

Policy Review

Applying Judicial Doctrine to Visitor Capacity Decision Making

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In the next decades, the park and recreation profession will have its day in court as agencies accept that restraint on recreational freedoms is the price to be paid for protecting important natural resources and the recreational opportunities they afford. Yet most professionals have had little experience with the judiciary, and to consider the judiciary as a valued management tool is an oxymoron for most. However, the judiciary will remain an active participant in public land management. Rather than viewing the judiciary with fear and intimidation, decision makers can use legal doctrines to exercise their administrative discretion and responsibility. Our natural and cultural resources, the recreating public, and the judiciary would benefit from agency decision makers proactively applying the doctrines of deference, ripeness, due diligence and due care, and sufficient evidence to visitor capacity decision making.

Keywords arbitrary, decision making, judicial doctrine, recreation carrying capacity, visitor capacity

In 1999, the National Congress on Recreation and Resource Capacity was attended by over 500 managers from local, state, and federal resource agencies. The congress had 22 sponsors ranging in diversity from the Blue Ribbon Coalition to the National Parks Conservation Association. The widespread national concern about visitor capacity on public lands and waters was evident, as were the diverse perspectives. Some participants believed that a numeric visitor capacity decision was not necessary and could be circumvented with adequate monitoring, or that with enough science the capacity for an area would be revealed. Some believed that a visitor capacity decision was not necessary until there were unacceptable conditions, or only when visitor limits and closures were deemed necessary. For many, the fear of litigation was the major deterrent to addressing visitor capacity.

The congress demonstrated the need for interagency collaboration and leadership. In July 2000, the Assistant Secretary for Fish and Wildlife and Parks in the U.S. Department of the Interior initiated the Federal Interagency Task Force on

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Visitor Capacity on Public Lands. This task force included representatives of five federal land and water management agencies and was charged to consider the diversity of outdoor recreation opportunities managed by the Bureau of Land Management, Bureau of Reclamation, Fish and Wildlife Service, Forest Service, and National Park Service.

The goal of the task force was to improve visitor capacity decision making, and to address the question: *How can recreation professionals make visitor capacity decisions that are logical, reasoned, deliberate, fair, and defensible?*

This question stimulated the task force to examine how the judiciary makes decisions, given its ultimate decision-making authority vested by the U.S. Constitution and more than 200 years of making complex decisions. It was learned that the judiciary has tools and decision making competencies that can help park and recreation officials. The doctrines of deference, ripeness, due diligence and due care, and sufficient evidence provide a perspective that can help make better visitor capacity decisions, and are presented here because they significantly contributed to the Task Force recommendations (Haas 2002).

Judicial Doctrines

A doctrine is defined as a rule, principle, theory, or tenet of the law that provides guidance, consistency, and predictability in judicial decision making (Black 1991). This section reviews the four doctrines already noted and illustrates how they were useful to the Federal Interagency Task Force on Visitor Capacity on Public Lands.

Judicial Deference

Agency decisions will be deferred to (supported) if there is adequate defensible evidence that the decision was principled, reasoned, followed due process, and was within their authority. Stated otherwise, the role of the court is not to judge whether a decision is good or bad, right or wrong, but to judge the reasonableness of the decision and how it was made (U.S. Department of Justice 1999).

The primary authority governing the conduct of federal agency decision making is the Administrative Procedure Act of 1946 (APA). APA provides judicial review standards and directs the courts to set aside agency decisions if they are found to be:

- Arbitrary and capricious, an abuse of discretion, or not in accordance with the law.
- Contrary to constitutional power and privilege.
- In excess of statutory authority or jurisdiction.
- Or without observation of procedures required by law.

APA further instructs the federal agencies to maintain an administrative record of all information and evidence used in reaching a decision, and for the judiciary to consider this "whole record" to assess the reasonableness of a decision.

