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## On Protecting the National Parks From the External Threats Dilemma

*Robert B. Keiter\**

*The National Park Service appears to have insufficient authority to protect the national parks from the adverse effects of external activities. In this article the author discusses how energy development and other activities affect the quality of the national parks. By using Glacier National Park as an illustrative case, the author then shows that under existing legislation the Park Service is unable to deal adequately with the various external threats facing America's national parks. The author concludes by presenting legislative proposals which would enable the National Park Service to protect our national resources.*

The present condition of America's national parks is cause for some alarm. The parks are confronted with increased visitor usage which has strained park resources and the management skills of park administrators. But this is only part of the difficulty. The parks also face problems due to activities occurring outside of park boundaries on public and private lands which threaten to degrade park resources and to detract from park visitors' experiences. Energy exploration and development projects, timber harvesting, road and subdivision construction, and other related activities are altering drastically the character of the lands located on the periphery of the national parks. The cumulative impact of these external threats to the parks may prove a more intractable and damaging problem than the American public's love affair with them.

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The 1980 report to Congress entitled the *State of the Parks* identified myriad "threats" that endangered the natural and cultural resources of the parks.<sup>1</sup> While the report covered both internal and external threats to park resources, over fifty percent of the threats were traced to sources located outside of the parks. Significantly, the larger parks—most of which are located in more remote and less populated western regions of the United States—reported nearly double the number of threats reported elsewhere in the park system.<sup>2</sup> Among these parks, Glacier National Park, located in the northwestern corner of Montana, reported more threats than any others.<sup>3</sup> If relatively isolated Glacier National Park is experiencing such serious difficulties, it is safe to assume that other, more centrally located national parks are likewise jeopardized. And the *State of the Parks* report confirms this assumption.

In the face of these threats, the national parks are not entirely defenseless. The 1916 National Park Service Organic Act created the national park system and established the National Park Service to administer the system.<sup>4</sup> Under the Act, the Park Service is required to manage a national system of parks to conserve scenery, natural and historic objects, and wildlife, and to provide for public use and enjoyment.<sup>5</sup> The Organic Act provides the Park Service with the legal authority to deal with problems internal to the parks, such as overcrowding, resource destruction, and vehicle use. The Act apparently also imposes the legal responsibility on the Park Service to protect the parks from threatening external activities.

The Park Service, however, is generally unable to regulate or to control effectively activities or developments originating on federal, state or private lands located outside park boundaries. The Park Service cannot claim jurisdiction over these adjacent lands since they are not part of the parks. Nevertheless, the Park Service cannot ignore developments outside the parks in view of the threat posed to park resources and the preservation mandate of the Organic Act. Although park officials can rely upon existing federal and state environmental control legislation to challenge external activities or to influence the decision-making processes of coordinate federal agencies and local governments, these statutes often fail to protect park resources meaningfully. Most of them only establish general standards governing environmental quality and land use decisions without regard for the unique status of the national parks. Moreover, much of the federal legislation only applies when external threats originate on public lands; it has no application when these threats are traced to activities on private lands.

In several respects the present external threats problem mirrors the age-old debate over preserving versus utilizing public and private lands.

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1. NATIONAL PARK SERVICE, DEP'T OF THE INTERIOR, STATE OF THE PARKS 1980: A REPORT TO THE CONGRESS (May, 1980) [hereinafter cited as 1980 STATE OF THE PARKS REPORT]

2. *Id.* at viii.

3. *Id.* at 52.

4. 16 U.S.C. § 1 (1976). See *infra* text accompanying notes 85-93.

5. 16 U.S.C. § 1 (1976).

Having created the national parks largely to preserve and protect the nation's unique natural resources from early settlement and exploitation, Congress now faces the issue of whether to protect the parks from developments on adjacent lands which could cause significant damage to park resources. Congress has already committed itself to the national parks by creating and expanding the park system, and there are indications that it is inclined to honor this commitment. The House of Representatives has twice passed a "Parks Protection Act" by a wide margin,<sup>6</sup> but the Senate has been less favorably disposed to the legislation.<sup>7</sup> The question necessarily arises then as to the best approach to protect the national parks from external threats.

This article addresses the national parks' current external threats dilemma and examines possible solutions to the problem. The article begins with a review of the problem of external threats to the national parks arising out of land use decisions involving adjacent public and private lands. Throughout this discussion, Glacier National Park will be used as an illustrative case. The article then contains an examination of existing legislation to determine the scope of protection presently available to parks facing external threats to their resources. The article concludes with an outline and examination of the proposed Parks Protection Act and other available alternatives to protect the parks from external threats.

#### THE EXTERNAL THREATS PROBLEM

##### *An Historical Perspective*

Most of the large national parks were included in the national park system during the early decades of this century because of their unique scenic values.<sup>8</sup> Since the areas were generally located in isolated regions of the sparsely settled west, there was little concern about where to establish park boundaries to assure complete ecosystem protection.<sup>9</sup> Park advocates were usually more concerned about protecting unique natural features from being despoiled by the public, than they were about including or adding less attractive perimeter lands to protect the park's en-

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6. H.R. 2379, 98th Cong., 1st Sess. (1983); H.R. 5162, 97th Cong., 2d Sess. (1982). H.R. 2379 was adopted by the House of Representatives on October 4, 1983 by a vote of 321 to 82. During the 97th Congress the House adopted a virtually identical bill, H.R. 5162, 97th Cong., 2d Sess. (1982). See *infra* text accompanying notes 241-89 for a discussion of the bill.

7. During the Ninety-Seventh Congress, H.R. 5162 died without action in the Senate Committee on Energy and Natural Resources. During the Ninety-eighth Congress, a similar fate befell H.R. 2379. On March 20, 1984, Senator Chaffee submitted Amendment No. 2807 to S. 978, 98th Cong., 1st Sess., 1984, entitled "Wildlife & the Parks Act of 1984" which bore some similarity to H.R. 2379, 98th Cong., 1st Sess. (1983). S. 978, Amendment No. 2807, 98th Cong., 1st Sess., 130 CONG. REC. § 2919-2923 (daily ed. March 20, 1984). See *infra* text accompanying notes 290-309. As of March 1, 1985, none of these bills had been introduced in the Ninety-ninth Congress.

8. A. RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE 5 (1979); J. SAX, MOUNTAINS WITHOUT HANDRAILS 7 (1980).

9. A. RUNTE, *supra* note 8, at 29; J. SAX, *supra* note 8.

tire ecosystem.<sup>10</sup> While the early parks occasionally felt the pressures of external development,<sup>11</sup> this generally was not a major concern for park planners. Instead, during its formative years the National Park Service actively sought to attract visitors to the parks and to provide visitors with comfortable accommodations and services.<sup>12</sup>

By the mid-twentieth century, with increased population growth and expanded resource and energy demands, it was inevitable that the parks would begin to feel the pressure of incompatible external activities. At about the same time that visitor use of parks surged dramatically,<sup>13</sup> the Park Service also began experiencing added problems traceable to human activity outside park boundaries. Early external threats which attracted national attention included upstream logging activities on lands adjacent to Redwood National Park<sup>14</sup> and the construction and operation of large coal-fired power plants near several southwestern parks.<sup>15</sup> The more recent energy crises have slowed visitor pressures on the parks, but ironically the energy crises have also been responsible for even more external pressures. For example, the search for coal, oil and gas reserves has led to exploratory seismic and drilling activities on the borders of Glacier National Park<sup>16</sup> and a proposed open pit mine next to Bryce Canyon National Park.<sup>17</sup> Plans have also been prepared to develop geothermal energy sources on the border of Yellowstone National Park,<sup>18</sup> and the lands immediately adjacent to Canyonlands National Park are being considered as a site for the long term storage of nuclear waste materials.<sup>19</sup>

Interior officials and conservation groups have been concerned for some time about the problem that external activities present to park

10. J. SAX, *supra* note 8, at 7-8. See also R. NASH, WILDERNESS AND THE AMERICAN MIND 108 (3d ed. 1982); J. SAX, *America's National Parks: The Principles, Purposes & Prospects*, 85 NAT. HIST., Oct. 1976, at 62-63.

11. The 1913 Hetch-Hetchy Dam Controversy in Yosemite National Park is probably the best known example of external development pressure on a national park. See R. NASH, *supra* note 10, at 161-81.

12. *Id.* at 325-26. See also A. RUNTE, *supra* note 8, at 43; Mantell, *Preservation & Use: Concessions in the National Parks*, 8 ECOLOGY L.Q. 1, 13-16 (1979).

13. In 1959, the number of park visits totalled 22,392,000 but by 1972 the number had jumped to 54,369,000. See J. ISE, OUR NATIONAL PARK POLICY 623 (1961); NATIONAL PARK SERVICE, PUBLIC USE OF THE NATIONAL PARK SYSTEM CALENDAR YEAR REPORT-1973, at 7, 9 (1974). In 1965, 547 people traveled on the Colorado River through the Grand Canyon. In 1972, over 16,000 people made the same trip. The dramatic increase prompted the National Park Service to adopt a permitting system to protect the canyon's physical integrity. Since 1972, the number of people who have annually made the trip has fluctuated between 11,830 and 15,219 persons. R. NASH, *supra* note 10, at 161-81.

14. See Hudson, *Sierra Club v. Dept. of the Interior: The Fight to Preserve Redwood National Park*, 7 ECOLOGY L.Q. 781 (1978), for a comprehensive discussion of the Redwood controversy.

15. W. EVERHART, THE NATIONAL PARK SERVICE 75-76 (1983); NAT'L PARKS & CONSERV. MAGAZINE, March 1979, at 6.

16. W. EVERHART, *supra* note 16, at 79. See also LIFE, July 1983, at 106-11.

17. W. EVERHART, *supra* note 15, at 79-80; NAT'L PARKS & CONSERV. MAGAZINE, April 1979, at 4, 22.

18. W. EVERHART, *supra* note 15, at 75; NAT'L PARKS & CONSERV. MAGAZINE April 1979, at 4, 22.

19. 16 HIGH COUNTRY NEWS No. 10, at 1 (May 24, 1984).

units.<sup>20</sup> Until recently, however, their concerns have tended to focus on specific developments and they have not regarded the problem in its systemwide dimensions. But during the mid-1970's, the Redwood National Park controversy crystallized concern about the potential impact of adjacent development activity systemwide, and Congress ultimately amended the National Park Service Organic Act to clarify the responsibility of park administrators to protect and to manage park resources.<sup>21</sup> In 1977, seven federal agencies, including the National Park Service, commissioned the Conservation Foundation to study the potential conflicts between and among federal land management agencies and those responsible for adjacent state and private lands.<sup>22</sup> At almost the same time, the National Parks and Conservation Association (NPCA) surveyed park superintendents systemwide to determine their perception of problems confronting their park units.<sup>23</sup> Then in 1980, the National Park Service completed its first comprehensive survey on the condition of the national parks which was submitted to Congress as a report entitled *State of the Parks Report*.<sup>24</sup>

The Conservation Foundation study and the NPCA survey provide general information concerning the external difficulties confronting national park units. The NPCA survey quantifies its data and lists the threatened park resources as well as the sources potentially degrading the park environment.<sup>25</sup> The studies reveal that park managers are widely concerned about non-park activities which threaten air and water quality, wildlife and fish resources, and the general aesthetic quality of the parklands.<sup>26</sup> The surveys also indicate that the parks are most usually threatened by adjacent activities such as: residential, commercial, industrial, and road development; logging, mining, and agriculture; energy extraction and production; and recreation.<sup>27</sup> Both reports conclude that existing laws do not adequately protect park resources against continued degradation from external threats.<sup>28</sup>

20. See J. ISE, *supra* note 13, at 563.

21. Pub. L. No. 95-250, § 101(b), 92 Stat. 166 (1978) (codified as amended at 16 U.S.C. § 1a-1 (1978)). See *infra* text accompanying notes 94-108.

22. W. SHANDS, AN ISSUE REPORT—FEDERAL RESOURCE LANDS & THEIR NEIGHBORS 3 (Conservation Foundation 1979) [HEREINAFTER CITED AS W. SHANDS].

23. NAT'L PARKS & CONSERV. MAGAZINE, March 1979, at 4 [hereinafter cited as NPCA Survey, March 1979]; *Id.*, April 1979, at 4 [hereinafter cited as NPCA Survey, April 1979]; *Id.*, Nov. 1979, at 21 [hereinafter cited as NPCA Survey, Nov. 1979].

24. 1980 STATE OF THE PARKS REPORT, *supra* note 1.

25. NPCA Survey, March 1979, *supra* note 23, at 5-9. For example, the survey concludes that residential development threatens seventy-three Park Service units and commercial development threatens fifty-seven units. *Id.* at 5.

26. See W. SHANDS, *supra* note 22, at 14-24; NPCA Survey, March 1979, *supra* note 23, at 5.

27. NPCA Survey, March 1979, *supra* note 23, at 5. The reports also cite numerous specific instances of severe problems which park managers presently face.

28. In the NPCA Survey, April 1979, *supra* note 23, at 4, almost half of the park superintendents responded that they did not believe they had sufficient legal authority to deal with external problems. The Conservation Foundation study concludes, among other things, that site specific environmental research is needed to understand the effects of external developments on federal lands. W. SHANDS, *supra* note 22, at 67.

*1980 State of the Parks Report*

The 1980 *State of the Parks Report* consists of data compiled by the Department of the Interior through a survey questionnaire submitted to the 326 units of the national park system.<sup>29</sup> The Department's questionnaire asked park administrators to identify potential threats to their parks, to evaluate whether the threats were internal or external to the park unit, and to specify the park resources that were endangered by the threats.<sup>30</sup> The term "threat" was defined to include such matters as air or water pollution, visitor activities, or residential or commercial development which had the potential to damage significantly park physical resources or to degrade park values or visitor experiences.<sup>31</sup> Over half of the identified threats were attributed to activities or to sources located outside park boundaries.<sup>32</sup> The Report confirmed the earlier Conservation Foundation and NPCA studies by concluding that air and water pollution, aesthetic degradation, and the physical removal of resources constituted major external threats to the parks.<sup>33</sup>

The number of reported threats ranged from zero in some of the smaller Park Service units to sixty-four in the Chattahoochee River National Recreation Area, a recently established unit located near Atlanta.<sup>34</sup> Park administrators reported a systemwide average of 13.6 threats per park.<sup>35</sup> Among the large national parks exceeding 30,000 acres in size, an average of 24.5 threats per park were reported.<sup>36</sup> Significantly, the twelve national parks which constitute the United States component of the International Biosphere Reserves program—natural areas dedicated to long term ecosystem protection and monitoring—reported an average exceeding thirty-six threats per park.<sup>37</sup> As noted in the Report, this con-

29. 1980 STATE OF THE PARKS REPORT, *supra* note 1, at 1.

30. *Id.* at 2.

31. *Id.* at 3. The term "threat" might be broadly defined as meaning "adverse resource impacts." This comprehensive definition of the term "threat," as further illustrated by the textual examples set forth in the 1980 STATE OF THE PARKS REPORT, has been adopted in this article.

32. *Id.* at viii.

33. *Id.* at viii, 4.

34. *Id.* at 52-57.

35. *Id.* at 18. The national park system administered by the National Park Service is comprised of a variety of different types of parks. These include national parks, monuments, recreation areas, preserves, scenic riverways, historic sites, historical parks, and a variety of other smaller units usually featuring a unique natural phenomenon or an historical site of significance. For a description of the different components of the national park system see J. ISE, *supra* note 13.

36. 1980 STATE OF THE PARKS REPORT, *supra* note 1. This article is focused on these large (in excess of 30,000 acres in size), wilderness-based national park components of the national park system. This is due in part to the author's experience examining the external threats problem from the perspective of Glacier National Park. See *infra* note 48.

37. *Id.* The International Biosphere Program was established under the UNESCO Man & The Biosphere Program and seeks to provide a world-wide network of protected natural areas for the conservation of valuable plant and animal genetic strains and for conducting scientific research aimed at safeguarding the global environment. 28 YEARBOOK OF THE UNITED NATIONS 965 (1974). To do so the program has established a worldwide network of Biosphere Reserves in which representative, although not necessarily unique, ecosystems, both un-

stitutes almost three times the average number of threats faced by park units and should be cause for some concern.<sup>38</sup> Since the unique status of the Biosphere Reserves generally means that they are more closely monitored than other park units, the threat assessment in these parks is a more accurate reflection of present realities than the assessments obtained from other park units.

The 1980 *State of the Parks Report* identified five categories of threatened park resources: biological, physical, aesthetic, cultural, and operational.<sup>39</sup> Park biological, physical, and aesthetic resources—the *raison d'être* for the large national parks—face the greatest threat.<sup>40</sup> Biological threats to mammals and plant species were reported by over 130 parks units.<sup>41</sup> Other threatened biological resources included birds, fishes, woodland and forest habitats, and endangered and threatened species.<sup>42</sup> Over 100 parks reported threats to physical resources which included possible degradation of park air and water quality.<sup>43</sup> The aesthetic category of resource threats included intangible considerations related to the park experience.<sup>44</sup> In this category, more than 100 parks reported threats to their scenic resources and to the general condition of silence.<sup>45</sup> It is apparent that the threats impact park resources as well as visitor experiences.

Unfortunately the statistical reporting style of the 1980 *State of the Parks Report* falls short of illustrating fully the serious nature of external threats and their potential impact on park environments. Nevertheless the Report does demonstrate the extent and systemwide dimensions of the problem.<sup>46</sup> More importantly, the Report reveals that America's largest national parks—"the crown jewels" of the system—face substantial problems which were largely undreamed of a generation ago. Among these parks, the Report ranks Glacier National Park as the most threatened

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disturbed and man modified, can be studied and the response of those systems to human use and development can be monitored. W. EVERHART, *supra* note 15, at 175. The twelve Biosphere Reserve Parks located in the United States include: Channel Islands National Monument, California; Big Bend National Park, Texas; Great Smoky Mountains National Park, Tennessee and North Carolina; Everglades National Park, Florida; Virgin Islands National Park, Virgin Islands; Olympic National Park, Washington; Glacier National Park, Montana; Yellowstone National Park, Wyoming, Idaho and Montana; Rocky Mountain National Park, Colorado; Sequoia-Kings Canyon National Parks, California; Organ Pipe Cactus National Monument, Arizona; Mount McKinley National Park, Alaska. Selection, Management and Utilization of Biosphere Reserves, General Technical Report PNW-82 (March 1979).

38. 1980 STATE OF THE PARKS REPORT, *supra* note 1, at viii.

39. *Id.* at 24.

40. Over seventy-five percent of the identified threats impacted these park resources. *Id.* at 24, 31.

41. *Id.* at 25.

42. *Id.*

43. *Id.* at 26.

44. The intangible, aesthetic considerations included degradation of the parks' general scene, silence, frontcountry and backcountry experience, and wilderness-natural scene, and the presence of odors. *Id.* at 27-28.

45. *Id.* at 28.

46. Furthermore, the report reveals the need for additional monitoring and research to document conclusively the threats. *Id.* at ix.



park.<sup>47</sup> By examining the the situation in Glacier National Park carefully, it should be possible to understand more fully the external threat problem and to frame the issues in more specific terms.<sup>48</sup>

### *Glacier National Park*

Glacier National Park was created in much the same way as other national parks.<sup>49</sup> As early as 1883, the region was lauded as an area of unsurpassed natural beauty offering pristine lakes and rivers and spectacular alpine scenery.<sup>50</sup> The area featured numerous glaciers and untouched wilderness lands with abundant wildlife. By the turn of the century the area faced pressure from mining, agricultural, and timbering activities.<sup>51</sup> Additionally, the Great Northern Railway had opened the territory for travel and settlement.<sup>52</sup> In 1895, the land in Canada immediately adjacent to Glacier's northern boundary had been set aside as the Waterton

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47. *Id.* at 52. It should be noted that three national park units reported more threats than the fifty-six threats reported by Glacier National Park. These were Chatahoochee River National Recreation Area—sixty-four threats; Cuyahoga Valley National Recreation Area—fifty-eight threats; and Prince William Forest Park—fifty-seven threats. None of these units are denominated a national park and none approach the size or grandeur of Glacier National Park or of the other large national parks, thus Galcier has received national attention as the most threatened park in the wake of the 1980 STATE OF THE PARKS REPORT. See LIFE, July 1983, at 106.

48. The author has selected Glacier National Park as the illustrative case because of its status as the most threatened national park in the 1980 STATE OF THE PARKS REPORT and because of his familiarity with Glacier National Park's situation. During 1983-84 the author served as a co-principal investigator under a University of Wyoming-National Park Service Research Center grant to prepare a report entitled "An Assessment of Research Needs to Develop Legal Bases for Challenging External Threats to Glacier National Park." In preparing this report the author visited Glacier National Park several times, met with park officials, and toured park boundaries to observe external activities.

Certainly other national parks are also facing extreme external pressures. For example, many would regard Yellowstone National Park as among the most threatened parks. Concern for potential damage to the Yellowstone ecosystem has recently spawned the Greater Yellowstone Coalition, a group composed of various environmental organizations who are pooling their efforts to provide protection for the Yellowstone region. See High Country News, July 9, 1984, at 7. In some respects Yellowstone's problems surpass Glacier's problems because of the interjurisdictional difficulties attributable to the fact that Yellowstone's boundaries are found in three states and it is surrounded by four national forests, each under separate administrative direction. Thus, Yellowstone National Park officials are faced with the task of working with state and local officials in three different states, and monitoring the actions of forest officials in four different national forests. See *infra* text accompanying notes 234-357 for a more specific discussion on the interagency coordination and private lands monitoring problems faced by national park officials.

49. See generally J. ISE, *supra* note 13.

50. C. BUCHHOLTZ, *MAN IN GLACIER* 45 (1976); J. ISE, *supra* note 13, at 171-82.

51. C. BUCHHOLTZ, *supra* note 50, at 27-41; J. ISE, *supra* note 14, at 171-73. Ironically, Glacier proved not particularly hospitable to mining, timbering and grazing activities and this fact, which was realized shortly after the turn of the century, helped fuel the park movement. Many persons familiar with the area concluded that the best use for the land was as a park to attract tourists to the area. C. BUCHHOLTZ *supra* note 50, at 46.

52. C. BUCHHOLTZ, *supra* note 50, at 54-56; J. ISE, *supra* note 13, at 173. Great Northern spokesmen, after witnessing the success of its Northern Pacific rival in promoting railroad access to Yellowstone National Park, favored establishment of the park as a means of increasing their business. One of the major early park proponents attributes the establishment of Glacier National Park entirely to the efforts of the Great Northern. *Id.* at 46.

Lakes National Park.<sup>53</sup> Realizing the need to act, Congress created the park in 1910.<sup>54</sup> In 1932, the United States Congress and the Canadian Parliament designated the two adjoining parks as the world's first international peace park.<sup>55</sup> In 1974, Glacier was designated a United States National Park Biosphere Reserve as part of the UNESCO international biosphere program because of its largely unaltered natural condition and the ecological integrity of the area.<sup>56</sup>

Glacier National Park is located in the northwestern portion of Montana and adjoins the Canadian border. The park is largely mountainous and contains numerous glacial lakes. Much of the land is heavily timbered by pine forests, but part of the terrain is alpine where rock and meadowland predominate. The park is bisected by the continental divide which accounts for the different climatic conditions within the park: a milder, moist Pacific climate prevails on the western side of the divide, while a dry, harsher high plains climate characterizes the east side.<sup>57</sup>

Wildlife in Glacier National Park is abundant and includes such species as mountain goat, big horn sheep, elk, deer, grizzly and black bear, moose, wolf and lynx.<sup>58</sup> Many of these species are migratory animals. Their habitat extends beyond park boundaries, particularly during the winter when heavy snows cover much of the natural food sources within the park.<sup>59</sup> Similarly, the park fish resources are comprised of several species that

53. See NATIONAL PARKWAYS, A PHOTOGRAPHIC AND COMPREHENSIVE GUIDE TO GLACIER AND WATERTON LAKES NATIONAL PARKS 9 (1974) (Worldwide Research and Publishing Co., Casper, Wyo.).

