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State Participation in Federal Policy Making for the Yellowstone Ecosystem: A Meaningful Solution or Business as Usual?

The national parks have been characterized as “enclaves of preservation adrift in a sea of development.”¹ Once surrounded and protected by vast wilderness, many of the national parks are adversely affected by activities outside their boundaries.² Existing federal legislation inadequately protects the national parks from incompatible external land uses.³ The National Park Service Organic Act⁴ established the national park system and empowered the Secretary of the Interior to manage activities within the parks.⁵ Conditions outside park boundaries are not subject to regulation by the Park Service unless they involve the direct use of park resources.⁶

Several approaches to protecting the national parks from external degradation have been proposed. One focuses on enacting federal legislation granting the National Park Service broader powers over lands adjacent to the national parks.⁷ Legislation addressing external threats to the national parks twice passed the United States House of Representatives but died without action in the Senate.⁸

Another solution is to give the states bordering the parks a “significant and meaningful role” in developing federal park management policy.⁹ For example, because the livelihood of many citizens in Idaho, Montana

1. Sax, *Buying Scenery: Land Acquisitions for the National Park Service*, 1980 DUKE L.J. 709.

2. See H.R. REP. NO. 98-170, 98th Cong., 1st Sess. 2-3 (1983).

3. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 241-43 (1976) [hereinafter cited as *Helpless Giants*]; Keiter, *On Protecting the National Parks From the External Threats Dilemma*, 20 LAND & WATER L. REV. 335, 419-20 (1985).

4. 16 U.S.C. §§ 1-3 (1982).

5. *Id.* § 3.

6. Keiter, *supra* note 3, at 370.

7. For a review and analysis of existing and proposed federal legislation, see generally Keiter, *supra* note 3; Comment, *Protecting National Parks From Developments Beyond Their Borders*, 132 U. PA. L. REV. 1189 (1984).

8. H.R. 2379, 98th Cong., 1st Sess. (1983); H.R. 5162, 97th Cong., 2nd Sess. (1982). The bills sought to establish a comprehensive parks management program requiring documentation of external threats, Interior Department review of federal actions that might threaten park resources, and cooperation between federal, state and local officials. H.R. 2379, *supra*, §§ 4(a)-7, 11, 12(a). For a discussion and analysis of the legislation, see Keiter, *supra* note 3, at 396-403.

9. Rocky Mountain News, Nov. 6, 1985, at 26 [hereinafter cited as Representative Cheney's statement]. Federal agencies are presently required to promote state and local participation in natural resource planning. 16 U.S.C. § 171 (1982) authorizes the Secretary of the Interior to cooperate with state and local governments to develop coordinated and adequate public parks, parkways, and recreational area facilities. National Park Service regulations require public notice whenever a public use or activity is restricted or controlled, when an existing regulation is relaxed or revoked, or when all or a portion of a park area is opened or closed. 36 C.F.R. § 1.7(a) (1985). Regulations promulgated under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370 (1982), also require public participation in the development of agency environmental impact statements. 40 C.F.R. § 6.400(a),(c) (1985). Public

and Wyoming is linked to the management of the Yellowstone region, Wyoming's congressional delegation encourages state involvement in federal planning.¹⁰ Arguing against creation of new federal park management schemes, Representative Dick Cheney stated that "[t]here are no problems in the Yellowstone area that can't be handled by a cooperative effort [between the state and federal governments]."¹¹

This overstates the effectiveness of local participation as a solution to the problems facing the Yellowstone region. Using the grizzly bear as an example, this comment examines the problem of external threats to the park and analyzes existing state legislation to determine the legal protections available. Three conclusions are drawn.

First, current state legislation is an ineffective legal solution to the dangers facing the grizzly bear and Yellowstone National Park. The Wyoming legislature has not addressed the fundamental policy issue of whether Wyoming should protect the grizzly bear. Wyoming's land use and environmental statutes, moreover, are not intended to solve problems of this dimension. Timber harvesting, ranching and energy exploration compete with the grizzly bear within the Yellowstone ecosystem. Priorities among these uses are not established by current state legislation. Additionally, no mechanism exists to coordinate planning by the state's environmental regulatory agencies. These factors limit the impact of state legislation aimed at protecting the grizzly bear and the Yellowstone ecosystem.

Second, even if these deficiencies can be overcome, state participation must be consistent with existing federal legislation. Wyoming lacks jurisdiction within Yellowstone itself, and therefore state solutions cannot reach activities inside the park. State action is thus limited to the land adjacent to the national park. Most of this land is federally owned and managed. Under the supremacy clause, federal laws and regulations supersede state action if state law conflicts with federal legislation, if Congress precludes local regulation, or if federal regulation is so pervasive that no room remains for state control. Assuming that federal regulations leave open the possibility of state control, state participation in policy making must be harmonized with existing federal legislation.

Finally, management of the grizzly bear and the Yellowstone region ultimately requires a national response in which local participation is only one ingredient. The residents of the states bordering Yellowstone Park are affected by park management policies. They in turn affect the suc-

participation is also required in developing national forest system land and resource management plans. 16 U.S.C. § 1604(d) (1982); 36 C.F.R. § 219.6 (1985). Congress also authorized park service officials to negotiate with local officials for enactment of local regulations protecting certain national parks. *See, e.g.*, 16 U.S.C. § 460ff-3(f) (1985). For an example of relatively successful federal-state cooperation see *infra* text accompanying notes 141-51.