In the case of natural resource litigation, during the last two decades virtually all litigation has been based upon the judicial standards of arbitrary and capricious or without due process. *Arbitrary* is defined as a decision made without principle or reason, and *capricious* as a whimsical or impulsive decision (Black 1991). *Due process* is principally defined by the steps and procedural guidance set forth in the National Environmental Policy Act of 1969 (NEPA), sometimes referred to as the magna carta for environmental planning in the United States (Eccleston 1999). Thus, the

court will defer to or support an agency decision if there is an administrative record that contains demonstrable evidence that the decision was principled, reasoned, not impulsive, and NEPA compliant.

The task force recognized the power of deference given decision makers if they are compliant with the law and have demonstrable evidence to support a decision. In specific response to the APA mandate and definition of the term arbitrary, the task force developed a set of principles to guide visitor capacity decision making.

Table 1 contains 12 principles developed with the help of many professionals across the five federal land and water agencies and academia. The principles reflect an interagency philosophy and a professionwide standard for visitor capacity decision making. They provide guidance to help decision makers make better decisions and to help stakeholders understand and collaborate in the process. These principles

TABLE 1 Principles for Visitor Capacity Decision Making

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1. Management direction defines the visitor capacity, regardless of whether the management direction or the capacity is explicitly stated, implied, or not stated at all.
 2. A visitor capacity helps to sustain the integrity of natural and cultural resources, and the important recreational and nonrecreational benefits they afford to local, regional, and national publics.
 3. A visitor capacity is a complex decision that is based upon sound professional judgment, defined as a decision that has given full and fair consideration to all appropriate information, and is based upon principled and reasoned analysis, the best available science and expertise, and is in compliance with applicable laws.
 4. A visitor capacity decision is made by a responsible official as part of a public planning process, and may benefit from the thoroughness and legal sufficiency afforded by a NEPA-compliant planning process.
 5. A visitor capacity quantifies the supply of available visitor opportunities that an area can accommodate, and may also address the allocation of opportunities across the variety of affected visitors—types of recreationists, commercial operators, educational programs, scientists, and others.
 6. A visitor capacity decision considers the larger regional landscape and system of opportunities affecting the particular area of recreation concern.
 7. A visitor capacity decision provides clarity for focused dialogue and analysis of consequences across the proposed management alternatives under consideration in a planning process.
 8. A visitor capacity decision uses a sliding-scale rule, whereby the level of analysis is commensurate with the potential consequence of the decision.
 9. A visitor capacity decision serves as a trigger or signal for managers, permittees, general public, and all stakeholders.
 10. Visitor use approaching a capacity triggers consideration of a full range of reasonable management responses.
 11. A visitor capacity decision needs to be adaptive to new science, information, uses, technology, trends, conditions, and other circumstances of importance.
 12. The effectiveness of a visitor capacity decision depends on an adequate program of monitoring that is commensurate with the potential consequences, and risk and uncertainty at hand.
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can also serve as demonstrable evidence in the administrative record should an appeal or litigation be initiated, and might be the sufficient evidence needed to refute allegations of being arbitrary and capricious.

Furthermore, while elaboration is beyond the length of this article, the task force also identified five categories of reasons (i.e., decision criteria) containing some 50 specific reasons for consideration in capacity decision making. Consideration of all or some of these reasons will help make a better decision and provide demonstrable evidence that a decision was indeed reasoned. Relatedly, in terms of following due process, the task force did not develop another planning process—they are already plentiful in the recreation capacity literature—but rather advises that capacity decisions would benefit from an agency's existing NEPA-compliant planning process.

Ripeness Doctrine

The court recognizes a span of time when it is appropriate or ripe to make a judgment on a case, and will not do so unless the case is *ripe* for judicial remedy. Early in the judicial process, the court will assess the ripeness of the case and conclude that (a) the case warrants judicial review, (b) the case is premature or not ripe, or (c) the case is no longer ripe because the plaintiffs have waited too long to bring the case to court (U.S. Department of Justice 1999).