54. C. BUCHHOLTZ, *supra* note 50, at 47-49; J. ISE, *supra* note 13, at 173-75. However, the bill creating Glacier National Park contained provisions sanctioning continued private land ownership, mining activities, railroad construction, and timber harvesting within the park. C. BUCHHOLTZ, *supra* note 50, at 51-52. It should be noted that Glacier National Park, like some of its sister parks (Yellowstone, Yosemite, Sequoia, Mount Rainier, Crater Lake and Mesa Verde), was created by Congress before any coherent national plan for parks had been established. It was not until 1916—six years after Glacier's creation—that Congress adopted the National Park System Organic Act establishing the National Park Service to administer the growing number of national parks.

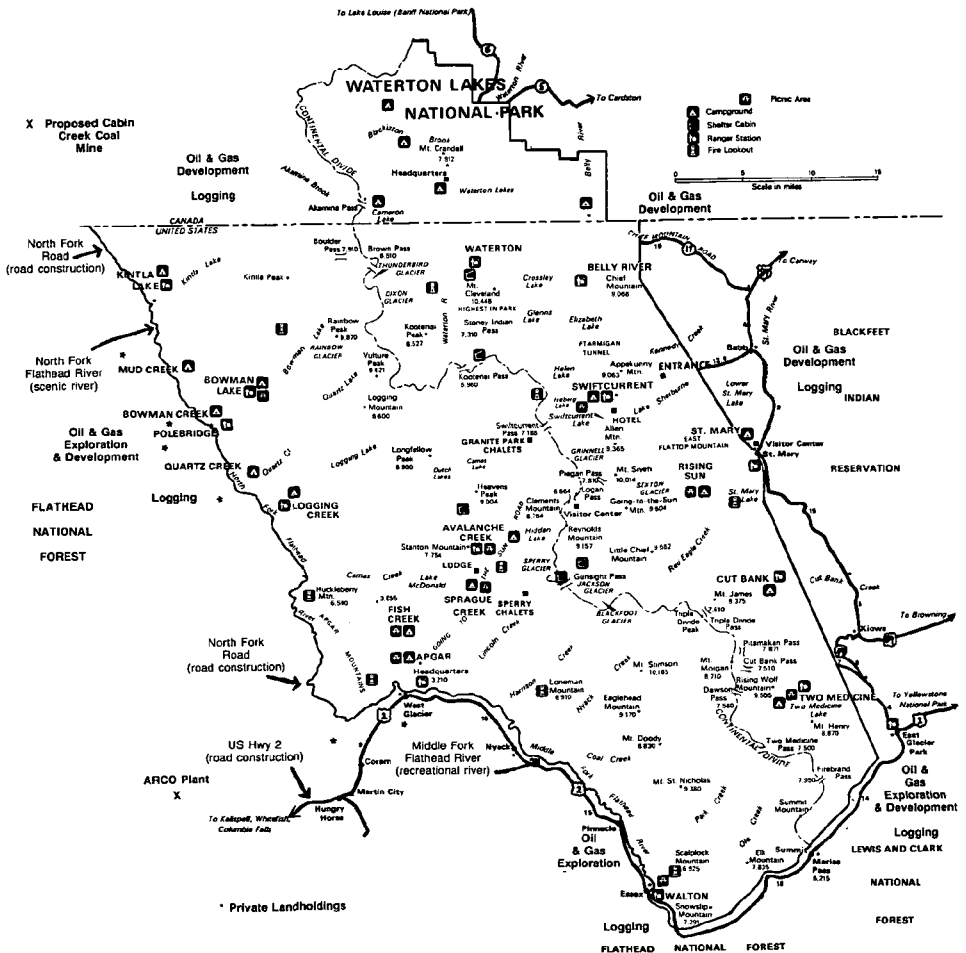
55. The park was named the Waterton-Glacier International Peace Park. J. ISE, *supra* note 13, at 177-78.

56. C. BUCHHOLTZ, *supra* note 50, at 79. Inclusion of Glacier National Park in the U.N. program signifies that the park's relatively unspoiled natural ecosystem area is worthy of preservation and future study as one of the more natural areas remaining in the modern world. See *supra* note 37.

57. See Flathead River Basin Environmental Impact Study 20-21 (1983) (prepared by Flathead River Basin Steering Committee) [hereinafter cited as Flathead Basin EIS]. A map is included on page 364 to familiarize the reader with Glacier National Park and its surrounding environs. The map also illustrates the nature and pervasiveness of the external threats facing Glacier National Park. Locations of the threatening activities are approximate due to the small scale of the map. A cursory glance at the map demonstrates the extensiveness of the immediate external threats problem facing Glacier National Park officials. The map does not, however, show the external threats traceable to distant sources such as the park's acid deposition problem.

58. J. ISE *supra* note 13, at 178. Among the park's wildlife, four species are listed as endangered or threatened: the grey wolf, bald eagle and peregrine falcon are listed as endangered species, and the grizzly bear is listed as a threatened species. See Endangered Species Act, 16 U.S.C. § 1531-1543 (1982); 50 C.F.R. § 17.11(h) (1984). See also Glacier National Resource Management Plan and Environmental Assessment 7-8, 57-58, 78-79 (1983) [hereinafter cited as Glacier Resource Management Plan]; see *infra* text accompanying notes 191-207.

59. *Id.* See also Flathead Basin EIS, *supra* note 57, at 167-73.



# GLACIER NATIONAL PARK WATERTON - GLACIER INTERNATIONAL PEACE PARK

can be found both within and outside park waters. Many fish migrate into park waters through the Flathead River waters for spawning purposes. These include the western slope cutthroat trout, bull trout, kokanee salmon, and eastern brook trout.<sup>60</sup> Owing to their migratory nature, park wildlife and fish are directly affected by activities taking place outside of Glacier National Park.

Glacier National Park is similar to most of the other western parks which are largely surrounded by publicly owned land.<sup>61</sup> Glacier is surrounded on its western and southern borders by the Flathead National Forest. To the east the park abuts the Blackfeet Indian Reservation, and on the north the park borders the Canadian Waterton Lakes National Park as well as provincial forest land. The privately owned land adjacent to the park consists mainly of small parcels which are interspersed with federal forest land. Additionally, the park is bordered on the west and south by branches of the Flathead River which have been designated as components of the nation's wild and scenic river system.<sup>62</sup> The Great Bear Wilderness area is located to the southwest of the park in the Flathead National Forest.<sup>63</sup>

Although relatively isolated, Glacier National Park like many other national parks, has experienced the pressures of growing urbanization. The western portion of Glacier National Park is within the upper reaches of the Flathead River basin which has seen continuous population growth and has been subjected to considerable development pressures since World War II.<sup>64</sup> The towns of Kalispell, Columbia Falls, and Whitefish—which are located approximately twenty miles west of Glacier—account for over 17,000 of the region's 72,000 person population.<sup>65</sup> An ARCO aluminum refinery, one of the largest employers in the basin, is located in Columbia Falls.<sup>66</sup> Additionally, several sawmills and lumber product plants are located in or near towns throughout the basin.<sup>67</sup>

60. Flathead Basin EIS, *supra* note 57, at 136.

61. For example, Yellowstone National Park located in northwestern Wyoming, is surrounded on all sides by national forest land: on the east by Shoshone National Forest; on the south by the Bridger-Teton National Forest; on the north by the Gallatin National Forest and on the west by the Targhee National Forest. Similarly Yosemite National Park in California is bounded by the Sierra, Inyo, Stanislaus and Toiyabe National Forests.

62. See 16 U.S.C. § 1274 (1982). See also U.S. Forest Service, Flathead National Forest, Proposed Forest Plan VI-6 (1983); see *infra* text accompanying notes 180-90.

63. It should be noted that the Great Bear Wilderness area is not immediately adjacent to the park since a highway and a strip of private land separates the two areas. 16 U.S.C. § 1132 (1982). See U.S. Forest Service, Flathead National Forest, Proposed Forest Plan VI-8 (1983); see also *infra* text accompanying notes 173-79.

64. See generally Flathead Basin EIS, *supra* note 57, at 43-66, for a general history and summary of population and economic growth in the region and projections for the future.

65. *Id.* at 34-35.

66. *Id.* at 47, 49, 78. The ARCO workforce, at full production, comprises almost one-eighth of the region's workforce, and the payroll generates almost one-fifth of the area's income. *Id.* at 47. The plant is the second largest contributing industry to the basin's economy. *Id.* Also, the plant is the largest source of fluoride emissions in the state of Montana. Glacier Resource Management Plan, *supra* note 58, at 33.

67. The wood products industry is the major industry in the region and it generates twenty-eight percent of the region's income. Flathead Basin EIS, *supra* note 57, at 46.

Major resource exploitation activities in the Flathead basin include coal, oil and gas exploration and extraction and timber harvesting.<sup>68</sup> The eastern portion of the Flathead National Forest that abuts Glacier National Park is part of the Overthrust Belt, a north-south stretch of the northern Rockies suspected of containing large deposits of oil and natural gas.<sup>69</sup> A large open pit coal mine is planned for the Cabin Creek area in the British Columbia provincial forest only six miles north of the park.<sup>70</sup> The Forest Service has leased many tracts of timber in the Flathead National Forest for logging,<sup>71</sup> including timber located in areas abutting Glacier National Park and on stream drainages that flow into park waters.

By virtue of Glacier National Park, as well as the Flathead basin's general natural attributes, the area is attractive for recreational and leisure activities, thus tourism is a major component of the local economy.<sup>72</sup> The influx of tourists and outdoor recreational enthusiasts has placed increased pressure on the forest and park resources. Tourism-related activities such as fishing, rafting and horsepacking have increased noticeably.<sup>73</sup> Local property owners have been subdividing and developing their lands for vacation home sites. The North Fork area particularly has seen considerable change over the past twenty years. Second homes and recreational retreats have replaced several of the ranches located on private lands within the national forest. Plans also have been completed to widen Highway 2 from Kalispell to the west entrance of the park, and to improve the North Fork road which runs the length of the park's western boundary.<sup>74</sup>

The area east of the park is mainly comprised of the Blackfeet Indian reservation. Population in the area is relatively light and has remained fairly stable over the past twenty years. Major activities potentially impacting the park include logging operations in adjacent forests on reservation lands,<sup>75</sup> and oil and gas exploratory activities on these same lands. Additionally, oil and gas extraction activities are underway in Alberta, Canada, to the northeast of the park.<sup>76</sup> The area immediately south of the

68. *See id.* at 44, 46.

69. *See* U.S. Forest Service, Draft Environmental Impact Statement for Flathead National Forest Land & Source Management Plan III, at 45-64 (1983).

70. *See* Flathead Basin EIS, *supra* note 57, at 10-11.

71. *Id.* at 46.

72. *Id.* at 47. The tourism and travel industries account for about twenty percent of the total basic employment in the region. Glacier National Park and the Flathead Lake, located approximately fifty miles south of the park are the major attractions. *Id.*

73. *See generally* J. SAX, *supra* note 8, at 11-15; R. NASH, *supra* note 10, at 316-41.

74. *See* Department of Transp., Federal Highway Administration Final EIS for Reconstruction of Montana Forest Highway Route 61 (January 1983) (North Fork Flathead River Road). *See also id.* at iv (improvement plans underway regarding U.S. Highway 2) and correspondence between Glacier National Park officials and Federal Highway Administration officials in Helena, Montana indicating that the NEPA Environmental Impact Statement process is nearly completed with respect to the improvement of Highway 2 (available from author).

75. Clearcutting on the Blackfeet Reservation has occurred up to the park boundary at Divide Creek. Other clearcuts are extensive and are adjacent to U.S. Highway 89. *See* Glacier Resource Management Plan, *supra* note 58, at 16.

76. *See* Flathead Basin EIS, *supra* note 57, at 83.

park consists almost entirely of Flathead National Forest lands and there are no significant concentrations of population in this area. Logging and oil and gas exploration activities also have occurred in this region. But, owing to the light population density and relative remoteness of the eastern and southern boundary lands, these areas do not pose as significant a threat to the park as can be traced to activities originating on the park's western border.

The 1980 *State of the Parks Report* documented fifty-six potential internal and external threats to Glacier National Park. At least twenty-five of the threats can be attributed to resource development activities on adjacent lands and regional population growth.<sup>77</sup> Furthermore, the 1983 final report of the Flathead River Basin Steering Committee, a comprehensive survey of environmental changes which have occurred throughout the basin, supports the perceptions of park officials that local developments threaten to alter dramatically the area surrounding the park.<sup>78</sup> Although all of the activities which have occurred on lands surrounding Glacier National Park do not threaten park resources to the same degree, Glacier National Park administrators, like their counterparts elsewhere, perceive that the park's resources are increasingly endangered by the cumulative effect of these activities.<sup>79</sup>

Park officials have reviewed the external threats problem and have compiled a list of major external threats. These threats can be subdivided into three categories: degradation of park air quality, degradation of park water quality, and impairment of park resources attributable to adjacent land use patterns.<sup>80</sup> By far the most comprehensive threats—and

77. See 1980 STATE OF THE PARKS REPORT, *supra* note 1, at 48-51; Glacier Resource Management Plan, *supra* note 58, at 3.

78. See Flathead Basin EIS, *supra* note 57. The Flathead Basin EIS was prepared by the Flathead River Basin Steering Committee, a group formed in 1976 and composed of a cross section of people and interests from the local community. The group was created to respond to the threat posed to the region's environmental quality by the proposed Cabin Creek coal mine in northwestern British Columbia. Eventually the group received federal funding which totalled \$2.9 million to produce environmental and other studies related to the potential impact of the coal mine on the region. As a result of the comprehensive research effort the final Flathead River Basin Environmental Impact Study was produced. For more information regarding the formation and undertakings of the Steering Committee, see *id.* at 10-14. At the conclusion of the study, Montana was concerned enough about future developments in the region to create a permanent Flathead Basin Commission to monitor environmental change in the area and to encourage cooperation between various resource management agencies. See MONT. CODE ANN. §§ 75-7-301 to -304 (1983).

79. See W. SHANDS, *supra* note 23, at 14-29.

80. The origins of this list of high priority external threats should be explained. In June, 1983 the author and Wayne Hubert, a professor in the Department of Zoology and Physiology at the University of Wyoming, met individually and in a group with Glacier National Park officials over a four-day period to discuss the park's external threats problem. The meetings were arranged as the initial step in the preparation of a report for park officials on Glacier's external threats. See *supra* note 48.

As a result of the June, 1983 meeting the researchers and the Glacier National Park staff developed a list of high, medium and low priority external threats. Eight major or high priority external threats to the park's environment were identified:

1. Acid deposition stemming from global sources and point sources near the park;

the group defying easy categorization or solution<sup>81</sup>—can be traced to land use decisions and activities on public and private lands adjacent to the park. Land development decisions affecting the public and private land bordering or near the park, not only impact air and water quality in the area, but they also are altering the character of the landscape surrounding the park. Whereas most of these lands were largely wilderness only a few decades ago, this is no longer the case as attested to by the North Fork region. Park visitors are finding their park experience altered: housing developments and logging areas are visible from the park's boundaries and various overlooks; road noise, helicopter overflights, and seismic exploration activity can be heard from within the park.<sup>82</sup> Also, improving area roads and expanding tourist facilities will bring more people into the park or onto lands adjacent to it, further jeopardizing the park wilderness experience. Park wildlife faces loss or significant alteration of its habitat.

Park officials have the capacity to confront and handle some of the problems that ensue from these activities. For instance, when external activities bring people or tourist-oriented services into the park, such as the rafting companies operating on the North and Middle Forks, park ad-

2. Airborn toxicants and particulates originating from global sources and point sources near the park;

3. Reduced water quality and loss of fish habitat associated with mineral extraction in Canada;

4. Reduced water quality and loss of fish habitat caused by logging in the United States and Canada;

5. Oil and gas development on Forest Service, Reservation and Canadian lands surrounding the park;

6. Loss of wildlife habitat and migratory corridors on private and public lands surrounding the park caused by development and management activities;

7. Impacts on wildlife populations and migrations associated with human recreation use on lands surrounding the park;

8. Impacts on the quality of wilderness experience for park visitors associated with increased access and human development surrounding the park.

Identified medium priority external threats to the park included: reduced water quality traceable to inholder properties; impacts on habitat and air quality from fugitive dust originating on unpaved roads surrounding the park; toxicants stemming from spills on railways or roadways adjacent to the park; cattle trespass from reservation lands; noise caused by oil and gas exploration and land development; the impact of introduced exotic plants in natural communities; impacts on aesthetic vistas associated with clear cutting on reservation lands; and noise from sightseeing helicopters. Identified low priority threats included: utility access and corridors; poaching; specimen collecting; Indian religious freedom activities; wildlife harassment; offroad vehicles; and political pressures.

81. Whereas external activities that degrade the quality of the park's air and water quality can usually be addressed through specific legislation—such as the Clean Air Act and Clean Water Act—the same is not true respecting external threats traced to adjacent land-use decisions. Although several federal statutes directly or indirectly regulate land-use practices on federal lands (and sometimes on private lands) surrounding the national parks, the statutes do not establish standards geared to the presence of the national parks and they are not directed at specific environmentally threatening activities. Thus the land-use issue presents a somewhat different problem for the parks from the one posed by air and water pollution. See generally *infra* text accompanying notes 125-233. See also *infra* text accompanying notes 136-51, for a discussion of the Clean Air Act and its application to Glacier National Park and text accompanying notes 152-60 for a discussion of the Clean Water Act and its application to Glacier National Park.

82. These observations are based upon the author's personal observations, as well as his meetings during June, 1983 with park personnel. See *supra* note 80.

ministrators have the legal authority to regulate these activities in the interest of the park.<sup>83</sup> When activities take place exclusively outside of the park, however, the authority of park officials is extremely limited. Park officials can seek cooperation from the federal agencies responsible for administering adjacent lands, but agencies such as the Forest Service are governed by entirely different statutory mandates than those imposed on the National Park Service. Park officials face even greater difficulties when working with state and local officials concerning the administration of private lands in the area. And, needless to say, park officials face manifold problems when they confront pollution injuries emanating from Canada.<sup>84</sup> Therefore, from the perspective of park officials, the critical question is the extent to which existing environmental and land use laws provide them with a basis to prevent, eliminate or modify external activities arising on adjacent public or private lands.

#### CURRENT LEGISLATION

The national parks derive some protection against the external threats problem from federal legislation specifically related to the national park system. This legislation includes the amended National Park Service Organic Act and the establishing statutes that have created individual national parks within the system. The parks can also be protected through the multitude of federal environmental laws that are designed to regulate activities occurring on adjacent federal and private lands. Finally, state environmental and land use control statutes are relevant in regulating activities on state and private lands adjacent to the parks.

#### *National Park Service Legislation*

##### *The Organic Act*

The National Park Service Organic Act established the national park system and authorized the Secretary of the Interior to administer the system.<sup>85</sup> Although Congress has steadily enlarged the park system over the years and has clarified the Secretary's administrative responsibilities, the basic purpose of the park system has remained unchanged. The Act establishes the national park system to conserve scenery, natural and historic objects, and wildlife, and to provide for public use and enjoyment.<sup>86</sup> The Act further provides that the parks be left "unimpaired for the enjoyment of future generations."<sup>87</sup> This dual mission of conservation and public use has caused countless difficulties for the Park Service which has

83. See *infra* text accompanying notes 85-113.

84. It is beyond the scope of this article to address the legal issues presented by international pollution problems such as those that could arise with construction of the Cabin Creek coal mine in British Columbia. See Arbitblit, *The Plight of American Citizens Injured by Transboundary River Pollution*, 8 *ECOLOGY L.Q.* 339 (1979); Comment, *Who'll Stop the Rain: Resolution-Mechanisms for U.S.-Canadian Transboundary Pollution Disputes*, 12 *DEN. J. INT'L L. & POLICY* 51 (1982); MONT. CODE ANN. §§ 75-16-101 to -109 (1983) (Uniform Transboundary Pollution Reciprocal Access Act).

85. 16 U.S.C. §§ 1, 2, 3 (1982).

86. *Id.* § 1.

87. *Id.*



been faced with the task of reconciling these seemingly conflicting mandates.<sup>88</sup> But the external threats problem unquestionably impacts both aspects of the Park Service's responsibility, because if park resources are degraded, visitor use also is likely to be discouraged.

The Organic Act provides the Secretary of the Interior with sufficient authority to manage the parks internally and to control activities occurring within park boundaries.<sup>89</sup> Pursuant to the Act, the Secretary has promulgated regulations governing such diverse activities within the parks as backcountry travel,<sup>90</sup> boating,<sup>91</sup> and aircraft use.<sup>92</sup> So long as the Secretary acts reasonably in promulgating these regulations—by seeking to protect park resources or to enhance visitor experiences—his actions will not be overturned upon judicial review.<sup>93</sup> By exercising his regulatory authority in this manner, the Secretary can and has indirectly controlled the impact of external activities on park resources. In Glacier National Park, for example, by limiting backcountry travel or commercial rafting the Park Service can control visitor use and thus preserve the wilderness characteristics of the park. Therefore, when particular external activities pose a threat because they involve the use of park resources, the Organic Act enables park officials to regulate these threats. However, when external threat problems do not involve the use of park resources, they are not readily subject to regulation by the Park Service under the Organic Act.

Recent amendments to the Organic Act appear to impose an unspecified duty on the Secretary of the Interior to protect the parks against both internal and external threats despite his general lack of regulatory authority over activities arising outside the parks. Specifically, a 1978 amendment to section 1a-1 of the Organic Act provides: "the protection, management and administration of those areas [national parks] shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established. . . ."<sup>94</sup> Judicial interpretation of section 1a-1 indicates that the Secretary's discretionary authority is limited by the requirement that he act in a manner consistent with the purposes of the national park system.<sup>95</sup> But the courts have not yet been called upon to interpret section 1a-1 in the context of a challenge based upon the Secretary's failure to take action to protect a national park against damage from external activities.

88. See J. SAX, *supra* note 6, at 11; R. NASH, *supra* note 10, at 325.

89. 16 U.S.C. § 1a-2(h) (1982) (Secretary authorized to promulgate regulations for boating on park waters); *Id.* § 3 (general authority for the Secretary to promulgate regulations deemed "necessary or proper for the use and management of the parks"). See 36 C.F.R. §§ 1.1-10 (1984); *Organized Fishermen of Fla. v. Andrus*, 488 F. Supp. 1351 (S.D. Fla. 1980) (sustaining Secretary of the Interior's regulations limiting fishing in Everglades National Park).

90. See 36 C.F.R. §§ 2.10, .13, .14, .16 (1984).

91. See *Id.* §§ 3.1-.23 (1984).

92. See *Id.* § 2.17 (1984).

93. See *Organized Fishermen of Fla. v. Andrus*, 488 F. Supp. 1351 (S.D. Fla. 1980); *Eiseman v. Andrus*, 433 F. Supp. 1103 (D. Ariz. 1977), *aff'd*, 608 F.2d 1250 (9th Cir. 1979).