10. Representative Cheney's statement, *supra* note 9.

11. *Id.* The congressman also suggested that Congress and environmental groups focus on other ecosystems "where there really are serious problems and threats," rather than on Yellowstone which is "probably the best protected and managed" of the ecosystems. *Id.* *But see infra* text accompanying notes 16-19.

cess of those policies. This interrelationship must be considered in responding to the external threats problem. Local participation is necessary in deciding how to protect the grizzly bear. Local interests should not, however, dictate national policy, nor should they be used as a pretext to ignore the threats to the Yellowstone region.

BACKGROUND

The Tension Between The National Parks and Their Neighbors

Conflicting interests and values are reflected in the controversy surrounding management of non-federal lands adjacent to the national parks. Congress created the national parks "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."¹² The National Park Service Organic Act mandates management of the national parks to facilitate public enjoyment. At the same time, the legislation requires that present enjoyment not impair that of future generations. The underlying policy of the Act reflects an inherent contradiction between preservation and use of the parks.¹³ This tension is seen in the present controversy concerning the Yellowstone ecosystem.

In 1980 the National Park Service reported to Congress on the threats to the national parks.¹⁴ The report identified 4,345 specific threats to park resources throughout the national park system, including air pollution, water quality and quantity degradation, aesthetic degradation, physical removal of resources, encroachment, visitor impact, and park operations.¹⁵ Over fifty percent of the reported threats were attributed to sources or activities outside park boundaries.¹⁶ Reporting forty-six threats, Yellowstone was the eighth most threatened unit in the system.¹⁷ The data for Yellowstone Park is incomplete, and the report does not identify specific threats to the park. Based on data compiled for other parks, however, the logical assumption is that many of the threats to Yellowstone originate on land outside the park itself.

12. 16 U.S.C. § 1 (1982). The National Park Service Organic Act is the general authority under which the park system operates. Each unit within the system is governed by its establishing act. The Yellowstone National Park establishing act is codified at 16 U.S.C. §§ 21-40c (1982).

In 1978, Yellowstone was designated a World Heritage Site by UNESCO. NATIONAL PARK SERVICE, DEP'T OF THE INTERIOR, FISHING BRIDGE AND THE YELLOWSTONE ECOSYSTEM: A REPORT TO THE DIRECTOR, at 3 (November, 1984) [hereinafter cited as FISHING BRIDGE REPORT]. It is also one of twelve International Biosphere Reserve Parks located in the United States. UNITED NATIONS, SELECTION, MANAGEMENT AND UTILIZATION OF BIOSPHERE RESERVES, GENERAL TECHNICAL REPORT PNW-82 (March 1979). Yellowstone National Park, in addition to being a national resource, is also an international resource.

13. See Suniville, *The National Park Idea: A Perspective on Use and Preservation*, 6 J. CONTEMP. L. 75, 76-77 (1979).

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

15. *Id.* at 4-5. For a detailed discussion of the report's methodology and findings, see Keiter, *supra* note 3, at 360-62.

16. STATE OF THE PARKS REPORT, *supra* note 14, at viii.

17. *Id.* at 52.

Yellowstone National Park comprises less than half of the larger ecosystem supporting its wildlife, thermal features and other natural resources.¹⁸ The buffering by national forests adjacent to Yellowstone offers insufficient protection from geothermal, oil and natural gas exploration.¹⁹ Most of the land bordering Yellowstone is wilderness and less than one percent is privately owned, but this area accounts for twenty-seven percent of the problems between bears and humans.²⁰ Activities outside Yellowstone affect conditions inside the park.

Preserving Yellowstone Park unimpaired for future generations may also conflict with the interests of the states and communities surrounding it.²¹ While activities outside Yellowstone affect the park, Yellowstone reciprocally affects the states bordering it.

The United States owns nearly forty-eight percent of all surface lands in Wyoming.²² The federal government's extensive holdings are an economic and political liability in many western states.²³ Federal land is immune from state property taxation, depriving Wyoming of potentially greater tax revenues.²⁴ More importantly, federal administrative control of this land may preempt state regulation.²⁵ This creates the perception of diminished state sovereignty. Thus on one level, the conflict over the Yellowstone ecosystem is a struggle between state and federal rights.

On another level, the controversy implicates the state's economic interests in Yellowstone Park. Tourism injects approximately 610 million dollars annually into Wyoming's economy.²⁶ A large portion of this sum is presumably generated by visits to Yellowstone. The economies of the communities adjacent to Yellowstone are inextricably tied to the park and are significantly affected by park management policies.²⁷

18. Robbins, *Do Not Feed the Bears?*, 93 NAT. HIST., Jan. 1984, at 12, 16.

19. See S. REP. NO. 161-44, 96th Cong., 1st Sess. (1979); Schneider, *Yellowstone: The Incredible Shrinking Wilderness*, 56 NAT'L PARKS & CONSERV. MAGAZINE, Jan.-Feb. 1982, at 20, 21-26; CONSERVATION FOUNDATION, NATIONAL PARKS FOR A NEW GENERATION 28 (1985) [hereinafter cited as NATIONAL PARKS FOR A NEW GENERATION]. For a discussion of adverse consequences caused by incompatible use of neighboring private property, see generally Sax, *Helpless Giants*, *supra* note 3.