The ripeness doctrine helps protect the judiciary and the federal agency from legal action taken at the wrong time. The court uses the criteria of substantial controversy, sufficient immediacy, and reality to judge whether a case is ripe for a judicial decision. It will not hear a case that involves an issue that is hypothetical or speculative. In natural resource litigation, ripeness is often concurrent with the point in the NEPA process when the FONSI (Finding of No Significant Impact) or ROD (Record of Decision) is filed because these signify that a decision has been made and action is imminent.

The task force recognized the relevancy of ripeness to visitor capacity decision making. Figure 1 illustrates a span of time when visitor capacity decision making is ripe, surrounded by times when it is not ripe (i.e., premature and postmature).

In Figure 1, the horizontal axis represents time. The diagonal line represents the typical situation for a field unit where the recreation resource becomes more important and valued. The line depicts recreation becoming a larger public issue, management concern, or opportunity. This growing interest in recreation might be a function of increasing visitation or attributable to situations where communities want to develop a regional recreation plan; where a private sector outfitter wants to expand operations; where a tourism board wants to market the nearby public recreation assets; when an agency needs to evaluate alternative land use allocations; or when public visitation is expected to greatly increase (e.g., 200th Bicentennial Lewis and Clark documentaries).

The vertical axis represents the degree of ripeness for making visitor capacity decisions. The lower band represents a premature stage for decision making, perhaps as a result of insufficient recreation inventory and demand data, vague management objectives and standards, insufficient natural and cultural resource information, or the lack of personnel with recreation competency or familiarity with the locale. This band conveys that there is minimum level of basic information and competency that is necessary before visitor capacity decisions can be addressed.

The middle band represents a span of time, or window of opportunity, for capacity decision making. This span of time is a decision opportunity, whereby the

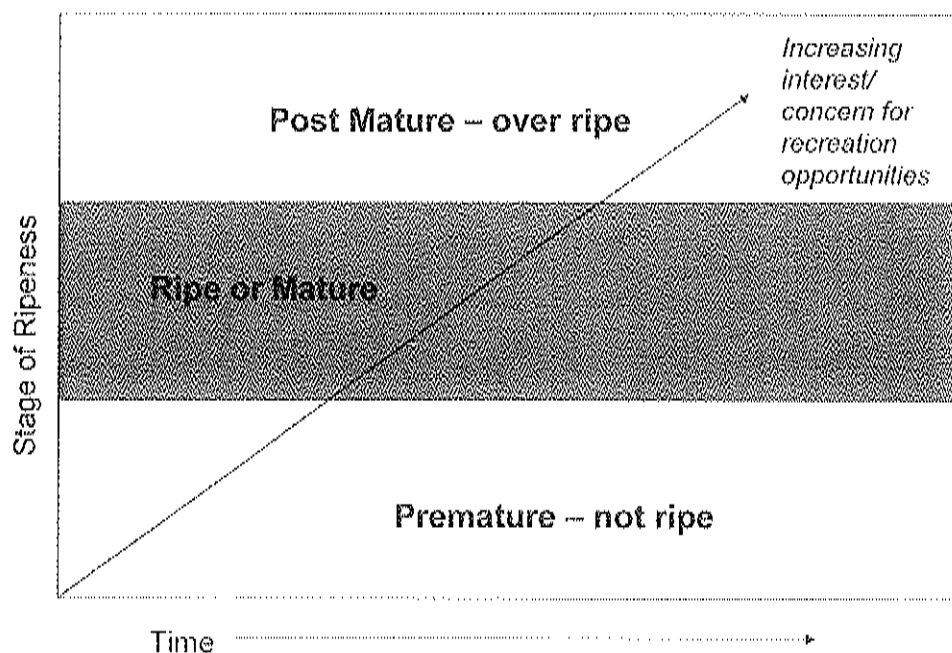


FIGURE 1 Ripeness for visitor capacity decision making.

decision maker is operating in an atmosphere characterized by available time, deliberateness, consultation, careful analysis, little or no controversy and political pressure, and due diligence.