94. 16 U.S.C. § 1a-1 (1982) (emphasis added).

The legislative history of section 1a-1 suggests that the amended statute was intended to impose a duty on the Secretary to protect park resources in the face of internal and external threats. The amendment was adopted as part of a larger legislative revision to the Redwood National Park establishing legislation.<sup>96</sup> The Redwood controversy presented the federal judiciary and Congress with an acute external threats problem. Following the establishment of Redwood National Park in 1968, continued harvesting of timber on adjacent private lands threatened to destroy protected redwood groves within the park by altering streamflow patterns and the surrounding vegetation. The Sierra Club commenced litigation against the Secretary of the Interior alleging that he had failed to protect the park under the Organic Act, the Redwood National Park Act, and his public trust obligation.<sup>97</sup> The court agreed with the Sierra Club's position and found that the Secretary had violated his statutory and public trust duties and ordered him to take steps to protect the park.<sup>98</sup> Although the litigation did not result in any demonstrable change in the Secretary's

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95. *Sierra Club v. Andrus*, 487 F. Supp. 443, 448-49 (D.D.C. 1980). So long as the Secretary acts reasonably, and not arbitrarily or capriciously, in fulfilling his statutory responsibilities, his actions will be sustained by a reviewing court. *Id.* at 449-50. In *Andrus*, the court found that the Secretary had acted reasonably in refusing to initiate litigation to determine the extent of reserved federal water rights in waterways affecting the Grand Canyon National Park and the Glen Canyon National Recreation Area. See also *Sierra Club v. Watt*, 566 F. Supp. 380 (D. Utah 1983) (Secretary properly promulgated regulations regarding mining in the Lake Mead National Recreation Area).

96. See Pub. L. No. 95-250, 92 Stat. 163 (1978); H.R. REP. NO. 581, 95th Cong., 2d Sess., reprinted in 1978 U.S. CODE CONG. & AD. NEWS, 467-68, 479 (statement of Cecil D. Andrus, Secretary of the Interior). The Secretary of the Interior endorsed the section 1a-1 amendment to the Organic Act by stating:

The proposed legislation also provides for an amendment to the General Authorities Act of 1970 to further define the Secretary of the Interior's duties and limitations with regard to the administration of the National Park System. This provision provides that the protection, management and administration of the various areas of the system, as previously defined, must be consistent with those high purposes originally established by Congress with the creation of the National Park Service in 1916. While this standard of decisionmaking should be self evident, we feel that the continued pressure upon the National Park System today makes a restatement and reinforcement of these basic premises very appropriate.

We believe enactment of this legislation will firmly define the Secretary's duty and authority in Redwood National Park and in the National Park System.

*Id.* at 467.

At about the same time as the Redwood National Park dispute, the National Park Service also was defending itself in litigation challenging its authority to regulate commercial and noncommercial raft use on the Colorado River through Grand Canyon National Park. See *Eisman v. Andrus*, 433 F. Supp. 1103 (D. Ariz. 1977), *aff'd*, 608 F.2d 1250 (9th Cir. 1979).

97. *Sierra Club v. Department of Interior*, 376 F. Supp. 284 (N.D. Cal. 1974) (Redwood I); see generally Hudson, *supra* note 14.

98. *Sierra Club v. Department of Interior*, 398 F. Supp. 284 (N.D. Cal. 1975) (Redwood II). This decision represented the second of three reported decisions in this litigation. In the first decision the court held that the Secretary of the Interior had a legal duty to protect park resources and overruled the Secretary's motion to dismiss for failure to state a cause of action against him. Redwood I, 376 F. Supp. 284 (N.D. Cal. 1974). In this second decision the court reached the merits of the claim and found that the Secretary had breached his legal duty. The court also ordered the Secretary to take several different actions to assure adequate protection for the park and to report back to the court on the success of his efforts. See Hudson, *supra* note 14, at 817-27.

administration of Redwood National Park,<sup>99</sup> it did prompt Congress to increase the size of the park, among other things, and to amend section 1a-1 to clarify the responsibility of the Secretary to protect park resources.<sup>100</sup> In view of the controversy that prompted the legislation, it seems apparent that section 1a-1, as amended, is designed to impose a duty on the Secretary to take action within his power to protect the parks from external as well as internal activities.

Other recent amendments to the Organic Act tend to confirm this view of the section 1a-1 amendment. In 1976, Congress added section 1a-5 to the Organic Act.<sup>101</sup> Section 1a-5 requires the Secretary of the Interior to study new areas for inclusion in the national park system and to submit annually a report to Congress listing these areas. The provision indicates that the Secretary is to take account of "threats to resource values" in selecting and listing areas for inclusion in the system.<sup>102</sup> This suggests that Congress recognized the potential impact that external activities could have on resources which are or might be included in a unit of the system and provided for expanding the system to protect these resources. Under this provision the Secretary can recommend acquiring lands adjacent to the parks as a means of protecting the integrity of an existing park.

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99. *Sierra Club v. Department of Interior*, 424 F. Supp. 172 (C.D. Cal. 1976) (Redwood III). The court eventually dismissed the suit when it determined that the only effective protection available to the park was through congressional legislation or an OMB appropriation request, both of which were beyond the authority of the court to order. See Hudson, *supra* note 14, at 828-46.

100. See Pub. L. No. 95-250, 92 Stat. 163 (1978); H.R. REP. No. 581, 95th Cong., 2d Sess., reprinted in 1978 U.S. CODE CONG. & AD. NEWS 467, 479. See also S. REP. No. 528, 95th Cong., 1st Sess. (1977). The Senate Report indicates the legislative purpose of section 1a-1 as follows:

[T]he primary purpose of subsection 1(a) which amends the Act of 1970 on the management of the Park System is to refocus and insure that the basis for decisionmaking concerning the National Park System continues to be the criteria provided by 16 U.S.C. § 1—that is,

to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

The committee has been concerned that litigation with regard to Redwood National Park and other areas of the system may have blurred the responsibilities articulated by the 1916 Act creating the National Park Service.

Accordingly, this provision suggested by the administration would appear to be particularly appropriate. The Secretary is to afford the highest standard of protection and care to the natural resources within Redwood National Park and the National Park System. No decision shall compromise these resource values except as Congress may have specifically provided.

*Id.* at 13-14.

101. Pub. L. No. 91-383, § 8, 16 U.S.C. § 1a-5 (1982). See 1976 U.S. CODE CONG. & AD. NEWS 4290-4311.

102. 16 U.S.C. § 1a-5 (1982). The statute provides, in part:

The Secretary of the Interior is directed to investigate, study, and continually monitor the welfare of areas whose resources exhibit qualities of national significance and which may have potential for inclusion in the National Park System. [Secretary is obligated to submit annual report to Congress listing areas for inclusion.] . . . Threats to resource values, and cost escalation factors shall be considered in listing the order of importance or merit. . . .

In section 1a-7, Congress originally mandated the Park Service to prepare general management plans for each unit in the system.<sup>103</sup> The thrust of the section 1a-7(b) requirement was directed toward assuring that adequate facilities for visitors were available in park units.<sup>104</sup> In 1978, following the amendment of section 1a-1, Congress amended section 1a-7 to require park general management plans to provide for the preservation of park resources.<sup>105</sup> The amendment to section 1a-7 deleted the prior exclusive references to visitor facilities and inserted the requirement that general management plans include, among other things, "measures for the preservation of the area's resources" and "indications of potential modifications to the external boundaries of the unit, and the reasons therefor."<sup>106</sup> By requiring park officials to consider boundary modifications, the amendment apparently contemplates that the management plans will address external, as well as internal, resource threats.<sup>107</sup>

The net effect of these amendments to the Organic Act is to clarify the Secretary's responsibility to manage park units in accordance with the Act's original mandate and to protect park resources to assure that they, in fact, remain unimpaired for future generations. Although perhaps not as clear a mandate as might be desired, the recent amendments to the Organic Act lead to the conclusion that Congress intended to impose a duty on park officials to respond to external threat problems. Unfortunately, the amendments do not offer a mechanism to assure that park officials can effectively respond to external threats, other than recommending the revision of park boundaries which ultimately requires congressional consent.<sup>108</sup> Thus, while Congress has taken some steps toward solving sys-

103. 16 U.S.C. § 1a-7(b) (1982).

104. The 1976 amendment creating the general management plan requirement specified that the plans shall include:

- (1) the facilities which the Director finds necessary to accommodate the health, safety and recreation needs of the visiting public. . .
- (2) the location and cost of all such facilities; and
- (3) the projected need for any additional facilities required for such unit.

Pub. L. No. 94-458, 90 Stat. 1943 (codified at 16 U.S.C. § 1a-7b (1982)).

105. Pub. L. No. 95-625, § 604(3), 92 Stat. 3518 (codified at 16 U.S.C. § 1a-7 (1982)).

106. 16 U.S.C. § 1a-7 (1982). The apparent purpose of the amendment was to broaden the scope of the required general management plans and to assure that the plans were comprehensive. However, the focus of the amendment still appears to be on the visitor carrying capacity of the various park units, not the external threats problem. See H.R. REP. NO. 1165, 95th Cong., 2d Sess. (1978). Accordingly, the language of the amendment requires the Park Service to include "indications of types and general intensities of development . . . associated with public enjoyment and use of the area . . ." and ". . . implementation commitments for visitor carrying capacities for all areas of the unit." 16 U.S.C. § 1a-7(b)(2), (3) (1982). But by broadening substantially the mandate to develop general management plans, it is fair to conclude that Congress intended to deal with more than just the visitor capacity problem.

107. It should be noted that the National Park Service has administratively adopted a policy requiring park units to develop and update a resources management plan to inventory park resources and develop conservation strategies. See *infra* note 274 and accompanying text.

108. 16 U.S.C. §§ 1a-5, 1a-7(b)(4) (1982). Cf. 16 U.S.C. § 1b.(7) (1982) (Secretary authorized to acquire rights-of-way within national park lands); 16 U.S.C. § 6 (1982) (Secretary authorized to accept donated lands within the national parks); 16 U.S.C. § 7b (1982) (Secretary authorized to acquire lands in order to establish and maintain airports in the national parks). Additionally, Congress occasionally has responded to specific problems confronted by individual park units by amending the park establishing legislation to sanction the acquisi-

temwide problems that were exemplified by the Redwood Park controversy, the legislation still does not assure that parks will be protected despite the best intentions of park officials.

Notwithstanding the Organic Act and its subsequent amendments, it can be argued that park officials are under a public trust obligation to preserve park resources against degradation. In *Sierra Club v. Department of the Interior*,<sup>109</sup> the initial court decision in the Redwood litigation, the district court held that the Secretary of the Interior was charged with statutory responsibilities and had a separate legal duty to protect the parks under his trust obligation. Although the public trust doctrine had been recognized in other contexts involving the Department of the Interior's management of public lands,<sup>110</sup> the decision is the first instance where the doctrine was imposed in the national parks context.<sup>111</sup> Subsequently, however, in *Sierra Club v. Andrus*, another district court rejected the public trust doctrine argument in an action challenging the Secretary of the Interior's refusal to initiate litigation to protect waters flowing into

tion of lands near the park. See, e.g., 16 U.S.C. §§ 79b(c), 79c (1982); 16 U.S.C. § 460dd-1(a) (1976) (Glen Canyon National Recreation Area). See generally Sax, *Buying Scenery: Land Acquisitions for the National Park Service*, 1980 DUKE L.J. 709. Congress has established the Land and Water Conservation fund under the Land and Water Conservation Fund Act of 1965 which provides funds for the purchase of additional lands for the national park system (and other federally managed land systems), but the Act does not authorize the acquisition of land. 16 U.S.C. §§ 460L-1 to 460L-20 (1982). Instead, monies are available from the fund to purchase additional lands for the national parks only when Congress has specifically authorized the acquisition. *Id.* §§ 460L-9(b), 460L-10(b). There is one limited exception to this specific congressional authorization requirement and that arises in the case of minor park boundary revisions sought by the Secretary of the Interior to, among other things, protect an area of the park system. The Secretary's authority, however, applies only to the acquisition of boundary lands when the park boundary was established after January 1, 1965. *Id.* § 460L-9(C). Also, the statute imposes the additional requirements that the acquisition be a consensual transaction and that the Secretary consult with local governmental officials. *Id.* See generally Coggins and Glicksman, *Federal Recreation Land Policy: The Rise and Decline of the Land and Water Conservation Fund*, 9 COLUM. J. ENVTL. L. 125 (1984).

109. 376 F. Supp. 90, 96 (N.D. Cal. 1974).

110. *Knight v. United Land Assoc.*, 142 U.S. 161, 181 (1891); *Utah Power & Light v. United States*, 243 U.S. 389, 409 (1916); *Davis v. Morton*, 469 F.2d 593, 597 (10th Cir. 1972). In *Knight*, the Supreme Court stated:

The Secretary [of the Interior] is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it.

*Knight*, 142 U.S. at 181.

It also should be noted that arguments can be fashioned to recognize other common law doctrines as part of the federal common law which might provide additional legal tools to Interior Department officials in their efforts to mitigate external threats. For example, the common law doctrine of public nuisance has been integrated into the federal common law although there is some uncertainty respecting its scope and potential application in a case such as the parks' external threats problem. See *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981). Cf. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979) (rejecting argument that federal common law required adoption of a national standard for resolving boundary disputes between Indian tribes and adjacent private landowners). Development of this issue is beyond the scope of this article.

111. See *Hudson*, *supra* note 14, at 815. See generally Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970).

the Grand Canyon National Park.<sup>112</sup> The court held that section 1a-1 of the amended Organic Act imposed duties tantamount to a public trust duty on the Secretary: "The legislative history of the 1978 amendment to 16 U.S.C. § 1a-1 makes clear that any distinction between 'trust' and 'statutory' responsibilities in the management of the National Park system is unfounded."<sup>113</sup> The court in *Sierra Club v. Andrus* thus adopted the view that the 1978 amendment to section 1a-1 codified the trust obligation imposed by the district court in the Redwood litigation. Although judicial acceptance of the argument that the Secretary is charged with a distinct public trust obligation is far from clear on the basis of these conflicting decisions, it seems apparent that the doctrine has been adopted legislatively through the section 1a-1 amendment. Therefore, the Secretary can be charged with a legal duty to protect park resources.

### *Park Establishing Statutes*

One dimension of the external threats problem can be traced to the legislation establishing individual national park units. In most instances, Congress has created national parks without a sufficient regard for the characteristics of the ecosystem of the area embraced by the park.<sup>114</sup> Park boundaries set forth in the establishing legislation are more likely to reflect the dynamics of political compromise between competing interests, than the natural and geographic features associated with an area.<sup>115</sup> In the case of Glacier National Park, the park only includes half of the North and Middle Fork drainages, thus the river systems and the important wildlife habitat associated with them do not enjoy the full protection of park status. This accounts for much of the pressure placed upon Glacier since many of the external threats can be traced to developments which have taken place in the unprotected portion of the river systems.<sup>116</sup>

The difficulties involving Redwood National Park and Grand Canyon National Park illustrate the incomplete ecosystem problem graphically. The 1965 Redwood National Park bill omitted upstream lands and upslope forests from the park.<sup>117</sup> This practically doomed the environmental integrity of the park from the outset because existing clearcut logging practices continued in areas immediately adjacent to the park. Until recently Grand Canyon National Park likewise faced considerable external pressure from incompatible land use activity occurring on the federal lands surrounding it.

When Congress realized that the Redwood problem defied solution under existing legislation, it amended the 1965 Redwood National Park Act to respond to the problems presented by the park's configuration and the proximity of privately owned timberlands.<sup>118</sup> Congress expanded the

112. 487 F. Supp. 443, 449 (D.D.C. 1980).

113. *Id.*

114. See A. RUNTE, *supra* note 8, at 14.

115. See R. NASH, *supra* note 10, at 108-21; Sax, *supra* note 108, at 712.

116. See Sax, *supra* note 108; Hudson *supra* note 14, at 794-808.

117. See *supra* text accompanying notes 96-100.

118. Pub. L. No. 95-250, 9 Stat. 163 (1978) (codified at 16 U.S.C. §§ 79b-79q (1982)).

boundaries of the park to more accurately reflect the realities of its ecosystem,<sup>119</sup> and it authorized the Secretary of the Interior to establish a rehabilitation program for logged-over areas now included within the park<sup>120</sup> and to acquire land to create a park buffer zone.<sup>121</sup> In addition, Congress established a program to provide employment for loggers whose jobs were eliminated by the expansion.<sup>122</sup> Similarly, in 1975 Congress recognized that the fractionalized management of the Grand Canyon area was creating problems for the Grand Canyon National Park. Therefore, Congress adopted the Grand Canyon Enlargement Act which expanded park boundaries, regulated certain existing uses within the expanded park, and provided for wilderness study of the area.<sup>123</sup>

These examples suggest that one method available to handle the external threats problem is for Congress to consider each park individually and to amend each park's establishing legislation accordingly. But this approach ultimately does not seem viable on a systemwide basis for dealing with the multitude of external threats presently confronting units of the national park system. When the Congress acts to expand park boundaries, the legislation can be extraordinarily expensive. In the case of the Redwood expansion, Congress considered authorizing \$359 million to acquire the additional acreage.<sup>124</sup> Furthermore, the political obstacles to revising park boundaries are likely to be enormous, even assuming sufficient support in Congress to seriously consider such legislation. Of course, the obvious advantage to confronting the external threats on a park-by-park basis is that it is possible to tailor the solution to the individual park. But this sort of a piecemeal approach does not make much sense when the problem of external threats is endemic to the entire park system, particularly if more comprehensive or less costly solutions are available.

### *Existing Environmental Legislation*

Several federal statutes provide the Park Service with a possible basis to protect the parks against threats stemming from land-use decisions involving federal lands and private property located outside the parks or involving other activities originating from the surrounding area. Existing legislation establishes some relevant standards governing the environment in the parks and on adjacent lands, and it sets forth procedures to be followed for development activities. The Clean Air Act<sup>125</sup> and the Clean Water Act<sup>126</sup> are examples of statutes that establish environmental stan-

119. 16 U.S.C. § 79b(a) (1982).

120. *Id.* § 79c(e).

121. *Id.* § 79b(c).

122. *Id.* §§ 79K, 79L.

123. *Id.* §§ 228-a to 228-j. See Note, *The Grand Canyon Park Enlargement Act: Perspectives on Protection of a National Resource*, 18 ARIZ. L. REV. 232 (1976).

124. See H.R. REP. NO. 581, 95th Cong., 2d Sess. 4, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 490. See also 16 U.S.C. § 79n (1982) (authorizing \$33,000,000 to carry out the Act's rehabilitation provisions).

125. 42 U.S.C. §§ 1857-1857c-1 (1982). See *infra* text accompanying notes 136-51.

126. 33 U.S.C. §§ 1251-1266 (1982). See *infra* text accompanying notes 152-60.

dards which take account of the national parks. The Wilderness Act,<sup>127</sup> Wild and Scenic Rivers Act,<sup>128</sup> Endangered Species Act,<sup>129</sup> and the National Forest Management Act<sup>130</sup> are examples of federal statutes that regulate land-use and development on federal lands including those located adjacent to national parks. The National Environmental Policy Act (NEPA)<sup>131</sup> is also noteworthy since it establishes procedures to be followed by federal agencies contemplating projects that might alter the existing environment. State legislation which governs local zoning and planning processes generally regulates land-use decisions on private lands located adjacent to the parks,<sup>132</sup> although the above-mentioned federal legislation also might have some limited application to private land-use decisions.

When particular land-use proposals or other activities are contemplated or challenged, one or more of these statutes could have some bearing on the decision-making process and the ultimate decision. For example, road construction on forest lands adjacent to a national park requires consideration of the impact on wildlife and other nearby land uses; thus, there might be interplay between such diverse legislation as the National Forest Management Act, NEPA, the Endangered Species Act, and the Wild and Scenic Rivers Act. Since the regulatory jurisdiction of various federal agencies is likely to overlap,<sup>133</sup> it is apparent that cooperative activity among interested federal agencies and other governmental entities should be a necessary part of such a decision-making process. Additionally, under federal environmental legislation such as the Clean Air Act and the Clean Water Act, state officials are often empowered to enforce these acts, as well as granted authority to establish local pollution control standards.<sup>134</sup> Thus, there also is likely to be considerable overlap in the federal and state regulatory role regarding activities occurring on federal, state and private lands adjacent to the parks.

This section does not purport to provide a comprehensive description of these statutes and their regulatory intricacies; rather, it demonstrates

127. 16 U.S.C. §§ 1131-1136 (1982). *See infra* text accompanying notes 173-79.

128. 16 U.S.C. §§ 1271-1287 (1982). *See infra* text accompanying notes 180-90.

129. 16 U.S.C. §§ 1531-1543 (1982). *See infra* text accompanying notes 191-207.

130. 16 U.S.C. §§ 1600-1706 (1982). *See infra* text accompanying notes 208-18. *See also* Federal Land Policy & Management Act, 43 U.S.C. §§ 1701-1784 (1982) (regulating Bureau of Land Management lands). This statute will not be addressed in this article since none of the lands adjoining Glacier National Park are BLM lands. But it should be noted that other national parks share boundaries with BLM lands so the statute could be important in addressing a particular park's external threats problems.

131. 42 U.S.C. §§ 4321-4370 (1982). *See infra* text accompanying notes 161-72.

132. *See infra* text accompanying notes 219-232.

133. For example, the Fish & Wildlife Service in the Department of the Interior is charged with enforcement of the Endangered Species Act, 16 U.S.C. § 1533 (1982), while the Forest Service in the Department of Agriculture is responsible for planning decisions on Forest Service lands, 16 U.S.C. § 1600 (1982). In some instances Congress has anticipated the potential interagency conflict that might arise by virtue of overlapping jurisdictional authorities and has mandated interagency cooperation and has established a dispute resolution mechanism. *See, e.g.*, 16 U.S.C. § 1536 (1982) (Endangered Species Act amendments of 1978).

134. *See, e.g.*, 42 U.S.C. § 7401(a)(3) (1982) (states are primarily responsible for preventing and controlling air pollution). *See also* 16 U.S.C. § 1535 (1982) (Secretary of the Interior required to cooperate with the states in implementing the Endangered Species Act).



their potential application to the external threats problem and their apparent shortcomings in responding to the problems currently confronting the parks. It should be noted that other statutes may have some application to specific problems confronting individual units of the National Park System.<sup>135</sup> But, the enumerated statutes appear to be the major pieces of legislation available to regulate incompatible activities arising outside the park boundaries. Therefore, it is necessary to return to the Glacier National Park example to examine how these statutes might assist park officials in resolving satisfactorily the external threats problem.

### *The Clean Air Act*

The Clean Air Act,<sup>136</sup> the Clean Air Act of Montana,<sup>137</sup> and the regulations promulgated pursuant to them<sup>138</sup> provide considerable protection against deterioration of air quality in the region surrounding Glacier National Park. Most importantly, the federal Clean Air Act classifies national parks and wilderness areas as Class I air sheds and mandates special protection of these areas to ensure against significant deterioration of air quality and visibility.<sup>139</sup> While federal and state air quality standards vary according to the pollutant and its source,<sup>140</sup> the Class I air shed designation is intended to provide the most rigorous protection available under existing law.

