of a Tallgrass Prairie National Park are too compelling and the sentiment in favor of it too strong and its adherents too persistent to allow any reasonable belief that the park in some form will not come to pass someday. This Article has attempted to delineate why this is so and how it can come to be. It did not attempt a comprehensive biological or ecological defense of the proposition, because other studies have documented conclusively that the tallgrass prairie is a unique natural asset now being threatened by a variety of causes. It is eminently worthy of preservation, both for its ecological and historical attributes, and preservation will be best accomplished by creation of a national park. Even though other federal land management agencies have become more sensitive to ecological factors in recent years, only the National Park Service has the tradition, the experience, and the commitment to preservation suitable for management of a prairie preserve. The National Park System is the most suitable niche because life communities are now being recognized as appropriate features for national park status, the tallgrass prairie is sorely under-represented in the System, and the Tall-

453 Stout, supra note 10, at 64.
grass Prairie National Park proposal is best suited for remedying some of those deficiencies. The National Park Service has statutory authorization for and considerable experience in devising measures appropriate for a Tallgrass Prairie National Park. Green-line acquisition policies coupled with intelligent planning and zoning will ensure the creation of a park for the pleasure of future generations. The park cannot become a reality overnight, but the time is ripe to begin.