The upper band represents a postmature stage, when a decision opportunity has degenerated into a decision problem. The upper band lacks the proactive atmosphere of the middle band. It depicts a time when decision makers are pressured by conflict, controversy, or unacceptable resource conditions. Unfortunately, a common belief is that one does not need to address visitor capacity until there is a problem, until use limits or closures are needed, or until various standards of resource or social conditions are compromised. Many capacity decisions are reactive to a loss of resource or opportunity, and thus are made when circumstances are in the upper limits of the ripeness stage or in the post mature stage. This is an unacceptable situation because, in effect, agency responsibility is being abdicated and replaced by political or judicial decision making.

Due Diligence and Due Care

Due diligence is the level of attention, persistence, and steady progress by a responsible official that is commensurate with the situation in question. It is the level of vigilance appropriate to a given situation. The court recognizes that situations will vary, and that the intensity of diligence can range from slight, to ordinary, to extraordinary (Black 1991).

Due care is the degree of attention, concern, prudence, and/or vigilance proportioned to a given situation based upon the apparent risk or potential consequences. It is the just, proper, and sufficient level of care warranted by the circumstances. The court recognizes three degrees of care, including slight, ordinary, and great. Slight care is that

amount of care that persons of ordinary prudence usually exercise in matters of slight importance; ordinary care is the degree of care that persons of ordinary prudence are accustomed to and usually exercise in similar circumstances; great care is the degree of care which a very cautious, competent, and prudent person would exercise under situations of high apparent risk and potential consequence.

Several other closely related concepts add further clarification. *Reasonable* is an action or decision that is not immoderate or excessive, but rather one consistent with the dictates of reason under the circumstances. *Reasonable care* is that degree of care that an ordinary prudent and competent person, engaged in the same line of profession or business, would exercise under similar circumstances. For example, medical malpractice law defines the traditional standard of care as the "average degree of skill, care, and diligence exercised by members of the same profession" (Black 1991).

Natural resource litigation often revolves around two questions framed by these concepts. Did the agency exercise diligence, care, and reasonableness? Did the agency exercise the level of activity expected of average competent professionals, and appropriate given the circumstances of risk and potential consequence? The discussion of how the Task Force used this doctrine is presented in the following section.

Sufficient Evidence Rule

Evidence is sufficient to justify a decision if it is satisfactory for the purpose, and is adequate in character, weight, or amount as will legally justify the decision at hand. Sufficient is further defined as adequate, enough, or as much as may be necessary for the need or end purpose (Black 1991).

The court recognizes that the amount of sufficient evidence varies among the three common standards of judicial decision making. The *beyond a reasonable doubt standard* means a degree of evidence that fully satisfies, entirely convinces, or provides moral certainty for a prudent person. The *clear and convincing* means a level of evidence that has less certainty or probability than the reasonable doubt standard, but is greater in certainty or probability than a preponderance of evidence standard. The *preponderance of evidence standard* means evidence that is of greater weight or more convincing than the evidence in opposition, or the degree of evidence which constitutes a higher probability. The judiciary implicitly recognizes beyond a reasonable doubt to be of a 90% or greater probability of certainty; clear and convincing evidence to imply a 70% or greater probability; and preponderance of evidence to imply a majority or 51% or greater probability of certainty (T. Gilmore, personal communication 2001).

The task force recognized that the latter two doctrines provided similar and significant insights for visitor capacity decision making. First, the level of attention, persistence, and steady progress by a responsible official toward making a capacity decision should be commensurate with the situation in question, and there are varying degrees of diligence and care ranging from slight, to ordinary, to extraordinary. Second, the level of confidence and certainty in a particular capacity decision can vary based upon the intended purpose for the visitor capacity.