Air quality problems in the vicinity of Glacier National Park include particulate, sulfur dioxide, and fluoride emissions traceable to industrial activity in the Flathead Valley, the use of home heating fuels, automobile exhausts, and dirt road travel.<sup>141</sup> Also, park scientists have detected an increased incidence of acid deposition which could be attributed to local industrial activities, as well as industrial activities as far away as the west coast and Japan.<sup>142</sup> The ARCO aluminum reduction plant is the major point source of particulate matter and sulfur dioxide.<sup>143</sup> Its emissions,

135. For example, the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1384 (1982), is likely to provide national parks bordering or including ocean areas (for example, Olympic National Park) with protection against depletion of marine mammals that constitute a part of the park's resources. See also Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101-3233 (1982) (governing, among other things, activities in the Alaskan national parks).

136. 42 U.S.C. §§ 1857-1857L (1982). See generally W. RODGERS, ENVIRONMENTAL LAW 208-353 (1977).

137. MONT. CODE ANN. §§ 75-2-101 to -429 (1983).

138. See 40 C.F.R. §§ 50.1-.12 (1984) (EPA regulations); MONT. ADMIN. R. § 16.8.101 (1981) (Mont. Air Quality Bureau regulations).

139. 42 U.S.C. §§ 7472(a), 7492 (1982). See also MONT. ADMIN. R. § 16.8.923 (1981).

140. See, e.g., 42 U.S.C. § 7408(a) (1982) (requiring EPA to issue air quality criteria for identified air pollutants); 42 U.S.C. § 7411(b) (1982) (requiring EPA to list and establish standards for new stationary sources of air pollution); MONT. ADMIN. R. § 16.6.1401 (1981) (airborne particulate matter standards); *Id.* § 16.8.1413 (sulfur emissions from Kraft pulp mills).

141. See Flathead Basin EIS, *supra* note 57, at 78-79; Glacier Resource Management Plan, *supra* note 58, at 33-35. See *infra* text accompanying note 137-53.

142. Flathead Basin EIS, *supra* note 57, at 76; Glacier Resource Management Plan, *supra* note 58, at 36.

143. See Flathead Basin EIS, *supra* note 57, at 78. It also should be noted that area sawmills and plywood plants contribute as point sources to the region's airborne particulate matter. *Id.*

however, have apparently not exceeded the designated statutory limits.<sup>144</sup> Similarly, the allowable statutory limits have not been violated with respect to non-point source particulate and sulfur dioxide pollutants in the immediate vicinity of Glacier National Park.<sup>145</sup> However, the federal Clean Air Act does not address the park's acid deposition problem due to sulfur dioxide emissions.

The federal Clean Air Act also does not cover all possible air pollutants which could have a harmful effect on park resources. Specifically, the fluoride emissions from the ARCO plant are not regulated under the statute.<sup>146</sup> In 1979, Glacier National Park and other federal land management agencies sued ARCO to limit fluoride emissions which were causing noticeable damage to area flora and wildlife.<sup>147</sup> The court permitted the suit to proceed as a common law trespass action despite ARCO's assertion that the Clean Air Act preempted such common law remedies.

Subsequently, the United States Supreme Court ruled in *Milwaukee v. Illinois*<sup>148</sup> that in the analogous water pollution context, common law claims were preempted by the statutory remedies provided by the Clean Water Act. The decision therefore calls into question the validity of the court's ruling in the ARCO litigation. Nevertheless, the case was eventually settled, and Montana has implemented state fluoride emission standards under the state clean air act.<sup>149</sup> However, the Montana standards establish permissible fluoride levels for crop lands and stock forage, and they do not take account of the effects of fluoride emissions on wildlife and their forage habitat.<sup>150</sup>

The federal Clean Air Act clearly attempts to protect the national parks from significant air quality deterioration by requiring that air quality in the parks meet the highest standards established under the statute.

144. *Id.* at 78-79.

145. *Id.* at 78-83. This section of the Flathead Basin EIS provides a good summary of current air quality conditions in the region, including the results of monitoring on the park's western border at Polebridge and Moose City. *See also* Montana Air Quality Bureau, Dep't of Health & Environmental Sciences, Montana Air Quality Data & Information Summary for 1981, at 61-68 (Sept. 1982).

146. *See* 42 U.S.C. § 7409 (1982); 40 C.F.R. § 50.1-50.12 (1984). *But see* 42 U.S.C. §§ 7408, 7409 (1982) authorizing the EPA to promulgate national primary and secondary ambient air quality standards for each air pollutant that "cause(s) or contribute(s) to air pollution which may reasonably be anticipated to endanger public health or welfare."

147. *United States v. Atlantic Richfield Co.*, 478 F. Supp. 1215 (D. Mont. 1979).

148. 451 U.S. 304, 306 (1981). *See also* *New England Legal Found. v. Costle*, 666 F.2d 30 (2d Cir. 1981), in which the Supreme Court's reasoning in *Milwaukee v. Illinois*, 451 U.S. 304 (1981) was applied to preclude common law actions for air pollution.

149. *See* MONT. ADMIN. R. § 16.8.813 (1981).

150. This problem arises because fluoride tends to accumulate on flora, but since livestock grazing areas are grazed regularly (usually annually), it is unlikely that more than a year's accumulation of fluoride will be on the range and ingested by the livestock. Similarly, fluoride that accumulates on hay that is harvested regularly should rarely reflect a year's accumulation. However, wildlife generally graze in areas sporadically and they are not fed by harvested hay. Therefore, it is entirely possible that grazing wildlife will ingest flora that contain more than a year's accumulation of fluoride. The Montana fluoride emission standard is framed in terms of cumulative fluoride emissions over a monthly or grazing season average. *See* MONT. ADMIN. R. §§ 16.8.813, 16.8.1501-1505 (1981).

The statute reaches both public and private activities external to the park and thus mitigates the impact of potential external threats from both these sources. Nevertheless, the Clean Air Act does not provide comprehensive protection against all air pollution injuries.<sup>151</sup> In the case of Glacier National Park this is evidenced by the lack of protection from fluoride emissions and acid deposition problems.

### *The Clean Water Act*

The Clean Water Act enlists the states in cooperation with the federal government to improve the quality of the nation's water. The main components of the Act are the effluent limitations imposed on discharge sources and general water quality standards.<sup>152</sup> It is significant that under the Act's water quality standards, the waters in Glacier National Park have been designated as Class I, the highest and most pristine water quality designation available.<sup>153</sup> This classification imposes a non-degradation standard on park waters and is designed to maintain the waters in their present condition.<sup>154</sup>

Most of Glacier National Park's interior waterways originate in the park so there are no serious problems with the pollution of these waters by point source discharges.<sup>155</sup> There is, however, commercial activity on border rivers such as the North Fork of the Flathead River, and on tributaries which flow into the border rivers.<sup>156</sup> This commercial activity presents potential pollution problems for these rivers, and the pollutants can also be carried into park feeder streams and thus affect the quality of park waters and fish habitat.

Present sources of water pollution outside the park in the North and Middle Fork drainages include logging, mining and mineral, gas and oil exploration activities and particularly the road construction which is associated with each of these activities. Most of this activity occurs on lands in the Flathead National Forest and is subject to regulation by the

151. See, e.g., Schoenbrod, *Goals, Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 U.C.L.A. L. REV. 740 (1983); Lunesburg, *The National Quest for Clean Air 1970-1978: Intergovernmental Problems and Some Proposed Solutions*, 73 Nw. U. L. REV. 397 (1978). The Clean Air Act's shortcomings in the case of national parks can be illustrated by the situation of the southwestern parks in the vicinity of the Four Corners region where large coal fired power plants were constructed before the effective date of the Act and, thus, the plants' emissions are not regulated under the statute. W. EVERHARDT, *supra* note 15, at 182. See also Ostrov, *Visibility Protection Under the Clean Air Act: Preserving Scenic & Parkland Areas in the Southwest*, 10 ECOLOGY L.Q. 397 (1982).

152. See 33 U.S.C. §§ 1311, 1316 (1982) (effluent limitations); *Id.* § 1313 (water quality standards). See generally W. RODGERS, *supra* note 136, at 419-23; Tripp, *Tensions & Conflicts in Federal Pollution Control & Water Resource Policy*, 14 HARV. J. LEGIS. 225 (1977).

153. 33 U.S.C. § 1313 (1982); MONT. ADMIN. R. §§ 16.20.605, .702(3) (1981).

154. MONT. ADMIN. R. §§ 16.20.701, .702(3) (1981). *But see* Comment, *Nondeterioration and the Protection of High Quality Waters Under Federal Water Pollution Control Law*, 1977 UTAH L. REV. 737.

155. Park waters face some degradation caused by septic systems maintained on in-holder's property. See Flathead Basin EIS, *supra* note 58, at 160-62.

156. *Id.* at 11.

Forest Service.<sup>157</sup> Assuming compliance with Forest Service lease terms and adequate inspection efforts, park waters should be protected from many of the adverse effects of these activities. The major potential source of water pollution stems from the proposed Cabin Creek coal mine in British Columbia which could discharge considerable waste water with mineral content (phosphorous and dissolved nitrates) and sedimentation into the North Fork waters.<sup>158</sup> Unfortunately, the Clean Water Act has no extraterritorial application, so it does not apply to Canadian mining activities.<sup>159</sup>

As in the case of the Clean Air Act, the Clean Water Act provides a substantial degree of protection against the pollution of park waters. But, the Act has not prompted Montana to adopt non-point source pollution control plans so pollution conveyed to park waters by runoff from timber and mining operations is not controlled as effectively as it might be.<sup>160</sup> Also, park waters do not presently enjoy any protection against water pollution originating in Canada. Thus, while the Clean Water Act is helpful in protecting the park's water resources, it fails to provide full protection against the array of external threats facing the park.

#### *The National Environmental Policy Act*

The National Environmental Policy Act<sup>161</sup> (NEPA) requires federal agencies to use all practicable means to administer federal programs in the most environmentally sound fashion.<sup>162</sup> The Act also sets up a procedure for federal agencies to follow in reaching decisions that have environmental consequences. The Act requires federal agencies to prepare an environmental impact statement (EIS) whenever they are considering proposals for "major federal actions significantly effecting the quality of the human environment. . . ."<sup>163</sup> NEPA requires the EIS to identify the

157. See, e.g., 43 U.S.C. § 1761 (1982) (Secretary of Agriculture's authority to impose conditions on grants of rights-of-way with respect to lands within the national forest system); 36 C.F.R. § 223.3 (1984) (contract conditions authorized in the case of Forest Service timber sales); 36 C.F.R. § 228.5 (1984) (plan of operations required before commencing mining operations on national forest lands); U.S. Dep't of Agriculture, Forest Service, Flathead National Forest, Environmental Assessment of Non-Wilderness Forest Lands Oil and Gas Leasing 10-11 (1980).

158. Flathead Basin EIS, *supra* note 57, at 111.

159. *But see* Boundary Waters Treaty, Jan. 11, 1909, United States-Canada, art. IV, 36 Stat. 2477, T.S. No. 551; MONT. CODE ANN. § 75-16-101 to -109 (1983). (Uniform Transboundary Pollution Reciprocal Access Act); Arbitblit, *supra* note 84.

160. Although 33 U.S.C. § 1288 (1982) mandates that the governor of each state should identify each area within it which has substantial water quality control problems, Montana and other states have not done so. Montana's water quality administrative regulations address point sources discharging pollutants but they do not address nonpoint source pollution control issues. MONT. ADMIN. R. § 16.20.901 (1981). See J. TRYENS, *THE TOXICS CRISIS: WHAT THE STATES SHOULD DO* 54 (1983); S. EPSTEIN, L. BROWN, & C. POPE, *HAZARDOUS WASTE IN AMERICA* 312 (1982).

161. 42 U.S.C. §§ 4321-4370 (1982).

162. 42 U.S.C. § 4332(A) (1982). See 42 U.S.C. § 4331 (1982) which lists preservation of "important historic, cultural, and natural aspects of our national heritage" as one of the policies underlying NEPA. See also 40 C.F.R. § 1505.1 (1984).

163. 42 U.S.C. §§ 4332(c) (1982). See 40 C.F.R. §§ 1501-1508 (1984) for Council on Environmental Quality regulations governing the implementation of NEPA, specifically the EIS process. The environmental impact statement process can be avoided by federal agen-

environmental impact of the proposed action, any adverse environmental effects which cannot be modified should the proposal be implemented, and any alternatives to the proposed action.<sup>164</sup>

Under NEPA, the involved federal agency is required to consult other agencies with jurisdiction over or special expertise concerning the environmental problem involved.<sup>165</sup> Major interagency disagreements concerning the environmental aspects of the proposed project are to be referred to the Council on Environmental Quality for its recommendations.<sup>166</sup> After it has reached a final decision, the proposing agency is required to prepare a "record of decision" which summarizes the agency's actions and explains why it rejected environmentally preferable alternatives and mitigation measures.<sup>167</sup> Judicial review is then available to assure compliance with the NEPA requirements.<sup>168</sup>

NEPA establishes a procedure wherein Glacier National Park officials can participate in the decision-making process of other federal agencies responsible for managing the lands surrounding the park or for federal projects contemplated near the park's borders. In most instances federal agencies contemplating actions or management decisions which pose a serious environmental threat to the park cannot avoid the NEPA requirements since such actions almost certainly would be regarded as significantly effecting the quality of the human environment.<sup>169</sup> For example, the recent proposal to improve and upgrade the North Fork road is subject to the NEPA process.<sup>170</sup> Similarly, timber sale decisions and resource development projects, such as oil and gas exploration, planned for the

cies if, after an "environmental assessment," they reasonably conclude that the proposed action will result in "no significant impact" to the environment. 40 C.F.R. § 1501.4 (1984). If an EIS is required, the agency will first prepare a draft EIS (DEIS), followed by a comment period when the public and other interested parties and agencies can respond to the DEIS, and then a final EIS will be prepared. 40 C.F.R. §§ 1502, 1503 (1984).

164. 42 U.S.C. § 4332(c) (1982).

165. *Id.* See also 40 C.F.R. §§ 6.300-6.303 (1984).

166. 40 C.F.R. § 1504 (1984). However, the C.E.Q. cannot overturn the agency decision, it can simply recommend action to the proposing agency and, of course, serve in a mediating capacity.

167. 40 C.F.R. § 1505.2 (1984). In the event of conflict between NEPA and the primary statutory mandate governing the agency's activities, the primary mandate prevails. *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976).

168. The courts can enforce compliance with the NEPA process if the agency decision "was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith. . . ." *Calvert Cliff's Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971). Courts, then, are authorized to review the merits of an agency's final decision to assure that the decision was not made arbitrarily or capriciously. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 228 n.2 (1980).

169. 42 U.S.C. § 4332(A) (1982).

170. The North Fork road decision is subject to NEPA because funds for the road improvement will be provided by the Federal Highway Administration. 23 U.S.C. § 109 (1982). Also, the Forest Service has assumed maintenance responsibility for the road. See Department of Transportation-Fed. Hwy. Admin. Final EIS for Reconstruction of Montana Forest Hwy. Rte. 61, at 1-2. NEPA, therefore, would apply by virtue of the FHA's funding involvement or the Forest Service's involvement. See, e.g., *Steubing v. Brinegar*, 375 F. Supp. 1158 (W.D.N.Y. 1974), *aff'd*, 511 F.2d 489 (2d Cir. 1975); *Earth First v. Block*, 569 F. Supp. 415 (D. Or. 1983).

Flathead National Forest should be subject to NEPA procedures. However, in February, 1981 the Regional Forester concluded that oil and gas leasing activity on non-wilderness lands in the Flathead National Forest which does not involve surface disturbing activity is not a major federal action significantly affecting the environment and, therefore, the EIS process under NEPA is inapplicable.<sup>171</sup> Thus, despite NEPA, park officials are not always guaranteed the opportunity to participate meaningfully in the decision-making processes of coordinate federal agencies even when their actions could threaten park resources.

When NEPA does apply, Glacier National Park officials are able to submit comments on the proposed EIS or they may be consulted by coordinate agencies. The NEPA process permits park officials to advise forest officials or others concerning the potential impact of a proposed federal activity on park resources and to suggest mitigating measures. But NEPA does not mandate a particular result, nor does it require that activities impacting national park resources be given special consideration. In the event that the agencies cannot reach a satisfactory solution, they can submit their disagreement to the Council on Environmental Quality for review, but the proposing agency remains ultimately responsible for the final decision.

Thus, from the park's perspective the effectiveness of the EIS process depends upon the cooperative working arrangements between Park Service officials and their counterparts in other federal agencies. It also depends upon whether NEPA applies to the proposed activity or development. And, when external activities do not occur on federal lands or involve federal agency action—as is the case with second home development on private lands in the North Fork region—NEPA has no application.<sup>172</sup> While NEPA is potentially helpful to park officials in assuring them an opportunity to advise coordinate agencies of potential threats to the park environment, it does not guarantee protection for the park.

### *The Wilderness Act*

The Wilderness Act<sup>173</sup> provides for the creation of wilderness areas and establishes standards for their management. Under the Act, a

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171. The decision authorizes oil and gas leasing activity to the extent that such activity is compatible with surface resource objectives and is regulated under special and standard permitting restrictions to protect surface resources. The decision was reached during the environmental assessment stage of the NEPA process and indicates that further environmental assessment will be necessary if surface disturbing activity occurs. The decision requires inclusion of special stipulations in the granted leases to minimize the impact of the exploratory activities on critical habitat for threatened and endangered species and wild and scenic river areas. See Environmental Assessment, Oil and Gas Leasing on Non-Wilderness National Forest Lands, Flathead National Forest (1980). *But see* Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983).

172. *Cf.* Montana Environmental Policy Act, MONT. CODE ANN. § 75-1-101 to -324 (1983) (statute, modeled after NEPA, applies to actions by state agencies). *But see infra* text accompanying notes 219-32.

173. See 16 U.S.C. §§ 1131-1136 (1982). See generally Robinson, *Wilderness: The Last Frontier*, 59 MINN. L. REV. 1 (1974).

wilderness area is to be managed so as to preserve its wilderness character and to leave it unimpaired for future use.<sup>174</sup> "Wilderness" is defined as "an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain" and as an area of "undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation. . . ."<sup>175</sup> It is generally agreed that wilderness designation provides the greatest assurance under present federal law that the included land will be immune from development or alteration by human activities.<sup>176</sup>

Under the Wilderness Act, parklands may be designated as wilderness areas, but lands within Glacier National Park have not been so designated.<sup>177</sup> However, Congress created the Great Bear Wilderness Area in the Flathead National Forest, and the wilderness boundary begins just beyond the southern park border.<sup>178</sup> Wilderness designation of these lands virtually adjacent to Glacier National Park provides considerable protection to the parklands against incompatible land use. For instance, while there was some recent concern about proposed mining activities in the Great Bear area, this has not materialized into a major threat to the park and the wilderness designation should preclude this and other development activity in the region.

Under the relevant statutes, wilderness designation and national park status have the same objective—preservation of the area's natural condition and its resources.<sup>179</sup> It is not surprising, therefore, that environmental groups and park advocates have frequently lobbied for wilderness designation of federal forest lands adjacent to the parks in an effort to establish buffer zones around the parks. However, this is not a fully satisfactory answer to the external threats problem because Congress has shown no predisposition toward authorizing such a far reaching wilderness program, and many of the federal lands adjacent to the parks lack the characteristics suitable for inclusion in the wilderness system.

174. 16 U.S.C. § 1131(a) (1982).

175. *Id.* at § 1131(c). Specific regulations governing the management of wilderness areas can be found in 36 C.F.R. § 293.1-17 (1984).

176. The original Wilderness Act provided for access to wilderness areas for mineral leasing purposes until December 31, 1983. 16 U.S.C. § 1133(d)(3) (1982). This exception has now expired, although Congress came close to repealing it shortly before its expiration. *See* H.R. 5282, 97th Cong., 2d Sess. (1982); H.R. 5603, 97th Cong., 2d Sess. (1982); H.R. 6542, 97th Cong., 2d Sess. (1982).

177. The Wilderness Act provides that in the event a park area is designated as wilderness, it shall be administered to preserve its wilderness character and in accordance with the purposes established by the Organic Act. 16 U.S.C. § 1133(b) (1982). The Act also provides that designation of parklands as a wilderness area shall not lower the standards governing the area and that the purposes of the act are within and supplemental to the purposes of the Organic Act. *Id.* § 1133(a).

178. Great Bear Wilderness Act, Pub. L. No. 95-546, 92 Stat. 2062 (1978). The Great Bear Wilderness Area is not immediately adjacent to the park. It is separated by the Middle Fork of the Flathead River and Highway 2 and a relatively narrow strip of land which consists of private property and Forest Service lands.

179. *Compare* 16 U.S.C. § 1131(a) (1982) with 16 U.S.C. § 1 (1982). However, the Park Service also is required to manage the parks to provide for public use and enjoyment of them. It appears to some, nevertheless, that the Park Service is gradually drifting toward a predominant philosophy of preservation rather than public use. W. EVERHARDT, *supra* note 15, at 180.

*The Wild and Scenic Rivers Act*

The purpose of the Wild and Scenic Rivers Act<sup>180</sup> is to preserve certain rivers which possess "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values" in their free flowing condition and to protect their immediate environments "for the benefit and enjoyment of present and future generations."<sup>181</sup> "Scenic river areas" are described as "those rivers or sections of rivers that are free of impoundments with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads."<sup>182</sup> The Act requires that each component of the national wild and scenic rivers system be administered "to protect and enhance the values which caused it to be included in said system."<sup>183</sup> The Act also provides for cooperation between various federal and state agencies that are responsible for managing designated rivers and it stipulates that such joint management must be in accord with the purpose of the Act.<sup>184</sup>

The Act contains specific provisions designed to protect designated rivers and the surrounding lands from incompatible activities. First, it directs that "particular attention shall be given to scheduled timber harvesting, road construction, and similar activities" which might be contrary to the purposes of the Act.<sup>185</sup> Secondly, the statute authorizes the regulation of mining activity and claims, and it requires such regulations to "provide safeguards against pollution of the river involved and unnecessary impairment of scenery within the component in question."<sup>186</sup> The Act stops short of prohibiting incompatible activities on lands surrounding a designated river and instead it requires regulation of these activities to minimize potential harm to the rivers and their immediately surrounding lands.

Glacier National Park is bounded by two rivers which are protected under the Wild and Scenic Rivers Act. Most of the North Fork of the Flathead River which constitutes the park's western boundary has been

180. 16 U.S.C. §§ 1271-1287 (1982). See generally Goodell, *Waterway Preservation: The Wild & Scenic Rivers Act of 1968*, 7 B.C. ENVTL. L. AFF. L. REV. 43 (1978).

181. 16 U.S.C. § 1271 (1982). See 16 U.S.C. § 1274(b) (1982) (providing that on the average not more than 320 acres of land on both sides of a designated river shall be included within the protected area).

182. *Id.* § 1273(b)(2).

183. *Id.* § 1281(a). The Act also provides that wild and scenic rivers administered through the National Park Service are subject to the Wild and Scenic Rivers Act and the Organic Act, and that if there is a conflict between the two statutes, the more restrictive provisions shall apply. *Id.* § 1281(c).

184. *Id.* § 1283(a). The statute specifically requires federal officials administering a designated river to cooperate with the Secretary of the Interior and state water pollution control agencies in order to eliminate or diminish the pollution of waters in the river. *Id.* § 1283(c). See also *id.* § 1a-2h (Secretary of Interior authorized to adopt regulations to control boating on national park waters).

185. *Id.* § 1283(a).

