



THE SECRETARY OF THE INTERIOR  
WASHINGTON

AUG 24 2006

The Honorable Pete V. Domenici  
Chairman  
Committee on Energy and Natural Resources  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

We are enclosing the report required to be provided to the Committee on Energy and Natural Resources of the United States Senate and the Committee on Resources of the House of Representatives by Section 206 of the Commemorative Works Clarification and Revision Act of 2003 (Public Law 108-126, November 17, 2003 (117 Stat. 1353)). Section 206 directs the Secretary of the Interior to report to Congress on plans for the Reserve, the great cross-axis of the National Mall in Washington, D.C., relative to (1) the National Park Service (NPS) stable and maintenance facilities, (2) concessions facilities, (3) the sale and distribution of merchandise, and (4) the protection of the character of the Reserve. As directed by that Act, the report has been prepared in consultation with the Commission of Fine Arts (CFA) and the National Capital Planning Commission (NCPC). We apologize for the delay in submitting this report.

Thank you for the opportunity to submit this report. We hope you find the information in this report helpful. Again, we apologize for the delay in responding to your request.

Sincerely,

DIRK KEMPTHORNE

Enclosure

cc:  
The Honorable Jeff Bingaman  
Ranking Minority Member  
Committee on Energy and Natural Resources  
United States Senate

Identical letter sent to the following:

The Honorable Craig Thomas  
Chairman  
Subcommittee on National Parks  
Committee on Energy and Natural Resources  
United States Senate

The Honorable Daniel Akaka  
Ranking Minority Member  
Subcommittee on National Parks  
Committee on Energy and Natural Resources  
United States Senate

The Honorable Richard. W. Pombo  
Chairman  
Committee on Resources  
House of Representatives

The Honorable Nick J. Rahall  
Ranking Minority Member  
Committee on Resources  
House of Representatives

The Honorable Steve Pearce  
Chairman  
Subcommittee on National Parks, Recreation and Public Lands  
Committee on Resources  
House of Representatives

The Honorable Donna M. Christiansen  
Ranking Minority Member  
Subcommittee on National Parks, Recreation and Public Lands  
Committee on Resources  
House of Representatives

**Plan for the Reserve Section of the National Mall, Washington, D.C.**  
**Report to Congress, August 1, 2006**

The Reserve is the great cross-axis of the National Mall in Washington, D.C. (40 U.S.C. Section 8901 note). Section 206 of the Commemorative Works Clarification Act of 2003 directs the Secretary of the Interior to report to Congress on plans for the Reserve. The National Park Service (NPS) provides a comprehensive evaluation of planning to the committees in this report.

**1. Consideration of the relocation of stable and maintenance facilities that are within the Reserve.**

United States Park Police (USPP) stables, which are accessed from Ash Road, are located along Independence Avenue between the Korean War Veterans Memorial and the District of Columbia World War I Memorial. The accessory maintenance facilities are modest and serve the administration of the facility and the handling of feed and manure associated with the stable operation. The NPS has developed criteria for choosing an acceptable site for this function. The site must be a secure law enforcement decontamination area - an area large enough to handle multiple decontamination tents for numerous Federal officials in the event of a chemical or biological contamination emergency. The site also must be located close enough to the memorials on the National Mall and to the White House complex to allow for immediate response, taking into consideration the mission of the USPP Mounted Officers. Their mission includes the ability to:

- Respond to spontaneous demonstrations;
- Control crowds at large scale public and First Amendment events;
- Provide security during helicopter landings of the President and other Heads of State;
- Respond to any emergency situation at the White House;
- Provide additional security to three national icons that have been identified as a prime terrorist targets; and
- Provide immediate supplemental law enforcement response throughout the National Mall for the protection of the 20 million visitors that travel to the park each year.

The NPS has identified three additional sites (identified on the enclosed map) that meet these criteria. Site 1 is located adjacent to Memorial Drive, between the Metro Line and the George Washington Memorial Parkway. Site 2 is located in East Potomac Park, across from the National Mall & Memorial Park Headquarters, bounded by Southbound Route 395 and the CSX railroad line. Site 3 is located at the intersection of Buckeye Drive and Ohio Drive in East Potomac Park, located on the White Course of the East Potomac Park Golf Course.

Based on our review of these sites, however, the NPS has concluded that the existing site best serves the USPP function. The current location provides law enforcement presence

in the high pedestrian traffic area between World War II and Lincoln Memorials, allowing for the USPP to better protect and serve visitors. Despite its proximity to the memorials, the existing facility also is not particularly visible to the public, due to the thickness of the vegetative cover afforded by this wooded portion of the National Mall. In 1980, we undertook a study of alternatives for this facility and presented it to the CFA. In their view, the existing site was acceptable as long as a specially designed building was erected in place of the temporary ones that still remain in place. The CFA wrote: "There is ample precedent for stables in urban parks where the buildings actually contribute to the setting." More recently, during the question and answer period for an April 2005 Senate hearing on the future of the National Mall, Subcommittee on National Parks Chairman Craig Thomas indicated his support for the existing site.