20. *Grizzly Bear Management in the Yellowstone Ecosystem: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environmental and Public Works*, 98th Cong., 1st Sess. 21 (1983) (statement of Dr. Christopher Servheen, Grizzly Bear Recovery Coordinator, U. S. Fish and Wildlife Service) [hereinafter cited as Servheen statement].

21. See, e.g., Peterson, *Conservation and Tourist Interests at Odds in Dispute at Yellowstone*, N.Y. Times, Aug. 5, 1985, at A10, col. 2.

22. STATE FORESTRY DIVISION, WYOMING DEPARTMENT OF PUBLIC LANDS, STATE FORESTRY DIVISION, WYOMING STATE FOREST RESOURCE PROGRAM 7 (July, 1983) [hereinafter WYOMING FOREST RESOURCE PROGRAM].

23. Shepard, *The Scope of Congress' Constitutional Power Under the Property Clause: Regulating Non-Federal Property to Further the Purposes of National Parks and Wilderness Areas*, 11 ENVTL. AFFAIRS 479, 482-84 (1984).

24. *Id.* at 483.

25. *Id.* at 493-94. See *infra* text accompanying notes 152-83.

26. UNITED STATES TRAVEL INFORMATION CENTER, ECONOMIC IMPACT OF TRAVEL ON WYOMING COUNTIES, 1984.

27. See *infra* text accompanying notes 187-97.

The interrelationship between Yellowstone and the states adjoining it suggests that local participation in developing park policy is an important element in solving the problems facing Yellowstone Park. The success of attempts to control external threats to the park depends in part on the cooperation of the actors responsible for those threats.²⁸ The unresolved issue is whether state and local interests should dictate policy concerning a national resource.²⁹

Threats to the Grizzly Bear

The status of the grizzly bear highlights tensions between Yellowstone Park and private activities adjacent to it.³⁰ In 1880, an estimated 100,000 grizzly bears roamed the western United States.³¹ The grizzly bear population in the western United States is now estimated to be 1,000 bears.³²

Visitors to Yellowstone National Park in 1909 reported that bears numbered as "autumn leaves."³³ Estimates of the present Yellowstone population have ranged from 166 bears actually counted to a high guess of 350.³⁴ The current estimate of the Yellowstone grizzly population is between 183 and 206 bears.³⁵ This drastic population decline is attributed to several factors.

First, the decline of the grizzly bear is partially a result of habitat destruction.³⁶ Grizzlies require much space to survive. The required area depends on factors such as the abundance of food, denning sites and cover, and the number of other bears and humans.³⁷ A single bear may require up to 1,000 square miles of range.³⁸ Development around park boundaries restricts habitat and disrupts natural migration, resulting in population isolation and loss of genetic exchange.³⁹ Occupied grizzly habitat in the Yellowstone ecosystem is approximately 8,800 square miles.⁴⁰ Of this total habitat, approximately 2,000 square miles are within the boundaries of Yellowstone National Park. Thus, less than one-half of the occupied grizzly habitat is actually within the park.⁴¹

28. See *infra* note 151.

29. Sax, *Do Communities Have Rights? The National Parks as a Laboratory of New Ideas*, 45 U. PITT. L. REV. 499, 501-502 (1984).

30. The grizzly bear is a threatened species under the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982). See 50 C.F.R. § 17.11(h) (1985).

31. Jubak, *Only Teamwork Can Save the Yellowstone Grizzly*, 55 NAT'L PARKS & CONSERV. MAGAZINE, Sept.-Oct. 1981, at 25, 26.

32. *Id.*

33. *Grizzly Bear Management in the Yellowstone Ecosystem: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environmental and Public Works*, 98th Cong., 1st Sess. 58 (1983) (chronology entered by Senator Simpson for the Record [hereinafter cited as Senator Simpson's statement]).

34. Jubak, *supra* note 31, at 26.

35. Servheen statement, *supra* note 20, at 32.

36. NATIONAL PARKS FOR A NEW GENERATION, *supra* note 19, at 126.

37. Strickland, *Grizzly*, WYOMING WILDLIFE Dec. 1984, at 21.

38. *Id.*

39. NATIONAL PARKS FOR A NEW GENERATION, *supra* note 19, at 126.

40. Servheen statement, *supra* note 20, at 21.

41. *Id.*

The decline in the grizzly population is also due to the killing of grizzly bears by humans. Poaching, mistaken killings by hunters, and control of bears that harass people are largely responsible.⁴² Following closure of Yellowstone's garbage dumps by the National Park Service, bear control actions jumped from an average of thirteen bears killed per year to sixty-three per year. A total of 160 grizzly deaths were reported from 1968 to 1972 (an average of forty per year).⁴³

While there may be other reasons for the decline of the grizzly population in the Yellowstone ecosystem,⁴⁴ habitat disruption and mortalities caused by man are two accepted causes. The question is whether Wyoming legislation protects the grizzly bear from these threats. The answer requires both an analysis of existing state legislation and an examination of the constitutional scope of possible future legislation.