186. *Id.* § 1280(a). Forest Service regulations governing mining on Forest Service lands are found at 36 C.F.R. §§ 228-228.15 (1984). Section 228.8 sets forth the requirements for environmental protection and requires that all mining operations "be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest surface resources." *Id.* § 228.8.



designated a "scenic river."<sup>187</sup> The Middle Fork of the Flathead River which constitutes the park's southwestern boundary has been designated a "recreational" river for that portion of the river which is adjacent to the park.<sup>188</sup> Several external threats to the park can be traced to the North Fork area and include resource development activity in the bordering Flathead National Forest, road construction plans, second home development and increased commercial river-rafting operations. The Middle Fork region presents less severe problems, but widening of the highway from Kalispell to West Glacier and expanding commercial rafting operations portend some changes on the lands adjacent to the river and park.

It is clear that any land management decision that would alter the character of either the North or Middle Fork rivers from their designated status would violate the Act.<sup>189</sup> Since the North Fork is designated as a "scenic" river for most of its course adjacent to the park, the parklands should be protected from development activities on the river's shore because the "scenic" designation envisions a largely undeveloped and primitive shoreline. Similarly, the non-pollution standard helps protect the river's waters. The statutory mandate to regulate nearby timber harvesting, resource development, and road construction also should help control these activities and minimize their impact on the river lands and adjacent parklands. To a lesser extent management of the area surrounding the Middle Fork protects nearby lands, but the "recreational" river designation provides less protection against development activities occurring on or near the river than the "scenic" river designation of the North Fork.

The presence of designated rivers on the park's boundaries establishes something of a buffer zone for the park, but the focus of the statute is limited to protecting river waters and the rather narrow strip of land bordering the rivers. The Park Service is an active participant in management planning for the North Fork,<sup>190</sup> and it should be able to comment on management plans which significantly affect the Middle Fork through the NEPA EIS process. But the Park Service ultimately is at least partly dependent upon the cooperation of the Forest Service to assure that management decisions take account of impacts on park resources. Thus, the Wild and Scenic Rivers Act should be regarded as only partially protecting adjacent parklands.

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187. 16 U.S.C. § 1274(a)(13) (1982). "Scenic" river designation covers that portion of the North Fork above Camas bridge and a "recreational" river designation covers that portion below Camas bridge. The park boundary extends to the middle of the river on the North Fork. Therefore, the Park Service, the Forest Service and the State of Montana are all responsible for management of the North Fork.

188. *Id.* The Glacier National Park boundary extends only to the northwestern bank of the Middle Fork, so the park does not include any of the Middle Fork within its boundaries. Thus, the Forest Service and the State of Montana are responsible for management of the Middle Fork.

189. *Id.* § 1281(a).

190. *See supra* note 187. *Cf.* 16 U.S.C. § 1a-2h (1982).

*The Endangered Species Act*

The Endangered Species Act protects endangered and threatened species and their critical habitat.<sup>191</sup> The Act requires the Secretary of the Interior, who is responsible for its administration, to identify and designate species of wildlife, fish, and plants that are endangered (facing possible extinction) or threatened (likely to become endangered) and to designate areas of critical habitat for those species.<sup>192</sup> Under the Act federal agencies contemplating action are required to conduct a biological assessment to identify endangered or threatened species which might be affected by their actions.<sup>193</sup> All federal agencies are required to consult with the Secretary of the Interior (through the Fish and Wildlife Service) to insure that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of (critical) habitat of such species. . . ."<sup>194</sup> After consultation the Secretary is directed to prepare a written opinion concerning the potential impact of the proposed action on the identified species, and to suggest alternatives if the proposed action will jeopardize the species or adversely modify its habitat.<sup>195</sup> Furthermore, the Act prohibits private activity that would constitute a "taking" of protected species.<sup>196</sup> The Act provides for citizen suits to enforce the terms of the statute.<sup>197</sup>

In the case of Glacier National Park, the Endangered Species Act is particularly relevant since the park and the surrounding lands provide important habitat for several species that have been designated as endangered or threatened. The grey wolf has been designated an endangered species,<sup>198</sup> and its habitat includes parklands and adjacent lands located in the North Fork area.<sup>199</sup> The grizzly bear has been designated as a

191. *Id.* §§ 1531-1543. See generally Smith, *Endangered Species Act and Biological Conservation*, 57 S. CAL L. REV. 361 (1983). See also Coggins & Ward, *The Law of Wildlife Management on the Federal Public Lands*, 60 OR. L. REV. 59 (1981).

192. 16 U.S.C. § 1533(a) (1982).

193. *Id.* § 1536(c). The biological assessment may be undertaken in connection with preparation of an EIS pursuant to NEPA. *Id.*

194. *Id.* § 1536(a)(2). 50 C.F.R. § 402 (1984) establishes procedures for the consultation process, and defines key terms in the statute such as "critical habitat," "destruction or adverse modification," and "jeopardize the continued existence of." *Id.* at § 402.02.

195. 16 U.S.C. § 1536(b)(2) (1982).

196. *Id.* § 1538(a)(1)(B). See *id.* § 1532(19) defining the term "take" as meaning "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." See also 50 C.F.R. § 17.3 (1984) which further defines the terms "harass" and "harm" rather broadly. The significance of this provision in the Endangered Species Act, as interpreted by the implementing regulations, is that it limits private activity on park boundaries that might constitute a "taking" of a designated species.

197. 16 U.S.C. § 1540(g) (1982). It is noteworthy that the Act authorizes "any person" to sue for enforcement, which means that an agency such as the National Park Service could initiate an enforcement action. *Id.* § 1540(g)(1)(A). The Act specifies civil and criminal penalties for violation of the statute. *Id.* §§ 1540(a), (b). The Act also authorizes the Attorney General to enforce the statute through a suit for an injunction against anyone who violates the statute. *Id.* § 1540(e)(6).

198. 50 C.F.R. § 17.11(h) (1984).

199. Critical habitat for the grey wolf has been designated, but it does not include any lands in Montana. *Id.* § 17.95(a).

threatened species,<sup>200</sup> and its habitat also includes the park and surrounding lands. The bald eagle and peregrine falcon, other endangered species,<sup>201</sup> annually pass through the park and adjacent lands while migrating, and some bald eagles permanently reside in the area.

To the extent that resource exploration activity, second home development, or road construction on national forest lands in the North Fork area or on other adjacent federal lands threaten these species or their critical habitat, the Act authorizes the Secretary of the Interior to review the proposed activities to determine whether the species will be jeopardized or its habitat adversely modified. If so, the Secretary can recommend alternatives to attempt to mitigate the impact on the species and its habitat. The recommendations of the Fish and Wildlife Service concerning possible jeopardy to the grizzly bear and grey wolf populations in the North Fork area if the North Fork road was paved convinced the Federal Highway Administration to abandon this alternative and to adopt the gravel surface improvement alternative.<sup>202</sup> It should be noted, however, that the agency proposing the action remains ultimately responsible for the decision of whether and how to proceed.<sup>203</sup> The agency's decision will only be overturned on judicial review if it was "arbitrary and capricious"—essentially reached in disregard of the evidence concerning the impact on the species and available alternatives.<sup>204</sup>

While the Endangered Species Act does not provide the Department of the Interior with authority to estop conflicting or threatening activities, it does assure that alternatives and mitigation measures are examined.<sup>205</sup> But, since none of the lands adjacent to Glacier National Park have been designated critical habitat for the listed species, some of the Act's protection is diminished. Moreover, waiver provisions are available under the Act which might enable federal agencies and private parties to circumvent its protective provisions.<sup>206</sup> Finally, the focus of the Act is on preserving wildlife habitat. This focus does not protect adjacent parklands if listed species are not present or if the activity does not adversely modify

200. *Id.* § 17.11(h).

201. *Id.*

202. *See* Federal Highway Administration, Final EIS on Proposed Improvement of the North Fork Flathead River Road (January 1983).

203. *See* National Wildlife Fed. v. Coleman, 529 F.2d 359 (5th Cir. 1976), *cert. denied*, 429 U.S. 979 (1976); Sierra Club v. Froehle, 534 F.2d 1289 (8th Cir. 1976).

204. Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Petersen, 685 F.2d 678, 681 (D.C. Cir. 1982).

205. To the extent that the Flathead National Forest or other federal agencies confront management decisions requiring an environmental impact statement for land surrounding Glacier National Park, park officials will have an opportunity to comment on the proposed action and to monitor compliance with the Endangered Species Act, or to suggest mitigation alternatives. To the extent that agency actions concerning land bordering the park do not require an EIS, the Endangered Species Act still requires consultation with the Secretary of the Interior. *See* S. YAFFEE, PROHIBITIVE POLICY: IMPLEMENTING THE FEDERAL ENDANGERED SPECIES ACT 98-103 (1982) (noting success of consultation requirement).

206. 16 U.S.C. § 1536(e)-(h) (1982); *id.* § 1539(a) (private commercial activity exemption).

wildlife habitat, even though it still threatens park resources.<sup>207</sup> Again it must be concluded that while the Act clearly assists park officials in their efforts to combat threatening external activities, it provides the parks with only piecemeal protection.

### *The National Forest Management Act*

National forest planning is required under the Forest and Rangeland Renewable Resources Planning Act, as amended by the National Forest Management Act.<sup>208</sup> This legislation establishes a Renewable Resource Program to protect, manage, and develop the national forest system.<sup>209</sup> The program is to be developed in accordance with the principles of the Multiple Use-Sustained Yield Act and NEPA.<sup>210</sup> While the National Forest Management Act is geared to develop renewable forest resources for economic purposes, it also recognizes "the fundamental need to protect, and where appropriate, improve the quality of soil, water, and air resources."<sup>211</sup>

The Act requires the Secretary of Agriculture to develop, maintain and revise land and resource management plans for units of the national forest system.<sup>212</sup> The Secretary is required to coordinate with the land and resource management planning processes of state and local governments and other federal agencies.<sup>213</sup> Additionally, the Act provides for public participation in the planning process.<sup>214</sup> The Secretary of Agriculture is directed to promulgate regulations that, among other things, assure consideration in the planning process of "the economic and environmental aspects of various systems of renewable resource managements, including the related systems of silviculture and protection of forest resources, to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife, and fish."<sup>215</sup> Implementation of the Act basically requires forest officials to follow the NEPA EIS process in developing and implementing plans for specific forests.

Since many of the external threats to Glacier National Park originate in the Flathead National Forest, management decisions reached by forest

207. For example, the proposed geothermal exploratory activity on the perimeter of Yellowstone National Park does not directly threaten park wildlife resources. Its impact will most likely be felt by the park's geologic features. Thus, it is not clear that the Endangered Species Act would apply. It is possible, however, that the exploratory activity would significantly affect grizzly bear habitat on lands adjacent to the park which would bring the provisions of the Act into consideration. *Id.* § 1536(c).

208. *Id.* §§ 1600-1687.

209. *Id.* § 1602.

210. *Id.* See *id.* § 528-542(f). (Multiple Use-Sustained Yield Act); 42 U.S.C. §§ 4321-4370 (1982) (NEPA) and *infra* text accompanying notes 161-72. See generally Coggins, *Of Succotash Syndromes and Vacuous Platitudes: The Meaning of "Multiple Use, Sustained Yield" for Public Land Management*, 53 U. COLO. L. REV. 229 (1981).

211. 16 U.S.C. § 1602(5)(c) (1982).

212. *Id.* § 1604(a).

213. *Id.*

214. *Id.* § 1604(d).

215. *Id.* § 1604(g)(3)(A). The Secretary's regulations establishing these guidelines and the planning process itself are found at 36 C.F.R. § 219 (1984).

officials under this legislation have an important bearing on the park environment. Because the Act requires cooperation among land management agencies, park officials are provided an opportunity to participate in the Flathead National Forest planning process.<sup>216</sup> Also, substantial revisions to the adopted plan will require interagency cooperation and adherence to the NEPA procedure, so park officials should have an opportunity to advise forest officials on changes in management direction which pose a threat to the park's environment.

In accordance with the Forest Service's legislative mandate, Flathead National Forest officials have enumerated several potentially conflicting goals in their Proposed Forest Plan. These conflicting goals include promoting recovery of the grizzly bear population, protecting resources in the forest's Wild and Scenic River system, providing for a sustained timber yield, and exploring and developing mineral resources.<sup>217</sup> While the plan is not exclusively concerned with protecting and preserving natural resources, it does take these goals into account and, in this regard, displays some concern for preserving the environmental integrity of forest lands adjacent to Glacier National Park.<sup>218</sup> Ultimately the concerns of Forest Service officials in managing forest lands cannot always be reconciled with the Park Service's interest in preserving the natural condition of the environment. Of course, on occasion their interests will coincide, particular-

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216. Flathead National Forest officials have developed a Proposed Forest Plan and a draft EIS as required under the Act which was available for public comment from March 4 to June 5, 1983. See Department of Agriculture-Forest Service, Flathead National Forest Proposed Forest Plan and Draft Environmental Impact Statement on the Proposed Forest Plan (1983) [hereinafter cited as Flathead DEIS].

217. In the Proposed Forest Plan, Flathead National Forest officials recognize, among others, the following forest goals:

1. Develop and maintain a high level of open communication with the public. Forest management will be coordinated with the land and resource planning efforts of other agencies and adjacent landowners.
2. Intensify management of the forest's three Wilderness areas and the Flathead Wild and Scenic River System to ensure resource protection while providing quality recreation opportunities.
3. Manage the full spectrum of recreation opportunities that exist on the forest.
4. Work toward achieving a recovered population of grizzly bears.
5. Maintain and, where appropriate, improve over time the habitat to support increased populations of big-game wildlife species.
6. Strive to maintain high quality water to protect migratory and resident fisheries, water-based recreation opportunities, and public water supplies.
7. Provide a sustained yield of timber that is responsive to local timber industry's needs and consistent with other forest management goals.
8. Provide opportunities for the exploration and development of mineral resources while protecting the identified resource values.
9. Develop and implement a road management program, with road use restrictions and closures, that is responsive to resource protection needs and public concerns.

Flathead National Forest Proposed Forest Plan II-1.

218. The Forest Service's Proposed Action, Alternative 8 in the DEIS, takes account of some environmental values, including assuring recovery of the grizzly bear population, enhancing visual quality in the national forest, and providing for roadless dispersed recreational opportunities. Flathead DEIS, *supra* note 218, at 5-12. But this alternative also provides for increasing recreational opportunities generally and this could add to the human use pressure on national forest lands adjacent to Glacier National Park. *Id.* at 5-13.

ly when Forest Service planners are constrained by the mandates of other legislation, such as the Wilderness Act and the Endangered Species Act.

While the Forest Service planning process provides park officials with an opportunity to "lobby" to eliminate or modify external activities that threaten the park's environment, it does not assure them that their concerns will carry the day. Park officials consequently are dependent upon the goodwill and cooperation of their Forest Service counterparts who are charged with a distinctly different mission in managing their resources. In view of the developments that have given rise to the parks' external threats problems, it seems clear that the problem will not always be adequately addressed by Forest Service planners, notwithstanding their best intentions.

### *State Zoning and Land-Use Planning Statutes*<sup>219</sup>

Montana statutes, like those of most states, establish a comprehensive system for adopting and implementing zoning regulations and land-use plans at the local level. The statutes authorize county zoning and local subdivision regulation.<sup>220</sup> But the statutes only establish general standards governing local planning or zoning decisions; specific zoning decisions are left to the discretion of local officials.<sup>221</sup> The statutes do provide for a public hearing before establishing or revising zoning districts or adopting or

219. It also should be noted that other Montana statutes, particularly state environmental protection legislation, could apply and regulate land-use decisions and other development activities occurring on lands adjacent to Glacier National Park. However, it is beyond the scope of this article to examine the breadth and potential effectiveness of these statutes. See generally MONT. CODE ANN., tit. 75, "Environmental Protection" (1983).

One aspect of state environmental control legislation is worth noting since it could afford national parks in some states enhanced protection against adjacent land-use practices. While many states, like Montana, have adopted environmental control legislation modeled after NEPA, 42 U.S.C. § 4321 (1982), some states have also adopted environmental rights statutes that provide additional protection against environmental degradation. Environmental rights statutes typically confer standing on any organization or citizen to challenge in court any governmental or private actions that threaten state air, water, land and other natural resource values. The court has the authority to review the challenged activity to determine if it has detrimentally affected the environment and, if so, to enjoin the activity and provide other appropriate relief. See MICH. STAT. ANN. § 14.528(201) (Callaghan 1968); MINN. STAT. §§ 116B to 116B-13 (1977); CONN. GEN. STAT. § 22a-17 (1975); IND. CODE § 12-6-1-2 (1977); S.D. CODIFIED LAWS ANN. § 34A-10-9 (1977). These state environmental rights laws would seem to provide additional protection to national parks located within the adopting state since they authorize suits against environmentally harmful activity occurring on lands surrounding a national park, and they presumably authorize the court to take account of the national park in evaluating the environmental impact of the challenged action. Cf. West Mich. Env'tl. Action Council v. National Resource Comm., 405 Mich. 741, 275 N.W.2d 538 (1979), cert. denied, 444 U.S. 941 (1979) (sustaining citizen challenge to oil and gas exploration in a state forest that would detrimentally affect a local elk herd). Montana has not adopted such a statute.

220. See MONT. CODE ANN. §§ 76-2-101 to -412 (1983).

221. *Id.* § 76-2-203. It should be noted that some states have adopted zoning and planning standards that are intended to provide protection for unique areas within the state, such as national parks, in the land-use planning and zoning process. See, e.g., FLA. STAT. § 380.05(1)(a) (1964) (providing for the designation of "areas of special concern"); WYO. STAT. § 9-8-202 (1977). But see Askew v. Cross Key Waterways, 372 So. 2d 913 (Fla. 1978).

amending zoning regulations.<sup>222</sup> Also, the statutes provide that any "person aggrieved" by a zoning decision may appeal to a Board of Adjustment and, ultimately, to a court of record.<sup>223</sup>

In the North Fork area adjacent to Glacier National Park, private landholdings are interspersed with the Flathead National Forest lands. Similarly private landholdings adjoin the park in other areas along its border. Subdivision and development activity has occurred and continues to occur on these private lands. This land development activity threatens to alter the relatively undeveloped state of the North Fork region and it portends a significant increase in the number of people residing or vacationing on the park's border. This will decrease the wilderness experience available to park visitors traveling in or near this area. It will also alter important wildlife habitat, thus further threatening the natural environment of the park. In addition, residential development in the North Fork area was partially responsible for the decision to improve the North Fork road.

Pursuant to the state legislation, Flathead County Commissioners have promulgated subdivision regulations applicable throughout the county, including the North Fork area.<sup>224</sup> The regulations provide for subdivision approval if the proposed development is in the "public interest."<sup>225</sup> The county subdivision regulations exempt certain land transactions from public review as a subdivision.<sup>226</sup> Notably, with one exception, the thirty or more land divisions that have recently occurred in the North Fork area have not been subject to county subdivision regulations, either because the subdivision preceded implementation of the regulations or was otherwise exempt.<sup>227</sup>

222. MONT. CODE ANN. § 76-2-205 (1983).

223. *Id.* §§ 76-2-226, 227. The courts generally interpret the concept of an "aggrieved person" rather broadly for administrative law purposes. *See, e.g., Association of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150, 154 (1970).

224. *See* Flathead County Subdivision Regulations 1975.

225. *Id.* at § 2.5.5. The "public interest" concept is further defined in the regulations to include the following considerations:

- a) the basis of the need for the subdivision;
- b) expressed public opinion;
- c) effects on agriculture;
- d) effects on local services;
- e) effects on taxation;
- f) effects on the natural environment;
- g) effects on wildlife and wildlife habitat; and
- h) effects on the public health and safety.

The regulations also require that a proposed subdivision development plan (preliminary plat) include an environmental assessment which provides county officials with a comprehensive analysis of the environmental impacts expected to accompany a development. *Id.* at § 3.2.2, app. B.

226. For example, the regulations exempt "occasional sales" (a sale occurring within a twelve-month period) and a single conveyance to an immediate family member. *Id.* at §§ 2.14(D), (E).

227. Subdivision number 63 in the Round Prairie region is the one exception. *See* Flathead County, Montana Subdivision Activity Map (available from the County Clerk and Recorder's Office, Kalispell, Montana).

National Park Service policy encourages park officials to participate in local land-use issues to protect park resources and avoid land-use conflicts.<sup>228</sup> Although park officials and others are legally entitled to participate in local land-use planning matters in Montana—which includes the right to seek administrative and judicial review of objectionable zoning or exemption decisions—this does not provide them with much assurance that park resources will be adequately considered or protected. The county regulations only establish a broad and amorphous “public interest” standard governing subdivision development, and they are rather easily by-passed through the exemption process.<sup>229</sup> Even if park officials scrupulously adhere to the recent Department of the Interior directives encouraging their participation on behalf of the park in local land-use matters, the effort may not have any appreciable effect on private land development activities occurring on the park’s borders.

In 1983, as an outgrowth of the Flathead Basin Environmental Impact Study, Montana adopted the Flathead Basin Commission Act which provides for an intergovernmental regional planning approach to development in the Flathead Basin.<sup>230</sup> The Act attempts to insure against environmental degradation in the basin by establishing the Flathead Basin Commission and requiring the Commission to “encourage close cooperation and coordination between federal, state, provincial, tribal, and local resource managers.”<sup>231</sup> But the Commission only has the authority to recommend action to the state legislature and governor.<sup>232</sup> Thus, while the Act implements an innovative regional planning strategy which could mitigate environmental harm in the North Fork region, there is no assurance that the Commission has adequate authority to perform effectively.

### Summary

The picture that emerges from this brief excursus through the potentially relevant statutes is that the national parks are not adequately protected from the external threats problem by existing legislation. The Organic Act mandates the protection of park resources but it does not extend Park Service jurisdiction beyond park boundaries. Congress has responded to individual, severe external threats by amending the park establishing legislation, but this has proven to be the exceptional case and it can be very costly. Although the Clean Air and Water Acts are

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228. See Memorandum from Russell E. Dickensen, Superintendent of the National Park Service, to Park Service Deputy Directors Grier and Hutchinson (Nov. 17, 1982). See also Special Directive 82 from the Superintendent to park superintendents and others (Draft on file with the author). In his memorandum the Superintendent declined to adopt the formal policy recommended in Special Directive 82, but he encouraged Park Service involvement in local land-use issues.

229. As Professor Sax has noted, it is not surprising that the county has not imposed more rigorous standards upon local property owners. Local political pressures and economic considerations are usually far more likely to influence zoning and land-use regulation decisions, than concern for national park resources. See Sax, *supra* note 108, at 710.

230. MONT. CODE ANN. §§ 75-7-301 to -308 (1983).

231. *Id.* § 75-7-304(2).

232. *Id.* § 75-7-305(1).



designed to protect park air and water resources by specially designating the parklands for the highest degree of protection, there are enough gaps in these statutes to create problems for the Park Service in confronting specific air and water quality problems. Congressional expansion and "fine tuning" of these statutes as well as agency revision of pertinent regulations could tighten the legislation sufficiently to protect and enhance park air and water quality.