The task force integrated these doctrines with the procedural guidance in NEPA to offer a sliding scale of analysis for decision making (Eccleston 1999). The scale is based upon the tenet that not all visitor capacity situations are the same, and that managers need flexibility to make decisions based upon a level of analysis that is commensurate with the purpose and potential consequence of the decision. The proposed scale of analysis ranges from modest, to ordinary, to extraordinary

(i.e., Level 1 to 3). The three levels vary based upon the (a) level and type of information necessary, (b) tools and techniques used, (c) time and effort required, (d) level of certainty and risk, and (e) level of scientific input. Examples of recent Level 3 analyses receiving national notoriety include the effort involving recreation use on the White River National Forest, off-highway vehicle use in the Southern California Imperial Sand Dunes, snowmobiles in Yellowstone National Park, and private/public sector boat use of the Colorado River through the Grand Canyon National Park. The Visitor Capacity Task Force Report contains a descriptive profile of 96 field units that proactively addressed the capacity question and are examples of Level 1 and 2 (Haas 2002).

Figure 2 is a conceptual depiction of a visitor capacity sliding scale of analysis, overlaid with the Figure 1 ripeness model for decision making. The vertical axis on the right depicts the (three levels of analysis). The diagonal line depicts that over time the focus and attention on recreation increases due to management concern, public issues, or opportunities. As the decision maker postpones a decision to a later time, the level of risk and potential consequences increase, and the window of opportunity decreases. Early in the window of opportunity, there may be an advantage to making capacity decisions based on a lower or more modest (e.g., Level 1), yet sufficient, level of effort and certainty. This early time has the advantage of being a proactive decision opportunity for establishing the critical administrative record, making a reasoned and deliberate decision in a positive atmosphere previously characterized, and yet allowing the time to monitor the reasonableness of the decision and adapt to new knowledge and circumstance.

Figure 2 is also intended to convey the tendency today to wait until there is a decision problem or resource conditions are being adversely affected before addressing visitor capacity, and thus imposing without choice the extraordinary level (i.e., Level 3) of time, effort, and analysis. This situation may force the decision

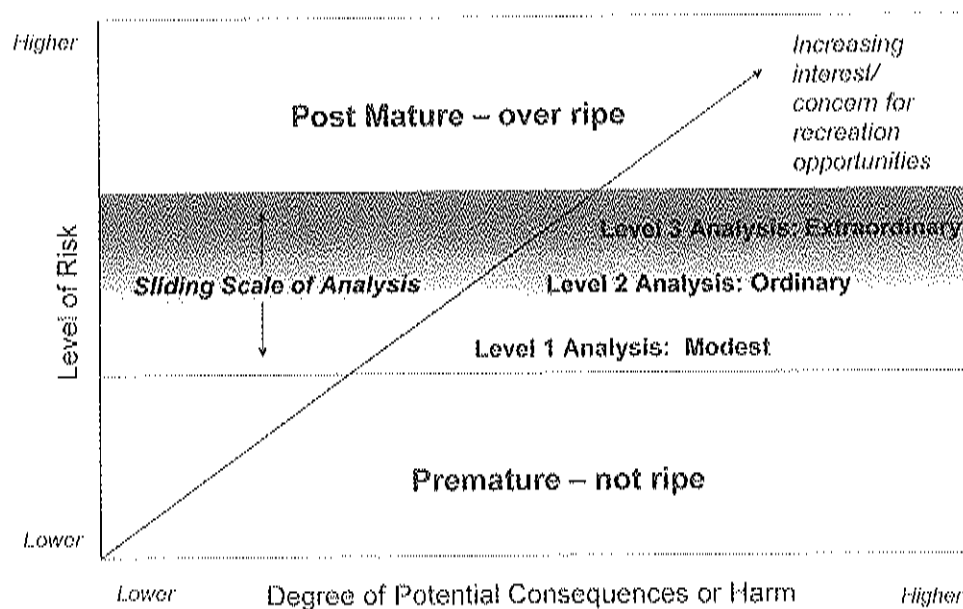


FIGURE 2 Visitor capacity sliding scale of analysis.