We have discussed this issue with the CFA and NCPC who agree that the best opportunity to continue this dialogue with the public and Congress is during the development of the National Mall Comprehensive Management Plan, which is described more fully later in this report.

**2. Relocation, redesign or alteration of concession facilities that are within the Reserve to the extent necessary to make them compatible with the Reserve's character.**

The current Lincoln Memorial concession program is being operated from a temporary structure. This is slated for demolition late this year and will be replaced with a kiosk based on a design consistent with other concession kiosks used on the Mall in front of the Smithsonian museums. An identical facility will also be constructed on the island of land enclosed by Bacon Drive, Constitution Avenue, 23<sup>rd</sup> Street and Lincoln Circle. These kiosks have received approval from the District of Columbia State Historic Preservation Officer, the CFA and the NCPC. Work has already begun on the north kiosk and should be completed by this fall. Work on the south kiosk will start upon completion of the north kiosk and should take eight months to complete.

**3. Limitations on sale or distribution of permitted merchandise to those areas where such activities are less intrusive upon the Reserve or relocations of existing sale or distribution structures that would otherwise be inconsistent with the purpose of the Reserve.**

The Office of the Solicitor of the Department of the Interior has been involved in the rulemaking and litigation on this issue for many years. The Department and NPS' extensive involvement are the result of the NPS' jurisdiction over so many areas in the Nation's Capital, including many parts of the National Mall and its nearby monuments and memorials, which have been and continue to be regarded as unique locations for First Amendment activity. The courts have stated that "the Mall is more than home to these enduring symbols of our nationhood" in that "its location in the heart of our Nation's Capital makes it a prime location for demonstrations. It is here where Martin Luther King, Jr. delivered his famous 'I Have a Dream' speech; where both sides of the abortion debate have staged their passionate demonstrations; where on any given day one may

witness people gathering to voice their public concerns. As we have said before, ‘It is here that the constitutional rights of speech and peaceful assembly find their fullest expression.’”

For this reason, the NPS management of demonstration activities on parkland has been the direct subject of First Amendment litigation, and the NPS’s regulations have been shaped and reshaped in accordance with these court decisions as well as other First Amendment jurisprudence. For discussion purposes, the history of the NPS regulations at 36 CFR 7.96 involves two interrelated components: the first component more broadly relates to the Federal government’s ability to regulate where and when protected speech may be exercised; and the second component focuses more specifically on whether sales constitute protected speech under the First Amendment and whether it has been properly regulated. These components also have been the subject of Congressional and public inquiry concerning whether the NPS regulations could be narrowed in scope to limit certain activities currently occurring on the National Mall by, for example, creating a larger memorial restriction zone that would prohibit demonstrations, expanding time limitations, or limiting the type of sales or even sales of any kind.

Perhaps the interrelated key principle identified in various court decisions, concerning the Federal government’s ability to regulate speech protected under the First Amendment, is whether the regulation constitutes a reasonable time, place, manner restriction of expression. Specifically, the courts ask:

- Is the regulation content-neutral?
- Is the regulation narrowly tailored to serve a significant governmental interest?
- Does the regulation leave open ample alternative channels for communication of the message?

This report will briefly summarize the extensive history of the NPS regulations and resulting First Amendment litigation, illustrating how these Constitutional principles have shaped the NPS regulations, and why we believe they represent the appropriate Constitutionally-approved balance at this time.

With regard to the first component, the Federal government’s ability to regulate where and when protected speech may be exercised, the NPS regulations detail the process for permits such as when an application is required, how an application is processed, when an application may be denied or granted, and that structures may be erected during demonstrations for the purpose of symbolizing a message or meeting logistical needs. The NPS regulations also identify certain limited restricted memorial areas where permits may not be authorized. The NPS regulations also provide for two different types of permits – demonstration permits and special event permits. Demonstrations are defined as picketing, speechmaking, marching, vigils and religious services, and like forms of conduct which involve the communication or expression of views or grievances which have the intent or effect of drawing a crowd of onlookers. Special events are generally defined as sporting events, pageants, celebrations, historical reenactments, regattas, exhibitions, fairs, festivals, and similar events.

The NPS regulations allow for permitted events to occur at one location 24 hours a day and 7 days a week within the Reserve, provided that camping does not occur. The camping regulations have been upheld as constitutional by the U.S. Supreme Court. Permit duration requirements for demonstrations, however, have been struck down by the D.C. Circuit as unconstitutional. As such, the vigil demonstration sites by the Vietnam Veterans Memorial and other groups have obtained permits for use at one location 24 hours a day and 7 days a week. For example, in Lafayette Park there have been long-term demonstration vigils such as during Operation Desert Storm, as well as a demonstration vigil that has been held continuously for the past 25 years. On the National Mall during the summer months, the International Society for Khrishna Consciousness regularly obtains permits for round-the-clock activities at one location, although they generally operate during daylight hours.