Even if park air and water quality were assured, the problem of incompatible adjacent land use remains a serious threat to park resources. The mosaic of federal land-use statutes fails to guarantee protection for park resources against incompatible activities on adjacent federal lands.<sup>233</sup> Virtually, none of the federal land-use statutes take special account of the unique environmental position of the national parks in establishing a regulatory scheme for federal lands, even if the lands are adjacent to parks. Legislation such as the Wilderness Act and Wild & Scenic Rivers Act can provide a buffer zone for the parks if adjacent lands have been appropriately designated, but this is only occasionally the case. Otherwise the federal agency responsible for the lands manages them in accordance with a mandate that differs considerably from the Park Service's preservation mandate. Park officials can participate in the land management decision-making process through the NEPA procedures or under statutory consultation requirements, but the responsible agency remains the ultimate decision-maker concerning resource use and development projects.

These federal statutes generally do not regulate developments on private lands adjacent to the parks, and Congress has been reluctant to extend its authority over private landholdings. State and local land-use legislation provides limited regulation of private land-use decisions, but it is not geared toward considering the special needs of nearby parklands. Since these existing statutes do not fully safeguard national park resources against the impact of external developments, the question arises whether additional legislation could protect the national parks effectively without too severely disrupting existing land management schemes.

#### SOLUTIONS

Solving the national parks' external threats problem is partly dependent upon congressional action since existing legislation fails to assure that the parks' natural ecology and resources will be adequately protected. As was demonstrated by the legislation that finally settled the Redwood National Park controversy, Congress clearly has the authority to act on behalf of the parks. First, Congress enjoys plenary powers over the federal lands under the property clause.<sup>234</sup> The property power also has been broad-

233. This problem is graphically illustrated by the Department of the Interior's own intra-agency decision-making involving Bureau of Land Management grazing policies on lands adjacent to the national parks. Recently the BLM adopted a policy which would enable BLM grazing permittees to acquire effective control over water sources within national parks for the use of their livestock at the expense of park wildlife. See 130 CONG. REC. S2921 (daily ed. Mar. 20, 1984) (remarks of Sen. Chaffee introducing the amendment).

234. U.S. CONST. art. IV, § 3, cl. 2. See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

ly interpreted to permit federal regulation of activities on private lands to preserve the ecological integrity of nearby federal lands.<sup>235</sup> Second, Congress' commerce power also has been expansively read,<sup>236</sup> and this too could provide Congress with a legislative means to reach private and governmental activity on lands surrounding the parks.<sup>237</sup> Third, Congress enjoys broad powers pursuant to its taxing and spending power, which enables it, for example, to purchase adjacent lands for inclusion in the national park system.<sup>238</sup> Assuming the political will to protect national park resources—and that seems apparent at least in the case of the House of Representatives, given its repeated endorsement of the Parks Protection Act—the question then becomes how Congress might best exercise its powers to mitigate the current external threats problem and assure a reasonable degree of protection for the parks.

Since the external threats problem is endemic to the entire national park system, one approach Congress can follow is to devise a comprehensive solution that could be implemented systemwide. In the past Congress has adopted this strategy in responding to the parks' concessions problems and the threat of mining in the parks.<sup>239</sup> The proposed Parks Protection Act similarly seeks to implement a systemwide solution to the external threats problem.

The external threats problem, however, may defy such a comprehensive approach. The national parks are amazingly diverse, and the nature and degree of external threats vary widely from park to park. The large, wilderness-like parks with ecosystems substantially intact generally face problems similar to those experienced by Glacier National Park. While external developments on nearby public and private lands threaten specific park resources, the cumulative effect of these activities severely threatens these parks' ecosystems. On the other hand, the smaller, non-wilderness parks, such as the national monuments and historic sites, are much less likely to be defined by ecosystem characteristics, and their concern usually

235. *Kleppe*, 426 U.S. at 546; see also *Sax*, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239 (1976); *United States v. Brown*, 552 F.2d 817, 822 (8th Cir. 1977), cert. denied, 431 U.S. 949 (1977); *Minnesota ex rel. Alexander v. Block*, 660 F.2d 1240, 1248-51 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982).

236. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Perez v. United States*, 402 U.S. 146 (1971).

237. The question regarding Congress' power to regulate local governmental land-use decisions arose by virtue of the Supreme Court's ruling in *National League of Cities v. Usery*, 426 U.S. 833 (1976). But see *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985) (overruling *National League of Cities v. Usery*). See also *Hodel v. Virginia Surface Mining and Reclamation Ass'n.*, 452 U.S. 264, 293 n.34 (1981) (the Court assumed that land-use regulation is an "integral governmental function" of state or local governments); *Minnesota ex rel. Alexander v. Block*, 660 F.2d 1240, 1248-51 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982) (rejecting tenth amendment challenge to federal regulations limiting motor vehicle use on state lands adjacent to a federally designated wilderness area).

238. See *Land & Water Conservation Fund Act*, 16 U.S.C. §§ 460 to 460L-22 (1982). See generally *Buckley v. Valeo*, 424 U.S. 1 (1976). Also, Congress enjoys the power of eminent domain which would enable it to condemn private property and to take the land for public purposes such as the establishment or expansion of a national park. U.S. CONST. amend. V.

239. See *Concessions Policy Act of 1965*, 16 U.S.C. §§ 20-20(g) (1982); *Mining in the National Parks Act of 1976*, 16 U.S.C. §§ 1901-1912 (1982).

is with controlling external activities that threaten to degrade the park's particular attractions. Congress can reasonably take some account of these and other notable differences among the parks in framing a response to the external threats problem. The legislation sponsored by Senator Chaffee and the solutions proposed here adopt this approach.

In its broadest dimensions the external threats problem calls into question the management of federal lands adjacent to the national parks and the use of private lands located on or near the parks' borders.<sup>240</sup> To solve the problem, therefore, Congress should address the federal interagency coordination issue and the ticklish question of regulating private land-use for federal purposes. Ideally a final solution should resolve both of these issues, although the parks would certainly receive some relief if Congress effectively addressed at least one of them. Thus, the proposals which follow should be evaluated in terms of how they respond to either of these two issues, and whether they might be modified or coordinated to solve both issues.

### *The Parks Protection Act*

The House of Representatives has twice passed a Parks Protection Act, but the legislation has languished in the Senate without action.<sup>241</sup> The bill introduced in the Ninety-eighth Congress was designed as a response to the 1980 *State of the Parks Report*.<sup>242</sup> The bill adopted three basic approaches to the "threats" problem. It established a comprehensive parks management program which required park officials to study, document and report on park resources and threats to them. It created a federal agency review program that mandated Interior Department review of federal agency actions that might threaten park resources, and the bill required park officials to work cooperatively with federal, state and local officials responsible for managing lands surrounding the national parks.

Several features of the Parks Protection Act should be noted. The bill expressed Congress' intent to provide "the highest degree of protection" to the natural and cultural resources of the national park system.<sup>243</sup> Because no comprehensive scheme currently exists to assure that park resources are not degraded and that external threats are identified and

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240. While the external threats problem also involves air and water pollution issues, it seems that many of the air and water pollution problems could be solved by revising the Clean Air Act and the Clean Water Act or by revamping administrative regulations and practices under the statutes. See *supra* text accompanying notes 136-60. Since air and water pollution threats to the national parks can be traced to adjacent land use decisions, these problems also can be addressed through legislation regulating public and private land-use on adjacent property. Therefore, this section will focus on this broader question of land-use management. See also *supra* note 81. .

241. See *supra* note 6.

242. H.R. 2379, 98th Cong., 1st Sess. § 2 (1983) [hereinafter cited as H.R. 2379]; H.R. REP. NO. 170, 98th Cong., 1st Sess. 2-4 (1983) [hereinafter cited as H.R. REP. NO. 170].

243. H.R. 2379, *supra* note 242, § 3.

monitored,<sup>244</sup> the bill required the Secretary of the Interior to implement a detailed resource management program for the parks. First, the bill provided that a biannual "State of the Parks" report be submitted to Congress documenting the condition of park resources and threats to them.<sup>245</sup> Second, it required the Secretary annually to submit a prioritized list of park threats and cost estimates to eliminate the threats to congressional budget committees.<sup>246</sup> Third, the bill mandated that the Secretary inventory park resources and undertake research related to the threats problem.<sup>247</sup> This required each park unit to prepare resource management plans identifying the park's various resources, internal and external threats to these resources, and proposals responsive to the perceived threats.<sup>248</sup> Additionally, the bill required the Secretary to hire and retain park personnel with a sufficient scientific and professional background to accomplish the bill's research goals.<sup>249</sup>

The Parks Protection Act contained two particularly significant provisions: the federal program review scheme and the intergovernmental cooperation mandate. The program review scheme was intended to assure that the special status and needs of the national parks would be considered before federal agencies undertook actions that might impact park resources.<sup>250</sup> First, section 10 of the bill limited the Secretary of the Interior's administrative authority over non-park public lands located within or adjacent to park units. Section 10 required the Secretary to certify that his management decision "will not have a significant adverse effect on the values for which such park system unit was established."<sup>251</sup> Second, section 11 of the bill extended the program review requirements to encompass coordinate federal agency actions that might affect the national parks. This "Federal Program Review" section required a federal agency

244. *Id.* § 2(4).

245. *Id.* § 4(a). The bill required the State of the Parks report to include: information on each park system unit, that among other things, described the unit, prioritized existing internal and external threats, noted ongoing and planned research, management and protective activities; and a rather detailed description and assessment of systemwide policies and programs designed to protect the parks. *Id.*

246. *Id.* § 5.

247. *Id.* § 6. The bill provided for the Secretary of the Interior to contract with the National Academy of Sciences to undertake the inventory and research requirements of this section.

248. *Id.* § 7. This section also envisioned coordination between park general management plans, see 16 U.S.C. § 1a-7 (1982), and the required resource management plan. See also H.R. 2379, *supra* note 242, § 15 (amending 16 U.S.C. § 1a-7 (1982)). Also, this section provides for coordination between the Park Service, other federal agencies, and the states in the preparation of the park's resource management plan. H.R. 2379, *supra* note 242, § 7.

249. H.R. 2379, *supra* note 242, § 14.

250. The bill entirely exempted certain federal actions from this program review scheme: 1) those required to safeguard life and property; 2) those necessary to respond to a state of disaster; 3) those necessary to respond to national security threats. *Id.* § 11(h).

251. *Id.* § 10(a), (b). The Secretary was authorized to proceed with the proposed action, even if it significantly affected park resources, if he determined that the public interest underlying the action was of greater importance than the threatened park values and his actions did not violate the Organic Act. In this event, the Secretary was required to delay implementation of his action for thirty days after notifying Congress of his decision to proceed. *Id.* § 10(b).

“conducting or supporting activities within or adjacent to” national park system units to proceed “to the extent practicable” in a manner which insured that its activities would not significantly degrade park resources.<sup>252</sup> It also established a procedure for the Secretary of the Interior to review proposed actions that might impact park resources and to recommend changes to avoid impacts on the park.<sup>253</sup> Section 11 required the proposing agency to “fully consider” the Secretary’s recommendations before proceeding with the project.<sup>254</sup>

Third, in the event of disagreement between the Secretary and the proposing agency, the bill provided for notifying the appropriate park oversight congressional committees and provided a thirty-day hiatus on implementing the decision.<sup>255</sup> In addition, the bill provided for public notification of the proposed action and decision, public access to relevant information concerning the matter, and judicial review.<sup>256</sup> The House Committee on Interior and Insular Affairs Report on the bill emphasized that the program review section did not authorize the Secretary of the Interior to block any other federal agency’s actions; instead it represented a mechanism for coordinated consultation and review of federal programs to ensure that the federal goal of preserving park resources was considered before potentially threatening programs were implemented.<sup>257</sup>

The second significant provision of the bill imposed upon the Secretary of the Interior an intergovernmental cooperation mandate. Specifically, the bill required the Secretary to cooperate with government agencies, including state and local government bodies, that were responsible for managing lands within or adjacent to national park units. The bill envisioned cooperative efforts between the governmental units to adopt “mutually compatible land use or management plans or policies for the general area.”<sup>258</sup> This section authorized the Department of the Interior to provide technical assistance to the involved governmental units and to provide grants to local governments to encourage them to protect threatened park resources.<sup>259</sup> It also imposed staffing requirements to ensure that persons trained in resource management and intragovernmental affairs would be added to the national park or regional staffs.<sup>260</sup> This section is comprehensive since it provides for intragovernmental cooperation at the federal level and it requires cooperation between the Park Ser-

252. *Id.* § 11(a).

253. *Id.* §§ 11(b), (c), (d). The bill required compliance with the Secretary’s recommendations if the proposing agency’s actions would have occurred on federal lands located within park boundaries. *Id.* § 11(f)(1)(A). In the case of federal actions on non-federally owned lands within park unit boundaries, the bill required compliance unless the public interest in the action outweighed the need to protect resources. *Id.* § 11(f)(1)(B).

254. *Id.* § 11(f)(2).

255. *Id.*

256. *Id.* §§ 11(g), (i).

257. H.R. REP. No. 170, *supra* note 242, at 8-10.

258. H.R. 2379, *supra* note 242, § 12(a). *See also id.* § 11(e) which required the Secretary to consider city, county, state or federal comprehensive development plans when evaluating a proposed agency action.

259. *Id.* §§ 12(a), (c).

260. *Id.* §§ 12(b), (f).

vice and state and local officials as a means of addressing the problem presented by external threats originating on state and private lands adjacent to the parks.<sup>261</sup>

The bill was not favorably received by the Department of the Interior.<sup>262</sup> The Department was concerned that the program review provisions amounted to a Department of the Interior veto authority over other agencies' actions notwithstanding the potential public benefit that might flow from their projects.<sup>263</sup> The Department objected to the open endedness of the language establishing and describing the program review requirements<sup>264</sup> and it argued that the mandatory review program was unnecessary because the Park Service already consulted and cooperated with its neighbors.<sup>265</sup> The Department also objected to the bill's mandatory research, planning and reporting requirements, noting that it needed administrative flexibility to respond to particular park problems, and it decried creating a local grant program as an unnecessary federal expenditure.<sup>266</sup>

Three members of the House Committee on Interior and Insular Affairs also objected to the bill. While applauding its purpose, they feared the bill represented too great a federal intrusion on the prerogatives of local government and private landowners holding property adjacent to the parks. The Committee dissenters believed that the bill would create "buffer zones" on park perimeters.<sup>267</sup> They also perceived a legislative preference for protecting park resources at the apparent expense of public use.<sup>268</sup> Furthermore, they strenuously objected to the program review section largely because it concentrated too much potential control over non-park activities in the National Park Service.<sup>269</sup> They argued that the term

261. It should be noted that there were a variety of other provisions in the bill establishing such things as a public education program and a scheme to encourage real property donations and setting forth definitions. *See id.* § 13 (public education program); *Id.* § 16 (donations); *Id.* § 18 (definitions). *See also id.* § 9 (priority attention to parks designated as "world heritage sites" or "biosphere reserves"); *Id.* § 17 (reconciling bill with the 1980 Alaska National Interest Lands Conservation Act).

262. H.R. REP. No. 170, *supra* note 242, at 12-15. The Director of the National Park Service twice testified against the bill and the Department submitted a report critical of the bill. Their objections were virtually identical.

263. *Id.* at 14.

264. *Id.* at 13-14. The Department specifically alluded to the difficulties presented by the ambiguous language accompanying the program review requirement—for example, "no significant adverse effect" on park values and "adjacent" areas— and speculated that considerable litigation might be expected because these terms did not lend themselves to easy interpretation.

265. *Id.* The Department noted that its new initiatives, such as the planned Land Protection Policy initiative, should help provide needed protection to park resources.

266. *Id.* at 12-14.

267. *Id.* at 17-18 (dissenting views of Representatives Young, Vucanovich and Hansen).

268. *Id.* at 17-18. They specifically noted that section 2 of the bill contained congressional findings that were exclusively concerned with assuring preservation of park natural or cultural resources without any reference to public use of the parks. They feared that the legislation may provide a basis to restrict public use in favor of preservation of park resources. This objection clearly reflected the longstanding debate over the value of preservation versus public use of national park resources. *See generally* J. SAX, *supra* note 8.

269. H.R. REP. No. 170, *supra* note 242, at 20.

“adjacent” lands was not defined, which meant that the Park Service might exercise an oversight role regarding activities far removed from the parks.<sup>270</sup> They also believed that this section and the grant section would undermine the autonomy of state and local governments.<sup>271</sup> As in the case of the Department of the Interior, the Committee dissenters felt that existing authorities were adequate to protect the parks and they pointed to the Reagan administrations’s program of upgrading park facilities as evidence of this.<sup>272</sup>

While some of the expressed concerns represent valid objections to the Parks Protection Act, several of the objections are shortsighted and fail to appreciate the assistance that the bill could provide parks, such as Glacier National Park. A glance at the 1980 *State of the Parks Report* reveals the extent to which Glacier officials lacked complete information concerning the dimensions of identified external threats problem.<sup>273</sup> Virtually every category of external threats was classified as needing further documentation.

The National Park Service and Glacier officials, however, have begun addressing the documentation problem. The Park Service has adopted a policy requiring park units to prepare and maintain a resources management plan to identify park resources, their current condition and potential threats to them, and to plan management strategies to conserve the resources.<sup>274</sup> Glacier officials recently completed their Resources Management Plan, and it addresses many of the external threats problems and suggests management directions to mitigate threats to the park’s resources.<sup>275</sup> In accordance with recommendations in the plan, Glacier scientists have begun a park resource monitoring program designed to detect changes in air and water quality at strategic locations throughout the park.<sup>276</sup> They also are monitoring environmental changes associated with nearby logging, oil and gas exploration activities, and continued subdivision development in the North Fork region.<sup>277</sup> The Park Service therefore has begun implementing a comprehensive resource management program and Glacier National Park officials have already undertaken some of the research and planning effort envisioned in the bill.

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270. *Id.* The Committee defended its selection of the term “adjacent” and its decision not to define the term by reference to specific linear distances by noting the differences between the various parks in the national park system and their surroundings. The Committee contrasted large western parks with an historical landmark, such as the Ford’s Theatre in Washington, D.C., and concluded that the concept of “adjacent” would be applied differently in these cases. *See id.* at 8-9.

271. *Id.* at 20-21.

272. *Id.* at 18.

273. 1980 STATE OF THE PARKS REPORT, *supra* note 1, at 46-47.

274. *See* Glacier Resource Management Plan, *supra* note 58, at 1 (statement for Management and the Master Plan); Memorandum from the National Park Service Director to Regional Directors regarding the Resource Management Plans (September 11, 1980). *See also* National Park Service, Resource Management Program Analysis and Planning Guidelines (Dec. 10, 1980).

275. *See* Glacier Resource Management Plan, *supra* note 58.

276. *Id.* at 31-53 and author’s interview with Alan O’Neil, Glacier National Park Assistant Superintendent, and Cliff Martinka, Chief Wildlife Biologist for the park (June, 1983).

277. *See* Glacier Resources Management Plan, *supra* note 58, at 13-19.

The program review provisions of the bill, however, are likely to provide Glacier officials with opportunities to resolve external threats problems which they presently do not enjoy. As illustrated previously, the existing federal legislation—notwithstanding NEPA—does not assure park officials an opportunity to participate in or comment upon proposed developments on adjacent federal lands. For example, following the Regional Forester's determination that an EIS was unnecessary in the case of oil and gas exploration activities on Flathead National Forest non-wilderness lands, park officials were virtually foreclosed from commenting upon or influencing leasing decisions involving North Fork lands adjacent to the park.<sup>278</sup> It is significant that the Forest Service's Environmental Assessment of the proposed leasing plan contains no discussion of the impact of the scheme on park resources and, in fact, only occasionally even mentions the park.<sup>279</sup> Forest Service and park officials apparently consulted each other informally,<sup>280</sup> but this was not mandated by present legislation. Under the bill park officials would be assured of the opportunity to comment upon and review decisions such as oil and gas leasing decisions, the North Fork road upgrade decision, and timber lease decisions. More importantly, the proposing agency would be required to at least consider the decision's impact on park resources and the park's mitigation suggestions. Furthermore, the possibility of congressional review would exist if the agencies were unable to agree upon steps to avoid degrading park resources. The bill's approach, therefore, would require meaningful federal coordination, consultation and review—with an eye on the condition of the park—which is lacking under existing legislation.

The Park Protection Act also could assist Glacier officials in their relationships with local government officials. In view of the private land development activity occurring in the North Fork region it is important that park officials involve themselves in the local planning process. Current Park Service policy encourages such involvement, but it stops short of mandating cooperative efforts as would have been required by the bill.<sup>281</sup> Additionally, the bill authorized park officials to provide technical assistance—presumably for evaluation purposes—to local officials and it created a grant program designed to enlist local cooperation to protect park resources. Although these are potentially controversial approaches which could engender resentment rather than cooperation from local officials, if park officials carefully limit their role and give proper regard to local initiatives, they may actually enhance their relationship with local officials while benefiting both the park and local landowners.

The Glacier National Park example illustrates some of the possible detriments and benefits of adopting a parks protection act. The bill's research, monitoring, and reporting provisions seem to duplicate present Park Service policies. The Park Service clearly has the authority under

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278. See *supra* note 171 and accompanying text.

279. See U.S. Dept. of Agriculture, Forest Service, Environmental Assessment on non-Wilderness National Forest Lands, Oil and Gas Leasing in Flathead National Forest (1980).

280. *Id.* at 54-56.

281. See *supra* note 228.



the amended Organic Act to mandate similar research, monitoring and investigation efforts in the parks.<sup>282</sup> And there is no reason why the resource management plan program could not be coordinated with the statutory general management plan program under section 1a-7.<sup>283</sup> While the Organic Act does not provide for a periodic reporting to Congress on the state of the parks, this might be included in the report required under section 1a-7, or the Organic Act might be amended to provide for such a report. If Congress were convinced that the Department of the Interior had fully exercised the authority available to it to protect park resources and had implemented an effective monitoring program, it is questionable whether Congress would feel the need to review regularly the state of affairs in the parks. If it did perceive such a need, Congress surely has the authority to solicit follow-up reports on the 1980 *State of the Parks Report*. Additionally, the Department of the Interior has the authority in managing its internal affairs—if it is willing to exercise it—to assure that adequately trained personnel are available to deal with park resource problems.

On the other hand, the program review provisions and intergovernmental cooperation requirements in the bill portend a significant expansion of existing law that could not otherwise be achieved administratively. The interagency review program is not entirely novel. The mandatory consultation provisions under the Endangered Species Act, for instance, provide for interagency consultation without ousting the proposing agency from its decision-making role or otherwise dramatically restructuring the federal administrative scheme.<sup>284</sup> By requiring Park Service review, the Parks Protection Act would have assured that the unique environmental values of the national parks would be weighed in the decision-making process and that the proposing agency would have before it the expertise of park officials. The bill, however, did not mandate a particular result regarding development on lands adjacent to the parks,<sup>285</sup> so that activities such as necessary energy exploration would not have been sacrificed to assure the ecological integrity of the parks. But the bill's aim was to ensure that the reverse did not blindly occur either. While it is true that the operative language in the program review provision turned upon the concept of "adjacent" lands—a concept subject to an expansive interpretation by the courts—such an interpretation probably could have been avoided by carefully drafting regulations in much the same manner as was done with the Endangered Species Act.<sup>286</sup> Alternatively, Congress might achieve

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282. The original preservation mandate, section 3 of the Organic Act, and the amended section 1a-1, resources protection requirement, surely provide a sufficient basis for such regulations. 16 U.S.C. §§ 1, 3, 1a-7 (1982). See *United States v. Brown*, 552 F.2d 817, 822 (8th Cir. 1977), *cert. denied*, 431 U.S. 949 (1977).