EXISTING WYOMING LEGISLATION

Zoning and Land Use Planning

Wyoming, like many states, established a scheme of state and land use zoning and planning.⁴⁵ The Wyoming legislature created a state Land Use Planning Commission in 1975.⁴⁶ Among the Commission's duties is identifying areas in the state determined to be of "critical or more than local concern" and establishing guidelines for development in these areas.⁴⁷ "Areas of critical or more than local concern" are areas where uncontrolled or incompatible large scale development could damage the environment, life or property, and where the short or long term public interest is of more than local significance. Those areas include "fragile or historic lands, natural hazard lands, renewable resource lands, new town lands and additional areas the commission determines to be of more than local concern."⁴⁸

On its face the Land Use Planning Act seems to provide a vehicle for state solutions for private activities disrupting grizzly habitat in the Yellowstone ecosystem. Grizzly habitat, because it is fragile, could fall within the statutory definition of "more than local significance." Uncontrolled or incompatible large scale development could damage this environment.⁴⁹ A closer examination, however, reveals several difficulties with this position.

First, the Act does not reach the problem of grizzly habitat degradation. The Land Use Planning Act applies only to those areas where un-

42. *Id.*

43. Senator Simpson's statement, *supra* note 33, at 59.

44. Some observers place the blame for the bears' decline on the National Park Service policy of "natural management." See, e.g., Robbins, *supra* note 18, at 23. Assuming that this explanation is correct, however, does not alter the analysis and conclusions of this comment.

45. WYO. STAT. §§ 9-8-101 to -302 (1977); *id.* §§ 18-5-201 to -207.

46. *Id.* § 9-8-201.

47. *Id.* § 9-8-202(a)(ix).

48. *Id.* § 9-8-102(a)(i).

49. *Id.*

controlled or incompatible large scale development could damage the environment.⁵⁰ A significant portion of the Yellowstone ecosystem is national forest or wilderness area.⁵¹ Activities occurring in grizzly habitat are subject to controls established under the Forest and Rangeland Renewable Resources Planning Act, as amended by the National Forest Management Act⁵², and the Endangered Species Act.⁵³ They therefore may not meet the requirement that the development be uncontrolled. The term "incompatible," furthermore, is ambiguous and could mean "uses that are incompatible with the environment" or "uses that are incompatible with existing uses." A large scale development requires a public or private development which is likely to affect a wide area or population.⁵⁴ Activities such as timber harvesting or oil and gas exploration within grizzly habitat may not fit the definition of "large scale development."⁵⁵ The Commission thus may lack authority to regulate grizzly bear habitat.

Second, any jurisdiction the Commission might possess is meaningless. The Wyoming legislature defunded the Land Use Commission in 1979.⁵⁶ Even though statutory authority exists for statewide land use planning and even though the Land Use Commission might be empowered to regulate uses affecting grizzly habitat, there is no existing enforcement mechanism. Moreover, these statutes do not prevent grizzly bear deaths caused by man.

Wyoming's counties, however, are authorized to regulate and restrict "the use, condition of use or occupancy of lands for residence, recreation, agriculture, industry, commerce, public use and other purposes in the unincorporated area of the county."⁵⁷ County planning and zoning commissions may prepare comprehensive plans to promote "the public health, safety, morals and general welfare of the unincorporated areas of the county."⁵⁸ The board of county commissioners may freeze building and land uses in unincorporated areas after adequate notice and public hearing.⁵⁹

The effectiveness of county planning to protect the grizzly bear is limited by several factors. County plans would not prevent grizzly bear deaths caused by man. Further, county planning and zoning regulations protecting the grizzly's habitat would be subject to legal and political constraints. Because no county zoning resolution or plan may prevent any use reasonably necessary to the extraction or production of mineral

50. *Id.*

51. *See supra* text accompanying notes 20, 41.

52. 16 U.S.C. §§ 1600-1687 (1982). For a further discussion see Keiter, *supra* note 3, at 389-91.

53. 16 U.S.C. §§ 1531-1543 (1982).

54. WYO. STAT. § 9-8-102(a)(vii) (1977).

55. The Land Use Planning Act does not define "damage to the environment." *See* WYO. STAT. § 9-8-202(a)(i) (1977). Land uses injurious to grizzly habitat could conceivably be included within this phrase.

56. *See* MEMORANDUM FROM GOVERNOR HERSCHLER TO JOINT APPROPRIATIONS COMMITTEE, 45th Legislature, January 1, 1980, at 1.

57. WYO. STAT. § 18-5-201 (1977).

58. *Id.* § 18-5-202(b) (Supp. 1985).

59. *Schoeller v. Board of County Comm'rs*, 568 P.2d 869, 874 (Wyo. 1977).

resources,⁶⁰ county zoning regulations do not reach the problems posed by natural resource exploration in the Yellowstone ecosystem. In addition, zoning regulations limiting economic development would be politically unpopular.⁶¹ Finally, the purpose of zoning is not to preserve but rather to guide growth in desired patterns.⁶²

The existing land use statutes which might serve as a vehicle for cooperative state solutions to the decline of the grizzly bear are generally ineffective. The legislation does not expressly empower either the state or the counties to regulate land use to protect wildlife habitat. That the legislation was enacted for this purpose is doubtful. Further, there is no statewide enforcement mechanism, and no standards set forth the priority to be given to habitat preservation. At the county level, zoning regulations protecting the grizzly would generate countervailing political pressures. Environmental protection statutes may, however, provide a more effective vehicle for state intervention.