TABLE 2 Purposes of a Visitor Capacity Decision Across a Sliding Scale of Analysis

| | LEVEL 2: To proactively address moderate-level (non-significant) land use allocation and visitor management decisions | LEVEL 3: To assess decisions of significant consequence (e.g., safety, visitation limits, major allocations, land use development) |
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| LEVEL 1: To measure recreation supply for planning and routine administrative functions | LEVEL 2: To proactively address moderate-level (non-significant) land use allocation and visitor management decisions | LEVEL 3: To assess decisions of significant consequence (e.g., safety, visitation limits, major allocations, land use development) |
| General recreation supply inventory and mapping | Includes Level 1, plus | Includes Level 2, plus |
| Build administrative and historic record | Assist in moderate level allocation decisions | To assess significant land use change proposals |
| Regional recreation demand and supply analysis | Assist in the expansion, closure, or alteration of moderate-scale recreation facilities or permittees | Risk management tool for significant public safety concerns |
| Concept design and planning for facilities and infrastructure | Limit- or site-level community and private-sector predictability | Assist in the expansion, closure, or alteration of large-scale recreation facilities or special use permittees |
| Assist in prioritizing budget, personnel, activities, and monitoring efforts | Assist to mitigate moderate-level risks to resources or recreation opportunities | Site design and planning for major developments |
| Proactively set capacity triggers to activate future mgmt. activities or resources | Site and facility design and planning for small-scale projects | Mitigation of existing or imminent threats to resources or other users |
| Development of visitor information and marketing materials and strategy | Proactively address anticipated safety issues | Allocation of significant uses/ users across time or space |

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| <p>Provide macro-level predictability to private sector and local community</p> <p>Minor and noncontroversial allocations among recreation and nonrecreation uses</p> <p>Justify emergency restrictions due to public health and safety concerns</p> <p>Develop environmental assessment</p> | <p>Increase stakeholder awareness and support for likely future management actions</p> <p>Assess small and nonsignificant proposed land use changes</p> <p>Help voluntary redistribution of visitor use via visitor information, marketing, and trip planning materials and strategies</p> <p>Adapt or reset capacity triggers to activate future mgmt. activities or resources</p> | <p>To establish significant visitor limitations or area closures deemed necessary</p> <p>Development of environmental impact statement</p> |
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maker to be reactive without the benefit of time, resources, data, monitoring, consultation, and due diligence. On the other hand, Level 3 analysis can be very strong and provide a high level of certainty when time and resources are available and due process is followed.

Table 2 is included to further illustrate how the Task Force used the legal doctrine to develop guidance on what level of analysis may be appropriate for the various purposes and consequences of a visitor capacity decision. A Level 1 analysis might be sufficient to develop a general inventory of recreation supply, to set triggers for additional resources, for macro-level or regional planning, or proactively establish an administrative and historic record. Level 3 analysis might be sufficient for major decisions associated with significant land use changes, locations where the potential of resource impairment is high, for considerations of major facility expansion or closure, or where the controversy to visitor limits and regulations is very high.

Conclusion

During the last 40 years, the vast majority of natural resource litigation has related to such issues as clearcutting, endangered species, air quality, in-stream flows, grazing, resource planning, and public involvement. In the next several decades, the park and recreation profession will have its day in court as local, state, and federal agencies increasingly accept the reality that restraint on recreational freedoms is the price to be paid for protecting important natural and cultural resources and the recreational opportunities they afford the American public (Haas 2000).

Unfortunately, most park and recreation professionals have had little, if any, experience with the judiciary. It is common to view the judiciary akin to the "woodshed"—that is, to be litigated is to have one's integrity and competency questioned, to find fault and failure, to bring undue attention, to divert valuable time and resources, or to forego administrative discretion and power. To consider the judiciary as a valued management tool is an oxymoron for most.

Yet the reality is that the judiciary will remain an active participant in public land management. Rather than viewing the judiciary with fear and intimidation, natural resource professionals should use legal doctrines to exercise their administrative discretion and responsibility. Our natural and cultural resources, the recreating public, and even the judiciary would benefit from agency decision makers proactively applying the doctrines of deference, ripeness, due diligence and due care, and sufficient evidence.

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