283. See, e.g., H.R. 2379, *supra* note 242, § 15.

284. 16 U.S.C. § 1536(a)(2) (1982). Cf. *Wild and Scenic Rivers Act*, 16 U.S.C. § 1283(a) (1982) (providing for cooperation between administrative agencies jointly responsible for management of a designated river).

285. It also should be noted again that the bill exempted certain federal agency actions from the mandatory review process. H.R. 2379, *supra* note 242, § 11(h). See *supra* note 250.

286. See, e.g., 50 C.F.R. § 402.02 (1984) defining "critical habitat," "destruction or adverse modification," and "jeopardize the continued existence of."

some certainty in the legislative scheme by delegating authority to the Secretary of the Interior to designate "adjacent" lands in the case of each park unit.<sup>287</sup>

Although problems could have arisen under the intergovernmental cooperation provisions, this section appeared unexceptional in view of the wide variety of similar provisions and conditional spending programs that permeate the federal statutes. The program can hardly be labelled "coercive" by local governments as there is nothing mandatory under the provisions and the available grant funds for any participating entity did not exceed \$25,000 annually.<sup>288</sup> It could even be argued that the cooperation provision would have sensitized local officials to the unique local benefits flowing from the park's proximity and ultimately enlisted them in protecting the park's resource base.

The Park Protection Act deserves serious consideration as a means of responding to the external (and internal) threats problem. Despite perhaps unnecessary planning, investigating, and reporting provisions, the bill was responsive to a variety of threats problems that are not adequately addressed under current environmental laws. The bill relied upon the interagency program review scheme to mitigate threats originating on adjacent federal lands, and it encouraged intergovernmental cooperation as a means of responding to private lands threats. The bill achieved these goals with a minimum impact on federal agencies and state or local governments. Thus, the bill represented a workable comprehensive solution that could be implemented systemwide. The bill could also be refined and limited to designated park categories or to particular types of threats.<sup>289</sup> Although not entirely satisfactory, this still would provide some needed protection for the parks.

### *The Chaffee Alternative*

During the Ninety-eighth Congress, Senator Chaffee introduced legislation in the Senate entitled the "Wildlife and the Parks Act of 1984" that was designed to protect park wildlife against loss of their habitat on federal lands adjoining the national parks.<sup>290</sup> The bill was modeled after the 1982 Coastal Barrier Resources Act<sup>291</sup> that preserves undeveloped coastal barriers by prohibiting federal expenditures which would promote

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287. This is essentially the scheme adopted by Senator Chaffee's proposal. *See infra* text accompanying note 296.

288. *See also* H.R. 2379, *supra* note 242, § 11(e) (which required the Secretary of the Interior to consider state, county and local governmental land development plans in evaluating the proposed actions of coordinate federal agencies).

289. *See infra* text accompanying notes 290-309.

290. S. 978, 98th Cong., 1st Sess. §§ 601-607, 130 CONG. REC. S2919-21 (daily ed. Mar. 20, 1984) (Chaffee Amendment No. 2807) [hereinafter cited as S. 978].

291. 16 U.S.C. §§ 3501-3510 (1982). The Act designates certain undeveloped coastal barriers for inclusion within the federal Coastal Barrier Resources System, and it prohibits the use of federal funds to subsidize or encourage development in these areas, including federal funds used for disaster relief or rebuilding assistance in the aftermath of storms or hurricanes.

development of these areas.<sup>292</sup> The thrust of the Chaffee bill was to prohibit the expenditure of federal funds for activities within designated "wildlife resource habitat areas" in the national parks or on contiguous federal lands that would detrimentally affect park wildlife. By protecting park wildlife and their habitat in this fashion, the Chaffee bill would have provided some protection to the national parks against the external threats problem, but this protection may not have been comprehensive enough to adequately deal with the myriad of problems confronting the parks.

The bill recognized that park wildlife resources are threatened by incompatible activities occurring within and outside units of the national park system, and that many of these activities are promoted by federal financial assistance and the programs of various federal agencies.<sup>293</sup> Accordingly, the bill prohibited federal expenditures within federally managed "wildlife resource habitat areas"<sup>294</sup> contiguous to the national parks unless the Secretary of the Interior determined that the expenditure would have no detrimental effect on native fish and wildlife species within the adjoining national park.<sup>295</sup> The bill required the Secretary to designate and update "wildlife resource habitat areas."<sup>296</sup> It also contained exceptions to the no expenditure provision, but required consultation with the Secretary before any of the exceptions could be implemented.<sup>297</sup>

The bill provided for interagency review by the Secretary of the Interior of any federal agency expenditure that might fall within the provisions of the Act.<sup>298</sup> The proposing agency would have been required to describe the planned action and assess the resulting impact on wildlife and their habitat.<sup>299</sup> Under the bill the Secretary then had the authority effectively to "veto" the expenditure if it adversely impacted park wildlife, unless it fell within the category of exceptions set forth in section 605.<sup>300</sup> Additionally, the bill required the Secretary to report to Congress regarding his actions under the proposed Act, his planned actions, and his evalua-

292. See 130 CONG. REC. 5-2921 (daily ed. Mar. 20, 1984) (statement of Senator Chaffee in support of the bill).

293. S. 978 *supra* note 290, § 602(a)(1)-(3). The bill also noted that NEPA does not provide for sufficient coordination among the responsible federal agencies to insure against inconsistent actions by the agencies that might impact park wildlife resources.

294. The concept of "wildlife resource habitat areas" refers to land within the national parks and adjacent to the national parks. *Id.* § 604(g). See also *id.* § 603(e) (defining the term "contiguous ecologically related Federally managed area").

295. *Id.* § 604(a)(1). This provision also prohibited federal expenditures on projects within the national parks in the absence of a "no detrimental effect" determination by the Secretary.

296. *Id.* § 604(b).

297. *Id.* § 605. The exceptions included federal expenditures or financial assistance for such things as military activities for national defense purposes, implementation of the Endangered Species Act, scientific research to conserve wildlife, and emergency actions to save human life.

298. *Id.* § 606.

299. *Id.* § 606(b). The assessment was to be prepared in accordance with the provisions of NEPA.

300. *Id.* §§ 604, 606(b).

tion of the adequacy of protections afforded park wildlife.<sup>301</sup> But the bill also protected private landowners within the designated "wildlife resource habitat area" by providing that they would receive fair market value for their property without considering any deflation in property value due to the designation in the event that the government acquired the property.<sup>302</sup>

There were several noteworthy limitations contained in the Chaffee bill. First, the bill applied only to park units which exceed 5,000 acres in size.<sup>303</sup> Secondly, the bill was designed only to protect park wildlife and their habitat; it did not directly reach internal or external threats problems that impact park resources other than wildlife and fish. It might have, however, indirectly reached these threats if they also impacted park wildlife.<sup>304</sup> Thirdly, the bill did not regulate activities or developments occurring on private lands adjoining the parks unless the activity was subsidized by federal funds. Finally, the bill was only intended to reach federal expenditures that support activities which threaten park wildlife, thus, it did not necessarily reach all incompatible federal agency actions. But the bill defined federal financial assistance rather broadly so that it encompassed activities such as federal leasing and permitting decisions.<sup>305</sup>

The Chaffee bill did not represent nearly as comprehensive an approach to the external threats problem as the Parks Protection Act, yet there were similarities between the two bills. The Parks Protection Act was not limited to protection of park wildlife, nor did it differentiate between units of the park system. While the Chaffee bill contained some congressional reporting requirements, these were considerably less detailed and comprehensive than those mandated in the Parks Protection Act owing to the reduced scope of the bill. Neither proposal, however, sought to regulate activities on private lands adjacent to the parks unless federal involvement was otherwise present.

Both bills clearly demonstrated Congress' concern over the present lack of interagency coordination and consultation on matters relating to the environment of the national parks. They both adopted an interagency review process to assure that park officials were provided notice and an opportunity to scrutinize the impact of the actions of other federal agencies which could affect the parks. The Chaffee bill adopted the approach

301. *Id.* § 607. This section envisioned the Secretary undertaking and continuing studies regarding park wildlife and their habitat, and the impact of internal and external activities on the wildlife.

302. *Id.* § 604(a)(2).

303. *Id.* § 603(c).

304. For example, proposed geothermal development in the national forests adjoining Yellowstone National Park may impact the park's geyser system and it also may detrimentally affect grizzly bear habitat that extends from the park into the national forests. See remarks of Senator Chaffee in support of S. 978. 130 CONG. REC. S2921 (daily ed. Mar. 20, 1984).

305. See S. 978, *supra* note 290, § 603(a). "The terms 'financial assistance' and 'expenditure' referred to any form of loan, grant, guaranty, insurance, payment, rebate subsidy, or any other form of direct or indirect Federal assistance or expenditure including the issuance of a permit or lease. . . ."

of granting the Secretary of the Interior "veto" power over the actions of sister agencies, while the Parks Protection Act only granted the Secretary a review and recommendation power. Thus, although the Parks Protection Act was more comprehensive in its coverage, it was ultimately less coercive in application.

Despite its more limited reach, the Chaffee bill would have protected Glacier National Park against some external threats. Many of the threats to Glacier stem from activities such as timber harvesting and oil and gas exploration in the Flathead National Forest that have been sanctioned by Forest Service officials through their leasing and permitting authority. Assuming that park officials adopted a reasonably comprehensive designation of "federal wildlife resource habitat" encompassing national forest lands adjacent to the park,<sup>306</sup> they would be in a position to review these Forest Service decisions since timber leasing and oil and gas permitting decisions almost inevitably can be expected to impact wildlife habitat.<sup>307</sup> Then, if necessary, park officials (acting through the Secretary of the Interior) would have the additional authority to preclude such activity on designated Forest Service lands.<sup>308</sup> This authority would clearly have assisted park officials in their efforts to mitigate those external environmental threats that can be traced to adjacent federal lands and that impact wildlife. It also would have insured a high degree of interagency coordination and cooperation that is presently lacking under NEPA and related federal statutes.

The Chaffee bill would not have aided Glacier officials in regulating private land use decisions in regions such as the North Fork. At least, however, the bill would have prohibited federal subsidies for private land development in this area. The bill also did not seem to protect effectively park air and water resources when the source of the pollution is distant from the park. For example, if the ARCO aluminum plant's fluoride emissions threatened park wildlife habitat, the bill did not provide a basis to regulate that activity since the plant probably would not be regarded as within a designated "wildlife resource habitat area." Nevertheless, the Clean Air Act could provide some protection in this case.<sup>309</sup>

Although the Chaffee bill's focus was limited to park wildlife and habitat preservation, its reach was still potentially broad. External activities occurring within a designated "wildlife resource habitat area" that effect other park values, such as park water quality or scenic vistas, also might effect park wildlife and would therefore be covered under the bill. But it is evident that threatened park resources encompass much more

306. See *id.* § 604(b).

307. The bill's provisions also would apparently have applied to logging and resource development activities occurring on the Blackfeet Indian Reservation east of the park.

308. Senator Chaffee's statement accompanying his introduction of the bill specifically alluded to the problems in Glacier National Park arising from timber harvesting and oil and gas leasing in the Flathead National Forest as examples of the type of federal activity that would be covered under the bill. See 130 CONG. REC. S2921 (daily ed. Mar. 20, 1984).

309. See *supra* text accompanying notes 136-51.

than wildlife, and to the extent that the bill did not reach these concerns it would have fallen short of responding to the external threats problem. The bill also adopted the approach of classifying the national parks which may represent a more viable solution, politically and administratively, to the external threats problem than implementing a comprehensive plan embracing all 326 units of the park system regardless of their size, principal purpose, or proximity to urban population centers. Furthermore, since the Chaffee bill was intended to avoid imposing additional costs on the federal treasury and could have even resulted in some federal savings, this made it attractive politically in view of present concerns over increased federal expenditures. Thus, while the Chaffee bill did not provide systemwide protection for the parks from external threats, it did move in that direction.

Several features of the Chaffee bill are particularly attractive and might be integrated into the Parks Protection Act to create a reasonably comprehensive response to the external threats problem, yet one that is politically acceptable. Although incorporating one or more features of the Chaffee proposal into the Parks Protection Act could reduce its scope, it would eliminate some of the Act's more problematic provisions. For example, Congress could modify the Parks Protection Act by limiting its application to parks exceeding a designated acreage, and thereby avoid creating a potentially unwieldy administrative review system. Congress also could adopt the adjacent lands designation approach set forth in the Chaffee bill to avoid the inherent uncertainty that exists under the Park Protection Act's present open-ended approach. Since only a limited number of parks would be involved, Congress could designate the boundaries of the adjacent lands, or it could delegate this authority to the Secretary of the Interior as the Chaffee bill does. Additionally, Congress might include the no expenditure provision as it relates to non-federal lands adjacent to the parks to provide additional protection not available under the Act's intergovernmental cooperation provisions. Finally, Congress might delete some of the Act's seemingly redundant planning and reporting requirements in favor of a more simplified scheme such as the one set forth in the Chaffee bill.

Admittedly this compromise approach—or a modified version of it—would constitute a major restructuring of the Parks Protection Act, but it would assure broader protection to the parks than is available under the Chaffee proposal. It would protect a wider range of park resources than the Chaffee bill does. It also would extend some meaningful protection against developments on private adjacent lands that is not available under the present Parks Protection Act. Defining the adjacent federal, state and private lands that are affected by the legislation would avoid one of the major criticisms directed against the proposed Park Protection Act. Since this approach would not rely upon the agency veto scheme set forth in the Chaffee bill, it should minimize the likelihood of severe interagency conflicts. Also, if Congress limited the reporting requirements, some of the National Park Service's present objections would be ad-

dressed. Perhaps more importantly, a modified version of the Parks Protection Act might be hospitably received by the Senate. If so, then the parks would at least receive some added protection.

### *Alternative Proposals*

There were no other bills introduced during the Ninety-eighth Congress that focused on the parks' external threats problems. There are, however, other legislative alternatives. For the most part these alternatives must be regarded as less systematic approaches to the external threats problem than the Parks Protection Act, but they could provide some needed relief for the parks. As noted earlier, any scheme must address the federal interagency cooperation problem to assure coordinated management of adjacent federal lands in a manner consistent with park management goals. Also, the private lands question should be addressed to assure that the development of adjacent private lands is compatible with park management goals. While the Parks Protection Act and the Chaffee bill address the former problem, neither bill provides much relief from the adjacent private lands issue. This section will first suggest another alternative to the interagency coordination problem, and then set forth possible approaches to the private lands issue.

### *Adjacent Federal Lands*

An alternative to the approaches proposed in the Parks Protection Act and the Chaffee bill in dealing with the federal interagency coordination problem is to create a new federal land management standard. Congress can revise the management goals governing federal land management agencies responsible for federal lands located adjacent to or near designated national parks. Congress can legislatively require other federal agencies, such as the National Forest Service or Bureau of Land Management, to manage a portion of their lands located adjacent to a national park in accordance with the mandate of the National Parks Organic Act. In effect, Congress can create national resource areas or national park reservations comprised of the national parks and designated surrounding federal lands.<sup>310</sup>

The concept of national resource areas on the federal lands is not complicated. The basic premise is that Congress selects certain national parks and designates national resource area boundaries around them defined

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310. This idea is borrowed from a recent proposal by Henry Phibbs, a Jackson, Wyoming attorney and Vice President of the Greater Yellowstone Coalition. At the Coalition's second annual convention he proposed the concept as a means of providing the Yellowstone ecosystem with protection against the threats which it faces from federal and private activities arising on the surrounding lands. See *NEWSWEEK*, June 25, 1984, at 33; *High Country News*, July 9, 1984, at 7. Cf. 16 U.S.C. § 460k-460k(4) (1982) (authorizing the Secretary of the Interior to establish National Conservation Recreational Areas on lands administered by him to assure preservation of wildlife resources and provide opportunities for public recreational use).

by the area's ecosystem characteristics.<sup>311</sup> The goal is to include the complete ecosystem (or most of it) within the bounds of the national resource area to assure that park resources, including watersheds and migratory game habitat, are adequately protected. Once designated, the area would be managed by the agency otherwise responsible for the particular federal lands in accord with the preservation-recreation mandate set forth in the Organic Act, with recreational use giving way to resource protection in the event of a serious conflict between the two.<sup>312</sup> The Park Service would not assume responsibility for managing the national resource area lands adjacent to a national park. Instead the resource area lands would remain in the hands of the existing agency responsible for them. Of course, it would make sense to include a consultation and coordination requirement in such legislation, but this may not be critical in view of the revised legislative mandate governing the sister agency's actions.

The national resource area concept would directly address the problem of incompatible land use practices on federal lands adjacent to the parks by precluding development activities within the ecosystem that threatened the natural resource base of the park. Such an approach could be implemented without revising the existing agency structure. It also should not create unnecessary agency friction since it would not be necessary to accord decision-making primacy or review authority to any one agency. While this scheme might be perceived as a serious threat to the authority of the federal land management agencies that have traditionally operated under a multiple use mandate, it can be modeled after existing federal legislation,<sup>313</sup> and it can be applied selectively to assure that federal lands are available for resource use and development purposes. Furthermore, agencies such as the Forest Service already manage wilderness lands and are responsible for providing public recreational opportunities on their lands.

The national resource area concept can be modeled upon the national recreation area scheme which Congress has used when it was not other-

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311. Congress might delegate the boundary designation authority to the Secretary of the Interior in the same way that the Chaffee bill delegated the "federal wildlife resource habitat" designation power to him. This could, however, create interagency conflict and Congress might be unwilling to delegate such power in this potentially sensitive situation. Alternatively, Congress might delegate the designation power to the heads of the agencies responsible for the affected federal land and require them jointly to reach a designation decision. Or, Congress might create a special commission or panel, modeled on the Endangered Species Committee, to handle the designation process or to review designations. See 16 U.S.C. § 1536(e) (1982).

312. This is basically consistent with present Park Service management philosophy. See W. EVERHART, *supra* note 15. It would make little sense for Congress to adopt legislation such as this for the purpose of protecting selected parks and their resources against external threats, if the same degradation would ultimately occur as a result of recreational use and development. Cf. 16 U.S.C. § 460k (1982) (National Conservation Recreational Areas). It also should be noted, however, that a national resource area designation would not be tantamount to wilderness classification since it would sanction compatible recreational use and development on federal lands within the designated area. In other words, while the preservation mandate would be the primary goal motivating land management decisions, it would not be the only goal.

313. See *infra* text accompanying notes 314-17.



wise disposed to designate public lands as a national park or wilderness. For example, Congress has designated the mountainous Whiskeytown-Shasta-Trinity area in northern California and the region surrounding and including the Sawtooth Mountains in central Idaho as national recreation areas.<sup>314</sup> In establishing these areas, Congress mandated that they be administered to provide the public with recreational opportunities while conserving the area's existing resources by authorizing resource development activity only when it is compatible with the public use-conservation mandate.<sup>315</sup> In the case of the Whiskeytown-Shasta-Trinity National Recreation Area, the statute provides that the Departments of the Interior and Agriculture remain individually responsible for the management of the included lands that are under their respective jurisdictions, and it requires coordinated management between the two agencies.<sup>316</sup> Thus, the statute envisions the separate federal agencies retaining their original jurisdiction while managing the lands within the area in accordance with a common public use-preservation mandate.<sup>317</sup> This is essentially the same approach, including the interagency coordination provision, which is contemplated with the creation of national resource areas encompassing selected national parklands.

The national resource area designation scheme is probably not a viable method for confronting the problems facing all of the threatened national parks. Implementing the national resource area approach in the case of any particular national park would require careful congressional inquiry into the incompatible land use activities traceable to adjacent federal lands, the extent of harm to the park resource base posed by these activities, the societal benefits derived from the adverse activities, and the appropriate definition of the area's ecosystem. Only after such a thorough inquiry could Congress be expected to decide intelligently whether and how to designate a national resource area for the park. Thus, this approach is viable only on a park-by-park basis and should not be regarded as a comprehensive solution to the park system's external threats problem.

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314. 16 U.S.C. §§ 460q-1 to q-9 (1982) (Whiskey-Shasta-Trinity National Recreation Area); 16 U.S.C. § 460aa-2 (1982) (Sawtooth National Recreation Area). *See also* 16 U.S.C. § 460jj (1982) (Arapahoe National Recreation Area); 16 U.S.C. § 460ll (1982) (Rattlesnake National Recreation Area); 16 U.S.C. § 460m-15 (1982) (New River Gorge National River).

315. *See* 16 U.S.C. §§ 460q-3, 460aa-1 (1982). In the case of the Whiskeytown-Shasta-Trinity area Congress excluded the Central Water Project from coverage under the management standards. *Id.* § 460q-3. In the same vein it would be possible for Congress to tailor a national resource area designation to exclude a particular valuable resource use from coverage under the statutory management standards, yet afford the remainder of the area protection under the scheme.

316. *Id.* § 460q.

317. In the case of the Sawtooth National Recreation Area the Secretary of Agriculture is presently vested with authority over all of the lands included in the designated area and he is directed to coordinate his management of the included wilderness and non-wilderness lands to assure accomplishment of the statutory mandate. He also is required to administer the wilderness lands in accordance with the Wilderness Act, *id.* §§ 1131-1136. *Id.* § 460aa-1. In many respects this approach provides an apt analogy to the proposed national resource area designation since it provides for the inclusion of surrounding non-wilderness lands in the recreation area which is built around designated wilderness lands. In the case of a national resource area the concept would be built around an existing national park.

Yet the national resource area designation offers the advantage of assuring significant protection to a park embraced within the designated area. Moreover, the approach offers an alternative to acquiring additional lands for inclusion within the national park boundaries—Congress' traditional approach to severe external threats.<sup>318</sup> By relying upon the national resource area designation, Congress can deal with the incompatible land use problem—at least insofar as it involves federal lands—without redefining park boundaries or shifting federal land management responsibility between agencies. If Congress is willing to evaluate carefully the national parks and their surrounding natural environments for potential designation as a national resource area, several of the larger, more endangered national parks should be included within national resource area designations. This seems particularly appropriate in the case of the larger national parks because they are large enough already to embrace nearly complete ecosystems within their presently defined boundaries. Thus, it should be possible to provide ecosystem protection without including so much adjacent federal land within the designated national resource area as to make it politically unrealistic or economically infeasible.

The immediate problem that a natural resource area designation poses, of course, is the potential elimination of resource development activity, such as logging and mineral extraction, on the designated federal lands which could deal a severe blow to financial interests and communities located in the proximity of the selected park. The national resource area designation, however, does not preclude recreational development and use of the surrounding lands so long as it is compatible with ecosystem preservation. To a great extent communities located in the immediate proximity of large, heavily visited national parks are already dependent upon tourist based income geared to recreational use of the area,<sup>319</sup> so a national resource area designation may simply further shift local economic activity to tourist and recreational commerce and away from other incompatible activities. Admittedly the designation could cause some difficult adjustments, but it probably would not portend financial disaster for the local community. It could provide a more secure long range economic base for the area than the boom-and-bust cycles traditionally associated with resource exploitative activities. Furthermore, there is no reason why resource development activities could not be shifted to other nearby areas on the federal lands that did not fall within the designated resource area. The creation of a national resource area within an area such as a national forest might justifiably be advanced as a rationale for opening other areas of the forest to resource development since forest recreation and preservation goals would be at least partially met by the designated region.

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318. See *supra* text accompanying notes 114-24.