Environmental Quality Legislation

Wyoming environmental protection legislation could apply to and regulate land use decisions affecting grizzly habitat. This section examines two such statutes, the Wyoming Industrial Development and Siting Act⁶³ and the Wyoming Environmental Quality Act.⁶⁴

The Industrial Development and Siting Act prohibits constructing a facility without obtaining a permit from the state Industrial Siting Council.⁶⁵ The Act regulates "any clearing of land, excavation, construction or other action that would affect the environment of the site of any facility."⁶⁶ Thus, the legislation might be employed to regulate industrial activities threatening grizzly bear habitat. The utility of the Act for this purpose is, however, relatively limited. First, the statute controls only activities that affect the environment near the facility's site.⁶⁷ Further, the Act applies only to certain types and sizes of industrial facilities, including energy generating and conversion plants generating specified quantities of energy, or industrial facilities with an estimated construction cost of at least fifty million dollars.⁶⁸ Finally, the purpose of the Act was to collect and disseminate information to develop future industrial growth,⁶⁹ not to preserve areas of the state.⁷⁰

60. WYO. STAT. § 18-5-201 (1977).

61. See *infra* text accompanying notes 147-51, 187-93. See also Sax, *Buying Scenery: Land Acquisitions for the National Park Service*, *supra* note 1, at 710.

62. Lambert, *Private Landholdings in the National Parks: Examples From Yosemite National Park and Indiana Dunes National Lakeshore*, 6 HARV. ENVTL. L. REV. 35, 39 (1982).

63. WYO. STAT. §§ 35-12-101 to -121 (1977).

64. *Id.* §§ 35-11-101 to -1207 (Supp. 1985).

65. *Id.* § 35-12-106(a) (1977).

66. *Id.* § 35-12-102(a)(viii)(A) (Supp. 1985).

67. *Id.* The act does not define the term "environment."

68. *Id.* § 35-12-102(a)(iii).

69. *Laramie River Conservation Council v. Dinger*, 567 P.2d 731, 733 (Wyo. 1977).

70. See *supra* text accompanying note 62.

In contrast, the Environmental Quality Act⁷¹ appears to offer more effective solutions. The policy of the statute is stated as follows:

Whereas pollution of the air, water and land of this state will imperil public health and welfare, create public or private nuisances, *be harmful to wildlife*, fish and aquatic life, and impair domestic, agricultural, industrial, recreational and other beneficial uses; it is hereby declared to be the policy and purpose of this act to enable the state to prevent, reduce and eliminate pollution; to preserve, and enhance the air, water and reclaim the land of Wyoming; to plan the development, use, reclamation, preservation and enhancement of the air, land and water resources of the state; to preserve and exercise the primary responsibilities and rights of the state of Wyoming; to retain for the state the control over its air, land and water and to secure cooperation between agencies of the state, agencies of other states, interstate agencies, and the federal government in carrying out these objectives.⁷²

The Act prohibits the discharge or emission of air contaminants⁷³ in a form causing pollution.⁷⁴ "Pollution" in turn means air contaminants which may injure human health or welfare or animal life.⁷⁵ The Act also prohibits discharging pollution into the state's waters without a permit.⁷⁶ Water pollution includes contamination creating a nuisance or rendering any waters harmful to wildlife.⁷⁷ Finally, a permit is required to mine solid minerals,⁷⁸ and operators must reclaim the affected land⁷⁹ for grazing, agricultural, recreational, wildlife purposes, or any other purpose of equal or greater value.⁸⁰ On its face, then, the statute contemplates regulation of air, water and land uses which adversely affect wildlife.

The Act's enforcement provisions are equally important.⁸¹ Enforcement is accomplished by a two-fold scheme. The director of the Department of Environmental Quality is empowered to enforce the Act and regulations promulgated under it⁸² by presenting cases for hearing to the Environmental Quality Council.⁸³ The director also possesses emergency power to issue temporary orders reducing or abating pollution to protect human or animal health or safety.⁸⁴ Further, the director may institute

71. WYO. STAT. §§ 35-11-101 to -1207 (Supp. 1985).

72. *Id.* § 35-11-102 (1977) (emphasis added).

73. *Id.* § 35-11-103(b)(i) (Supp. 1985).

74. *Id.* § 35-11-201 (1977).

75. *Id.* § 35-11-103(b)(ii) (Supp. 1985).

76. *Id.* § 35-11-301(a) (Supp. 1985). *See also* *People v. Platte Pipeline Co.*, 649 P.2d 208, 212 (Wyo. 1982).

77. WYO. STAT. § 35-11-103(c)(i) (Supp. 1985).

78. *Id.* § 35-11-405.

79. *Id.* § 36-11-415(b)(ix).

80. *Id.* § 35-11-103(e)(i).

81. Penalties for violations of the act are set forth at *id.* § 35-11-901.

82. *Id.* § 35-11-109(a)(i),(iii).