For this reason, if as some have suggested, the NPS regulations were modified to expand the current memorial restricted area at the Lincoln Memorial or the Vietnam Veterans Memorial, the NPS must carefully consider not only whether it is needed to preserve "an atmosphere of calm, tranquility, and reverence" within the memorials but also whether it is "an unreasonable limitation on First Amendment activity." Visual intrusiveness is not a condition considered when processing First Amendment permit applications. The balancing effort has occasionally been unsuccessful, however, such as when the Vietnam Veterans Memorial restricted zone was struck down as unconstitutional, as applied to prohibiting literature distribution on the sidewalks at Henry Bacon Drive and Constitution Avenue, because it "burden[ed] substantially more speech than [sic] is necessary to further the government's legislative interests." Furthermore, to be consistent with First Amendment jurisprudence, an expansion of a current memorial restricted area would have to be applied evenly to all activities and without consideration to their content. In other words, any proposed change would preclude not only any demonstration vigil site activities but also would preclude the hundreds of other traditional events and demonstrations that regularly occur there, such as high school band concerts, religious services, and other demonstrations. Indeed, an extended memorial restricted zone would have precluded the 1963 March on Washington, the 2000 Millennium Celebration, or the long-standing Easter Sunrise services.

Once construction on the Lincoln Memorial Circle Security and Road Rehabilitation project requires the use of the area containing the current demonstration vigil sites later this year, however, no permits will be issued for the area, and any demonstrators wishing to continue their activities will be relocated to other permit areas. Once construction has been completed, we will have a better idea whether applicants will request to use the earlier sites. If such applications are received, however, consistent with NPS regulations and the Constitutional parameters set forth by the courts, we will then determine anew whether such activity is appropriate in the newly constructed and rehabilitated area.

The second component of NPS regulations involves whether certain sales constitute protected speech under the First Amendment and whether they have been regulated properly. The sales provisions in the current NPS regulations that have been upheld as constitutional were created after years of developing First Amendment jurisprudence.

There is no gradation point whether the sale is the predominant rather than the underlying claimed use, and the courts have held that sales themselves may constitute constitutionally protected expressive conduct. In any event, the NPS regulations prohibit all sales except for "books, newspapers, leaflets, pamphlets, buttons and bumper stickers" and provide that such sales occur as part of a demonstration or special event except in certain restricted memorial areas. The NPS sales regulations thus prohibit the sale of audiotapes, religious beads, as well as T-shirts that earlier had proliferated all around the National Mall. In the resulting litigation in 1995, the Court of Appeals upheld the NPS regulations as to prohibiting the sale of audiotapes and religious beads. In 1997 and 2001, the Court of Appeals again upheld the NPS sales regulations. One of the lawsuits was brought by seven non-profit organizations, including the regular demonstrators at the vigil sites near the Vietnam Veterans Memorial. After the NPS sales regulations were upheld and enforcement began, most T-shirt vendors left, however, the vigil site demonstrators continued their expressive and permitted merchandise sales activities in accordance with NPS regulations.

The court cases described above are a few of many the First Amendment cases that have guided the development of the NPS regulations. The vigil demonstration sites, which are engaged in sales and under a demonstration permit in accordance with these NPS regulations, must be considered to be at least legally consistent with the special nature and sanctity of the National Mall. We strongly support the protection of the character of the Reserve. However, we hope that this report highlights the historical context in which the NPS regulations must be consistent with courts' First Amendment jurisprudence. We also hope that it provides a fuller understanding as to why any suggested changes to create a greater expanse of areas restricting demonstrations, expand time limitations, or limit the sales or type of sales must be considered carefully due to substantial limitations imposed by First Amendment jurisprudence.

#### **4. Consideration of measures to protect the character of the Reserve.**

The NPS has initiated a three-year planning effort that will result in The National Mall Comprehensive Management Plan/ Environmental Impact Statement, a 50-year vision plan for the use and management of the National Mall, including the Reserve, and Pennsylvania Avenue National Historic Site. In year one (underway), the NPS will plan, prepare, and scope; in year two, the NPS will develop alternatives and a public draft plan; and in year three, the NPS will complete that plan. The National Mall Plan differs from a general management plan in that it covers a longer timeframe and addresses a greater level of detail.

To date in year one, a number of products have been produced to allow planning with widespread participation by an informed and caring public. On April 11, 2006, Federal and local agencies took part in a Cooperating Agency Meeting. A memorandum of agreement was reviewed and project orientation and background was provided. The project website at [www.nps.gov/nationalmallplan](http://www.nps.gov/nationalmallplan) will be launched in April. A Civic Engagement Plan, prepared to encourage participation by diverse national and local audiences, includes a *Symposium for The National Mall* to be held at Ford's Theatre on

October 24-26, 2006. In cooperation with local interests, attention also will be given to resources outside the boundaries that affect the integrity of the park. Planning issues to be defined through the public scoping process include:

- Conserving the Character of the Evolving Historic Landscape
- Defining Landscape Standards
- The Function of a National Symbolic Landscape Within a Complex Urban Framework
- Venue for Demonstrations and Special Events
- Recreational Use
- Public Access and Transportation
- Security and Public Safety
- Facilities
- Partnerships.

We will work closely with the public, Congress, the District of Columbia State Historic Preservation Officer, the CFA and the NCPC on the National Mall Plan. The completed plan may result in other legislative proposals to protect the character of the Reserve.