319. In the Flathead basin region, approximately twenty percent of the employment is related to tourism and the provision of tourism related services, most of which can be traced to the presence of Glacier National Park. See Flathead Basin EIS, *supra* note 59, at 47. One need only consider the communities of Jackson, Wyoming and Gatlinburg, Tennessee and the area surrounding the Grand Canyon's South Rim to reach a similar conclusion with respect to Grand Teton National Park, Great Smokies National Park, and Grand Canyon National Park.

The national resource area concept could be applied in the case of Glacier National Park without disrupting too severely the existing federal land management scheme. It also could sufficiently protect the park from the most severe incompatible adjacent federal land-use practices. Congress could designate the boundaries of the ecosystem surrounding Glacier National Park as a national resource area and thereby limit incompatible activities such as timber harvesting, and mineral, oil and gas exploration and extraction. Such a designation would probably include Flathead National Forest lands within the North and Middle Fork river drainages as well as big game critical habitat areas in the national forest and on the Blackfeet Reservation,<sup>320</sup> and perhaps additional surrounding federal lands.<sup>321</sup>

The Forest Service would remain responsible for national forest lands and the jurisdiction of the Park Service would not be expanded. The Forest Service has already developed a forest plan which places a notable emphasis on preserving the forest's environment and providing recreational opportunities.<sup>322</sup> While a national resource area designation would limit the Forest Service's ability to pursue its multiple use philosophy on the designated lands, it would not preclude resource exploitation activities on other Flathead National Forest lands, and it would not preclude these activities on the designated lands if they were compatible with the area's preservation-recreational use mandate.

There may be some shift in the region's economic base, but the shift should not be dramatic as tourism centered around the park and nearby Flathead Lake already accounts for a significant portion of the region's revenues. It could be expected that tourism and recreation based revenues would increase because of the region's enhanced attractiveness for outdoor activities.<sup>323</sup> The national resource area designation would not necessarily affect existing improvements such as roads, although it might limit future improvements if they were inconsistent with the revised management philosophy. Additionally, the national resource area designation would not affect development on private lands in areas such as the North Fork, unless Congress concluded that it was necessary to impose additional limitations to accomplish the park's preservation-recreational use mandate.<sup>324</sup>

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320. See, e.g., 16 U.S.C. § 460n-2 (1982) (Lake Mead National Recreation Area) and *id.* § 410aa-4 (Chaco Culture National Historical park) for examples of how Congress has dealt with Indian reservation lands or areas of significant importance to Indians encompassed within designated recreational areas or parks.

321. The designation probably would not include much more land than would be included in the "federal wildlife resource habitat" designation provided for in the Chaffee bill. See *supra* text accompanying notes 290-309.

322. See Department of Agriculture-Forest Service, Flathead National Forest Draft Environmental Impact Statement on the Proposed Forest Plan S-12 to S-22 (1982). See also *supra* text accompanying notes 208-218.

323. Already it has been predicted that tourism-based employment is the most likely sector of the Flathead basin economy to experience stable and continued growth over the next twenty years. See Flathead Basin EIS, *supra* note 57, at 52-57.

324. See *infra* text accompanying notes 325-57.

The attractiveness of the national resource area concept is its relative simplicity. Rather than adopt a procedurally cumbersome and awkward administrative scheme for confronting the national park's external threats problem, this approach is straightforward in mandating a revised management philosophy on certain clearly designated federal lands that fall within the defined ecosystem which embraces the park. It should avoid rivalry between competing agencies, and it does not create additional administrative bodies. There are, however, two potential shortcomings from the perspective of park protection. First, this approach probably does not represent a systemwide solution to the external threats problem confronting the parks, although it could provide an effective means of handling the most severe cases. Second, the national resource area concept as outlined does not address the private lands question which accounts for many of the current problems facing the parks. But there are several options available to Congress which would enable it to provide the parks with some relief from incompatible private land development activity.

#### *Adjacent Private Lands*

The National Park Service's regulation of private lands has proven to be a thorny problem in the history of the national parks. Congress has been extremely reluctant to extend federal regulatory authority over private lands located in the proximity of the national parks, even in the case of private inholdings within park boundaries. Nevertheless, Professor Sax has convincingly demonstrated that Congress has the constitutional power to regulate developments occurring on private lands that impact park resources.<sup>325</sup> He furthermore has suggested a regulatory approach respecting private lands beyond park boundaries that would authorize park officials to respond to broadly defined nuisance-like activities in order to protect the park resource base.<sup>326</sup> His proposal stops short of implementing a federal zoning scheme, yet it offers the prospect of providing park officials with meaningful authority to respond to the external threats problem. Unfortunately Congress has not been responsive to the proposal despite the increased external problems the parks have experienced that can be traced to private development activity.

Congress has continued to rely upon less intrusive, traditional approaches to the private lands question. These approaches include: purchasing private property to eliminate incompatible adjacent uses;<sup>327</sup> mandating consultation and participation by park officials with local governments in land-use planning and zoning matters;<sup>328</sup> and enacting Sword of Damocles zoning provisions which establish minimum federal zoning requirements that ultimately set a threshold standard for the exercise of

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325. Sax, *supra* note 235, at 250-58. See also *supra* text accompanying notes 234-38. 326. *Id.* 258-73.

327. See, e.g., 16 U.S.C.A. § 45f (West Supp. 1984) (Mineral King addition to Sequoia National Park); *id.* § 4300o (Antietam National Battlefield).

328. See, e.g., *id.* § 460ff-1 to -3. (Cuyahoga Valley National Recreation Area); *id.* § 460m-18 (New River Gorge National River).

the federal eminent domain power.<sup>329</sup> Professor Sax concludes in his 1976 article that none of these provisions has proved particularly effective in responding to the external threats problem.<sup>330</sup>

Congress might consider some changes in the existing law which could make one or more of these approaches more effective. Congress has generally delegated limited acquisition powers to the Secretary of the Interior through various park establishing statutes which only authorize him to acquire private lands within the newly defined park boundaries.<sup>331</sup> Although the Secretary enjoys broader authority under the Land and Water Conservation Fund Act to acquire property to protect park resources, his authority to add peripheral lands to the national parks is limited to minor boundary revisions.<sup>332</sup> Otherwise the Secretary must secure the specific approval of Congress before he may add lands to the national parks. While the congressional approval requirement provides a political check on the Secretary's power, it also hampers his efforts to respond expeditiously to external threats arising on private lands.<sup>333</sup> Congress might broaden the Secretary's acquisition authority to protect endangered parklands by eliminating the congressional approval requirement. Congress could still retain an oversight role by requiring the Secretary to advise the relevant congressional committees when he intends to acquire property as he is presently required to do in the case of minor boundary revisions.<sup>334</sup> If Congress appropriated sufficient funds, this could provide some further protection to the parks against egregious instances of adjacent private land development activities.

Congress also might amend the Organic Act to require participation by park officials in state or local land-use and zoning matters to assure that the park is considered in decisions reached by state or local governmental officials. Congress has adopted such provisions in the case of particular parks,<sup>335</sup> but it has not expressed a general intent to encourage such practices. Many park officials have apparently been confused as to whether they can or should participate in such local political matters.<sup>336</sup> The Department of the Interior has implemented a policy encouraging

329. See, e.g., *id.* § 459b-3(b)(2). (Cape Cod National Seashore); *id.* § 230a(e) (Jean Lafitte National Park). See also Sax, *supra* note 235, at 242.

330. Sax, *supra* note 235, at 242.

331. See, e.g., 16 U.S.C. § 460ff-1 (1982) (Cuyahoga National Park).

332. *Id.* § 460L-9(c) (1982). See *supra* note 108, for an explanation of additional limitations on the Secretary's acquisition power under the Act.

333. Despite Congress' apparent intention to acquire private ranchland as a scenic easement on the canyon rim adjacent to the Black Canyon at the Gunnison National Monument in Colorado and the ranch owner's desire to sell the property to the government, Congress did not appropriate the funds quickly enough to estop the rancher's alternative development plans which he was forced to implement to avoid bankruptcy. Consequently, while Congress reviewed the matter, the bulldozers began clearing the natural vegetation from the canyon rim, thus disturbing the otherwise natural scenic vista available to canyon visitors. See Denver Post, June 29, 1984, at 1.

334. 16 U.S.C. § 460L-9(c) (1982).

335. See *supra* text accompanying note 328.

336. See NPCA Survey, April 1979, *supra* note 23, at 4.

participation,<sup>337</sup> but this does not have the force of law. A congressional mandate directing and authorizing park officials to participate in local land use planning matters would send a clear signal to state and local officials that Congress is concerned about adjacent private land developments and could, perhaps, obviate the need for more intrusive federal involvement later.<sup>338</sup> If Congress adopts this approach it should make it clear that park officials are to work cooperatively with local officials to solve park problems.

Probably the ultimate solution to the private lands external threats problem would be for Congress to implement a limited federal zoning scheme.<sup>339</sup> Needless to say, such an approach is fraught with political difficulty,<sup>340</sup> but probably does not exceed Congress' constitutional powers.<sup>341</sup> The existing Sword of Damocles-type statutory provisions,<sup>342</sup> however, are only a few steps removed from this approach, and the implementing regulations adopted under these statutes give an idea of the type of regulation that could be expected if Congress were to choose this path.<sup>343</sup> In the event Congress determines that a federal zoning approach is appropriate, it should consider adopting a scheme that provides for federal zoning restrictions only if state or local governing bodies are unwilling to adopt a scheme meeting federal standards.<sup>344</sup> But this is clearly an approach of last resort—probably well beyond the pale of present political realities—and there are other less onerous approaches which might be considered.

Besides these traditional approaches, Congress has other alternatives available to address the private lands external threats problem. Congress can adopt a limited version of the Chaffee bill and preclude federal expenditures that subsidize in any manner incompatible private land-use ac-

337. See *supra* note 228. The Department of the Interior also seems to have the authority to promulgate regulations providing for Park Service participation in local zoning and land-use matters. See *supra* text accompanying notes 234-38.

338. The Parks Protection Act adopted an approach similar to the one suggested here by providing for intergovernmental cooperation between federal, state and local officials. See *supra* text accompanying notes 258-61.

339. A recently suggested, interesting variation on the federal zoning approach would accord the Secretary of the Interior authority to promulgate regulations governing non-federal property adjacent to the national parks when there is a "nexus between the regulated conduct and the federal land" and the regulations are "necessary to protect federal property." Comment, *Protecting National Parks from Developments Beyond Their Borders*, 132 U. PA. L. REV. 1189, 1212 (1984). Although framed as an administrative rulemaking solution to the private lands external threats problem, this approach is tantamount to federal zoning and potentially presents many of the same difficulties as a straightforward federal zoning scheme.

340. See Sax, *supra* note 235, at 244.

341. See *supra* text accompanying note 237. See also *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1608-18 (1978) (discussing the federal role in environmental land-use regulation).

342. See *supra* text accompanying note 329.

343. See, e.g., 36 C.F.R. §§ 30.1-.5 (1984) (Department of the Interior zoning standards for the Whiskeytown unit of the Whiskeytown-Shasta-Trinity National Recreation Area).

344. See *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 288 (1981) (Supreme Court sustained, against a tenth amendment challenge, a Surface Mining Reclamation Act provision which provided for federal regulation of private mining activities if the state was unwilling to enact comparable state regulatory legislation).

tivities which threatened a national park. The Chaffee bill proposes a prohibition on federal expenditures for private or public activities that would be detrimental to the ecological integrity of lands adjacent to national parks which have been designated as "wildlife resource habitat areas."<sup>345</sup> Congress could scale down the Chaffee bill by reducing its scope to reach only private land development activity and omit its regulatory impact on federal activity.<sup>346</sup> Standing alone, it is admittedly hard to see much logic in this approach, since it only addresses the private lands problem, but Congress could supplement it by adopting a scheme such as the Parks Protection Act to deal with the problem of federal interagency coordination.<sup>347</sup> Or Congress could utilize the national resource area approach outlined above and combine it with the Chaffee "no expenditure" requirement as a means of dealing comprehensively with the adjacent public and private lands threats problem in the case of designated parks. Alternatively, of course, Congress could simply adopt the Chaffee proposal, though it would be necessary to define clearly those areas which were covered by the legislation.

Congress also can rely upon its conditional spending power in attempting to control land-use patterns on private or state lands adjacent to the parks. Under this approach, Congress would condition the receipt of designated federal funds on a state or local government's willingness to implement a planning or zoning scheme that takes account of the park environment and limits development activity. For example, Congress might require local zoning schemes that preclude or limit development on critical wildlife habitat, prohibit construction that would mar park scenic vistas, and limit additional road construction on park perimeters.<sup>348</sup> Using the conditional spending power to achieve such regulatory objectives is not as coercive as direct federal regulatory legislation, such as federal zoning requirements. The states and local governments retain the option of foregoing federal funds and continuing with business as usual. Even though this approach would bring the federal government into local land use development matters—a traditional state prerogative—it should not run afoul of tenth amendment constitutional limitations.<sup>349</sup>

A specific conditional spending approach that Congress might adopt involves amending the Land and Water Conservation Fund Act to condition federal grants to the states upon a state's adopting local planning

345. See *supra* text accompanying notes 290-309.

346. Examples of federal financial assistance which would have been precluded under the Chaffee bill include federal mortgage assistance, disaster assistance, sewer construction subsidies and Small Business Administration loans. See *supra* note 305 and accompanying text. Cf. S. REP. NO. 419, 97th Cong., 2d Sess. 7, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3212, 3216 (examples of limitations on federal expenditures under the Coastal Barrier Resources Act).

347. See *supra* text accompanying note 309.

348. See 36 C.F.R. §§ 30.3, .4 (1984) (Department of the Interior regulations defining permitted uses within the Whiskeytown unit of the Whiskeytown-Shasta-Trinity National Recreation Area.)

349. North Carolina *ex rel.* Morrow v. Califano, 445 F. Supp. 432 (E.D.N.C. 1977), *aff'd*, 435 U.S. 962 (1978). See also Garcia v. San Antonio Metropolitan Transit Authority, 105 S.Ct. 1005 (1985).

and zoning standards which protect nearby national park resources. Under the Land and Water Conservation Fund Act, the states can receive up to sixty percent of Congress' annual appropriations to the fund for outdoor recreational planning and development, and for acquiring lands and waters for public recreational purposes.<sup>350</sup> In 1980 Congress appropriated approximately 318 million dollars to disperse to the states under the Act,<sup>351</sup> which represents a significant amount of money for the states to channel into their outdoor recreational programs. Besides requiring the states to prepare and submit a comprehensive recreational plan,<sup>352</sup> the Act does not impose other notable conditions on participation in the program.

A conditional spending approach under the Land and Water Conservation Fund Act should encourage the states to take action to arrest future external threats problems traceable to private land-use on the parks' perimeters. While this approach might be used generally to protect the national parks, it would appear to be particularly useful if adopted in conjunction with the national resource area approach. As described previously, a national resource area designation would assure that specified federal lands surrounding a national park were managed under a preservation-recreational use mandate. This is basically the same goal which underlies the Land and Water Conservation Fund Act.<sup>353</sup> Thus, if Congress were to limit the availability of funds to the states under the Act by requiring states to implement land-use schemes compatible with national resource area designations, Congress would simply assure consistency between federal and state goals while encouraging coordination among federal land managers and state officials.

Once the federal lands surrounding a national park have been designated a national resource area, local officials will most likely be interested in providing for development that can take advantage of the enhanced recreational opportunities available on the public lands. Federal or state financial assistance through the Land and Water Conservation Fund could provide an important source of revenue to assist local communities in this endeavor, while assuring that future development is consistent with the area's designation. Although Land and Water Conserva-

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350. 16 U.S.C. § 460L-7 (1982). The statute limits the amount of money which any one state can receive under the act to ten percent, *id.* § 460L-8(b)(3), and the states are required to provide fifty percent of the cost of a program in matching funds. *Id.* § 460L-8(c).

351. See 1982 Federal Budget, Dep't of the Interior I-M27. Since 1980, congressional appropriations have decreased noticeably. In 1981, congressional appropriation was approximately 293 million dollars. See 1983 Federal Budget, Dep't of the Interior I-M32. However, current projections are for an appropriation of seventy-five million dollars. See 1985 Federal Budget, Dep't of the Interior I-M40. Assuming that Congress adequately funds the state assistance program under the Land & Water Conservation Fund Act, the legislation clearly has the potential of providing substantial amounts of money to the states. See also Coggins and Glicksman, *supra* note 108 at 184-229 (arguing that the Reagan administration's practice of impounding funds appropriated under the Land and Water Conservation Fund Act is illegal).

352. 16 U.S.C. § 460L-8(d) (1982).

353. *Id.* § 460L (declaring a congressional policy under the Land & Water Conservation Fund Act of assuring outdoor recreational opportunities by encouraging states "to conserve, develop, and utilize" outdoor recreation resources).



tion Fund Act monies are not available to private businesses, they still could receive direct financial benefits from the scheme suggested here. Local communities can actively develop public recreational opportunities to take advantage of the national resource area designation, and attract more visitors to the area who can be expected to patronize local businesses. Furthermore, if local entrepreneurs perceive the potential financial advantages accompanying the national resource area designation, they may be inclined to support the area's federal lands redesignation. While the national resource area designation might cause some local economic dislocation, the Land and Water Conservation Act monies could cushion the impact and assist the local community in developing a reasonably stable financial future.

If this approach were adopted and the federal lands surrounding Glacier National Park were designated as a national resource area, then Montana would probably have to revise its land-use planning statutes to accommodate the park.<sup>354</sup> The state might require the county commissions in those counties bordering a designated national park to implement zoning regulations designed to protect park resources against degradation from adjacent land-use practices occurring on private lands within the national resource area.<sup>355</sup> More specificity regarding permissible uses, building restrictions, and aesthetic considerations could be achieved through the local zoning scheme. Of course, the zoning regulations would continue to provide an administrative scheme for appeals and variance requests.<sup>356</sup>

Flathead County also would most likely have to revise its land development plan and amend its zoning regulations. Consequently, development in the North Fork region would probably be limited. Depending upon the designated boundaries of the national resource area surrounding the park, nearby communities also could be affected by the zoning limitations. Recreational development and use of private land within the national resource area would still be permitted so long as it did not threaten park resources such as critical habitat for park wildlife. There would still be opportunities to develop private land for visitor accommodations and services, vacation homes, recreational uses, and other purposes that were not destructive of the ecosystem. Some property values might actually be enhanced in this situation, since purchasers would be assured that seriously incompatible uses would not be permitted on neighboring tracts.

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354. To a limited extent the state of Montana has clearly expressed a desire to protect park resources located on the western side of the park by creating the Flathead Basin Commission and directing the Commission to develop a cooperative strategy to preserve and enhance environmental resources in the Flathead basin. See MONT. CODE ANN. § 75-7-301 to -308 (1983).

355. This might, for example, be accomplished by amendment of MONT. CODE ANN. § 76-2-203 (1983) which sets forth the criteria for zoning regulations and clearly enumerates several factors to be included in such regulations.

356. See, e.g., MONT. CODE ANN. §§ 75-7-213, -215 (1983). See also 36 C.F.R. § 30.5 (1984) (zoning appeal procedures for the Whiskeytown unit of the Whiskeytown-Shasta-Trinity National Recreation Area). See also *Developments in the Law—Funding*, *supra* note 341 at 1580-1608 (arguing in support of land-use planning strategies that take account of environmental factors and outlining state involvement in such schemes).

But, it is unlikely that resource extraction activities such as logging and mining would be allowed to continue on private lands within the national resource areas designation. These types of activities would have to be pursued on private or governmental lands elsewhere in the region. In the event that this type of zoning limitation heavily impacted particular landowners, the state might consider implementing a land exchange program.<sup>357</sup> Thus, while the effect of the scheme on the area surrounding Glacier National Park will not be insubstantial, its long range social utility could be considerable and its short range effects can be tempered.

In view of the potential local social and economic impact of any viable solution to the private lands external threats problem, adoption of any of these schemes will involve a real test of Congress' political will. Nevertheless, the effect of private development activities cannot be ignored if Congress hopes to protect the parks adequately. At a minimum, Congress should make it clear that park officials are expected to represent park interests before local governmental entities responsible for land-use activities on surrounding private lands. Furthermore, if Congress acts to assure federal interagency coordination respecting the national parks, it should establish a consistent federal policy by limiting federal expenditures that might subsidize inconsistent development activities on neighboring private lands. A scheme such as the one proposed in the Chaffee bill or one involving conditional spending limitations would ameliorate some of the parks' problems. In addition, using the national resource area designation scheme along with a conditional spending scheme keyed to Land and Water Conservation Fund Act monies could substantially protect those parks which Congress chose to include in a national resource area system.

#### CONCLUSION

Despite a plethora of federal environmental and land-use laws, park officials frequently find themselves stymied in their efforts to respond to external threats problems. While the National Park Service Organic Act provides park officials with considerable authority to regulate developments within the parks and imposes a responsibility on them to monitor external developments, it does not grant them any clear authority to respond to external threats. Legal authority is lacking to assure a coordinated federal approach to manage federal lands in the vicinity of the parks, and there is virtually no federal involvement—and only limited state regulation—respecting the use of private lands adjacent to the parks.

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357. When Congress designates a national resource area under this scheme it also might be induced to appropriate federal funds that would be available for state use in responding to individual hardship cases resulting from adoption of appropriate, compatible local zoning regulations. This, in turn, could mitigate the financial impact of the scheme on the states and local governments. Cf. S. 978, *supra* note 290, § 604(a) (providing that private landowners shall receive fair market value for their property if it is acquired by the government under the Chaffee "wildlife resource habitat area" designation). See also *supra* text accompanying note 302.

In view of the pervasive external threats problem facing the national park system, it seems desirable to address the issue through a comprehensive legislative solution. However, because the various components of the national park system are each unique, the problem may defy easy systematic solutions. The Parks Protection Act and the Chaffee bill represented two relatively comprehensive solutions for resolving aspects of the external (and internal) threats problem. While both schemes addressed the federal interagency coordination problem, there are drawbacks to the solutions proposed by each which could leave the parks vulnerable to incompatible federal land management policies on their borders or create inter-jurisdictional agency rivalries. Only the Chaffee proposal, which was confined to limiting inconsistent federal expenditures, was very likely to make much of an inroad on the private lands problem. Congress could, however, protect the parks considerably by modifying the Parks Protection Act and integrating several features of the Chaffee bill into it.

There also is another approach to the external threats problem that would substantially protect selected parks, and that might be adopted alone or in conjunction with one of the proposed statutory schemes. Under this approach Congress should create a national resource area land management program to administer federal lands located adjacent to designated national parks and encompassed within the park's ecosystem boundaries. This would protect selected parks against incompatible activities traceable to these federal lands. Congress also should combine the national resource area approach with meaningful federal spending limitations keyed to insuring consistency in federal policy respecting the encompassed state and private lands. In particular, Congress should condition grants to the states under the Land and Water Conservation Fund Act upon a state's willingness to establish land-use policies protective of national park resources. Although this approach does not present a plausible systemwide solution for the parks' problems, it provides meaningful protection once Congress has been persuaded to act, and it does so without administrative restructuring or drastic displacement of state prerogatives.

There are admittedly considerable trade-offs involved in any response to the national parks' external threats dilemma. But the national parks represent a unique and notably successful American creation, and they therefore deserve some consideration. Given the extent of current external threats, the problem can be ignored only at the peril of the parks. It is clear, however, that viable approaches are available to resolve the national parks' present dilemma. Hopefully this article has illuminated the dimensions of the problem and outlined proposed and possible legislative solutions in a sufficiently critical vein to move the debate forward. Otherwise we can expect continued deterioration of an irreplaceable national resource.