83. *Id.* § 35-11-112(a)(vii).

84. *Id.* § 35-11-115(a) (1977).

a civil action for injunctive relief to halt activities threatening immediate and substantial danger to animal safety.⁸⁵

Private enforcement of the statute is possible by two methods. Any person having an adversely affected interest may petition the Environmental Quality Council to designate an area as unsuitable for surface coal mining operations.⁸⁶ The Council may designate the area as incompatible with surface coal mining if mining could damage fragile lands and natural systems.⁸⁷ This provision has only a limited impact, because it applies only to surface coal mines.

The Wyoming Supreme Court, however, recognizes a private cause of action under the statute.⁸⁸ Because the aim of the enactment is to protect the public, Wyoming's Supreme Court construes the Act liberally.⁸⁹ The Environmental Quality Act provides that any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with the Act by any governmental entity including the Department of Environmental Quality for any failure to perform any nondiscretionary act or duty.⁹⁰

In contrast to traditional standing rules,⁹¹ personal harm is not a prerequisite to bringing an action under section 35-11-902.⁹² Actions may be brought by interested parties who allege no actual personal harm other than a violation of the Act's rules and regulations.⁹³

Wyoming's Environmental Quality Act appears to be capable of protecting certain aspects of grizzly habitat within the Yellowstone ecosystem. The statute specifically addresses pollution and other activities adversely affecting wildlife.⁹⁴ This reference encompasses destruction of grizzly habitat resulting from air or water pollution.⁹⁵ The legislation does not, however, provide any mechanism for the state to prevent the killing of grizzly bears by humans. Moreover, although the statute controls solid mineral mining,⁹⁶ the Environmental Quality Act does not address oil and

85. *Id.* § 35-11-115(b). The court may issue an ex parte order and must schedule a hearing on the matter within three working days from the date the petition for injunctive relief is filed. *Id.*

86. *Id.* § 35-11-425(a) (Supp. 1985).

87. *Id.* § 35-11-425(a)(ii)(A),(B).

88. *Belle Fourche Pipeline Co. v. Elmore Livestock Co.*, 669 P.2d 505, 510 (Wyo. 1983).

89. *People v. Platte Pipeline Co.*, 649 P.2d 208, 212 (Wyo. 1982).

90. WYO. STAT. § 35-11-902(a) (Supp. 1985).

91. *See, e.g.*, *Matter of Various Water Rights in Lake DeSmet*, 623 P.2d 764, 767 (Wyo. 1981), where the Wyoming Supreme Court cited *Sierra Club v. Morton*, 405 U.S. 727 (1972), with approval and said that standing involves a sufficient stake in an otherwise justiciable controversy and requires "sufficient personal interest in the outcome of litigation by way of injury or potential injury to warrant consideration by the court." *Id.* The court also noted that a plaintiff must allege that he has been or will in fact be perceptibly harmed. *Id.* at 769.

92. *Belle Fourche Pipeline Co. v. Elmore Livestock Co.*, 669 P.2d 505, 509 (Wyo. 1983).

93. *Id.* at 510. But, where an action is brought by a private attorney general, the plaintiff must afford the Department of Environmental Quality and the alleged violator with the notice required by subsection (c)(i). *Id.* at 511.

94. *See supra* text accompanying notes 72-75.

95. *See supra* text accompanying notes 72-76.

96. WYO. STAT. § 35-11-405 (Supp. 1985).

natural gas exploration, which is perceived as a major threat to the grizzly bears' habitat.⁹⁷ Legislation regulating oil and gas exploration will be examined in the following discussion.

Oil and Gas Conservation

Wyoming statutes regulate the conservation of oil and gas.⁹⁸ The legislation prohibits the waste of oil and gas⁹⁹ and establishes an Oil and Gas Conservation Commission (WOGCC) to implement the Act.¹⁰⁰ The state purports to assert these laws over all lands in Wyoming,¹⁰¹ including lands of the United States if conservation of oil and gas by the United States on its lands fails to effect the intent and purposes of the Act.¹⁰²

Although the WOGCC could regulate oil and gas drilling in grizzly bear habitat, the purpose of the Act is not to preserve natural habitat, but to prevent waste.¹⁰³ The Act defines "waste" as physical waste including inefficiently storing oil or gas and producing oil or gas in a manner that reduces the quantity of oil or gas ultimately recoverable from a pool.¹⁰⁴ The WOGCC and the courts are explicitly precluded from making or enforcing orders, rules, regulations or judgments restricting production of any pool or of any well except to prevent waste.¹⁰⁵

In *Gulf Oil Corp. v. Wyoming Oil and Gas Conservation Commission*,¹⁰⁶ however, the Wyoming Supreme Court appeared to adopt an expansive view of the WOGCC's powers. In that case the WOGCC granted a permit to an oil company to drill a well on national forest lands, subject to the condition that the company refrain from using its preferred access route.¹⁰⁷ The WOGCC found that the oil company's proposed access route would leave a nonreclaimable scar on the mountain traversed by the road. This, the WOGCC concluded, constituted unreasonable land surface damage in violation of WOGCC's Rule 326.¹⁰⁸ The court upheld the WOGCC's action.¹⁰⁹ Although federally owned minerals were involved and the United States Forest Service had jurisdiction over surface distur-

97. T. McNAMEE, *THE GRIZZLY BEAR* 72 (1984).

98. WYO. STAT. §§ 30-5-101 to -126 (1977).

99. *Id.* § 30-5-102.

100. *Id.* § 30-5-104 (Supp. 1985). The WOGCC's enforcement powers are set forth in *id.* § 30-5-114 (1977).

101. *Id.* § 30-5-118 (1977).

102. *Id.*

103. *Id.* § 30-5-102.

104. *Id.* § 30-5-101.

105. *Id.* § 30-5-117.

106. 693 P.2d 227 (Wyo. 1985). For a further discussion, see Note, *Broader Jurisdiction for the Wyoming Oil and Gas Conservation Commission*, 21 *LAND & WATER L. REV.* 69 (1986).

107. *Gulf Oil*, 693 P.2d at 232. The preferred access route would have required extending an existing county road for approximately four miles over national forest land and private property owned jointly by Gulf and Texaco, Inc. *Id.* at 230.

108. *Id.* at 232. Rule 326 of the Rules and Regulations of the Wyoming Oil and Gas Conservation Commission provides in part that "the owner shall not pollute streams, underground water, or unreasonably damage the surface of leased premises or other lands." WYOMING OIL AND GAS CONSERVATION COMM'N, *RULES AND REGULATIONS* § III, Rule 326 at 22 (promulgated 1951).

109. *Gulf Oil*, 693 P.2d at 230.

bances caused by the drilling,¹¹⁰ federal mining and environmental legislation does not, the court held, preempt state regulations conditioning permits to drill on national forest land for federally owned minerals.¹¹¹

This case suggests that the WOGCC possesses authority to apply Rule 326 to protect grizzly bear habitat from threats resulting from oil and gas exploration. In the *Gulf Oil* case, however, there was substantial political support at the local level for the WOGCC's action.¹¹² In contrast, precluding oil and gas development to protect the grizzly bear would probably generate little popular support.¹¹³ Further, the Act seems limited to situations involving the waste of oil or natural gas.¹¹⁴ Thus, the only condition under which the WOGCC could restrict oil and gas production in areas occupied by grizzly bears is to prevent waste. To invoke its provisions to protect these areas exceeds the basic intent of the Act.¹¹⁵

The "Sagebrush Rebellion" Statute

In response to the federal government's widespread landholdings in Wyoming and concomitant administrative control over those holdings,¹¹⁶ the state legislature declared that all federal land is the property of the state of Wyoming and subject to its jurisdiction.¹¹⁷ The legislature expressed its view that federal ownership of unappropriated land in Wyoming "is without foundation and violates the clear intent of the constitution of the United States."¹¹⁸

At first glance this legislation appears to be a petulant expression of frustration with and hostility toward the federal government.¹¹⁹ The legislation's more thoughtful sections, however, do afford a basis for state regulations protecting grizzly bear habitat. Wyoming's Board of Land Commissioners¹²⁰ is charged with managing the lands subject to the Act in "a manner as to permit the conservation and protection of watersheds and *wildlife habitat*, and historic, scenic, fish and wildlife, recreational and natural values."¹²¹ The Act requires that the land be used to encourage the optimum development of the state's resources, including wildlife and

110. *Id.* at 234.

111. *Id.* at 238. The court also held that the WOGCC's order was supported by substantial evidence contained in the entire record. *Id.* at 240-41.

112. *Id.* at 230.

113. See *infra* text accompanying notes 145-51.

114. See *Gulf Oil*, 693 P.2d at 241-42 (Rooney, J., dissenting). See also, *supra* text accompanying notes 103-05.

115. WYO. STAT. § 30-5-117 (1977).

116. See *supra* text accompanying notes 22, 29. The Wyoming legislature enacted so-called Sagebrush Rebellion legislation in 1980. WYO. STAT. §§ 36-12-101 to -109 (1985 Cum. Supp.). Similar legislation was enacted by Arizona, Colorado, Hawaii, Idaho, New Mexico, Utah and Washington. See Shepard, *supra* note 23, at 484 n.35. See also, Note, *The Sagebrush Rebellion: Who Should Control the Public Lands?*, 1980 UTAH. L. REV. 505, 511.

117. WYO. STAT. § 36-12-103 (Supp. 1985). The act does exempt federal land controlled by the Department of Defense and federal lands held as national parks, monuments, in trust for Indian, wildlife refuges or wilderness areas. *Id.* § 36-12-109(a)(iii), (iv).

118. *Id.* § 36-12-101.

119. *Id.* See also Shepard, *supra* note 23, at 483-85.

120. See WYO. STAT. §§ 36-2-101 to -210 (1977).

121. *Id.* § 36-12-102(a) (Supp. 1985) (emphasis added).

wildlife habitat.¹²² The legislation also provides for private damage suits for violations of the Act.¹²³

Accordingly, the Board of Land Commissioners could issue comprehensive regulations protecting grizzly bear habitat within the Yellowstone ecosystem, since the legislature explicitly expressed its intention to protect wildlife habitat.¹²⁴ Moreover, because the legislature provided for private actions, environmental groups could sue to enforce these regulations.

There are several flaws in this analysis. First, the intent of the legislature is by no means clear. The land must be used to promote the optimum development of the state's human, industrial, mineral, agricultural, water, timber and recreational resources in addition to wildlife and wildlife habitat.¹²⁵ The development of industrial, mineral and timber resources conflicts with the preservation of wildlife and wildlife habitat.¹²⁶ Section 36-12-106 of the Wyoming statutes speaks of developing wildlife habitat. This could mean development of grizzly bear habitat in a manner that preserves the habitat. At the same time, it could refer to development of grizzly habitat for industrial, mineral, agricultural and timber resources. Second, even if the legislature's intent was to protect habitat, the private enforcement provision provides only for civil actions for damages, not for injunctive relief against violations of the Act. Finally, regardless of the legislation's validity, the jurisdiction of the Board of Land Commissioners is conditioned upon transfer of federal lands to the state of Wyoming.¹²⁷ The Board of Land Commissioners lacks authority to promulgate regulations protecting grizzly bear habitat until this event occurs. Thus, if the Board of Land Commissioners is empowered to protect the grizzly, that authority must be found in the legislation creating the Board.

The Board of Land Commissioners

The Board of Land Commissioners controls all state lands,¹²⁸ subject to rules enacted by the legislature to govern the Board's operations.¹²⁹ Among the powers granted to the Board of Land Commissioners is selling timber on state lands.¹³⁰ In connection with this power, the Board ap-

122. *Id.* § 36-12-106.

123. *Id.* § 36-12-108(b).

124. *Id.* § 36-12-102(a).

125. *Id.* § 36-12-106.

126. See 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).

127. WYO. STAT. § 36-12-102(a) (Supp. 1985).

128. WYO. CONST. art. 18, § 3; State *ex rel.* Wallis v. State Bd. of Land Comm'rs, 36 Wyo. 302, 305, 254 P. 491, 492 (1927). The commission is comprised of the governor, secretary of state, state treasurer, state auditor and the superintendent of public instruction. WYO. CONST. art. 18, § 3.

129. WYO. STAT. § 36-2-101 (1977). See also Mahoney v. L.L. Sheep Co., 79 Wyo. 293, 305-06, 333 P.2d 712, 716 (1958).

130. WYO. STAT. § 36-1-112 (1977). The Commission's other powers include leasing state lands. See *id.* §§ 36-5-101 to -116. See also *id.* §§ 36-4-101 to -121 (creating a recreation commission with power over state parks and historical, archaeological, geological and ecological sites); *id.* §§ 36-8-201 to -211 (creating a Yellowstone Park Commission).

points a state forester who directs all forestry matters within Wyoming.¹³¹ The state forester is responsible for preventing forest fires, improving the state forest system, promoting the development of the forest industry, and cooperating with federal agencies.¹³² Section 36-2-108 of the Wyoming statutes specifically authorizes the state forester to assume control over all forest lands and to cooperate with federal officials. Several obstacles preclude this as a solution to the decline of the grizzly bear population in the greater Yellowstone ecosystem.

First, the term "improving the state forest system" does not encompass preserving wildlife habitat. Section 36-2-108 (b)(vii) requires the forester to promote the forest industry's development. This language suggests that the Wyoming legislature envisioned improving the state forest system by encouraging timber harvesting. This mandate may conflict with preserving grizzly habitat. Second, Wyoming lacks an adequate reforestation law.¹³³ Wyoming merely requires removal of slashing and other debris left over from timber cutting.¹³⁴ Third, regulating state forests is an ineffective solution as a practical matter. Wyoming owns only 200,000 acres (approximately two percent) out of a total of 9,776,200 acres of forested land in Wyoming,¹³⁵ and federal land supplies eighty-nine percent of all timber cut in Wyoming.¹³⁶ Regulation of state forest lands to enhance the grizzly bear's habitat thus would have a minimal effect. Finally, the Board of Land Commissioners has no power to prevent mortalities caused by humans. This authority is vested in the Wyoming Game and Fish Commission.

Wyoming Game and Fish Commission

The Wyoming Game and Fish Commission¹³⁷ is empowered to fix hunting seasons and bag limits on all types of wildlife, except predatory animals, predacious birds, and protected species.¹³⁸ Grizzly bears are defined as "trophy game animals."¹³⁹ The enabling legislation, more importantly, authorizes the Game and Fish Department to enter cooperative agreements with other agencies to promote wildlife research.¹⁴⁰

131. *Id.* § 36-2-108(a) (Supp. 1985).

132. *Id.* § 36-2-108(b)(i)-(vii).

133. California and Washington, for example, require reforestation of land upon which timber is harvested. These statutes could serve as a model for habitat protection for forestry operations conducted in grizzly bear habitat. See CAL. PUBLIC RESOURCES CODE §§ 4631-4789.6 (West 1984); WASH. REV. CODE ANN. §§ 76.12.010 - .170 (1962).

134. WYO. STAT. § 36-3-109 (1977).

135. WYOMING FOREST RESOURCE PROGRAM, *supra* note 22, at 8. Of the remainder, eighty-four percent is in federal, twelve percent private, and two percent in Indian ownership.

136. *Id.* at 9.

137. WYO. STAT. §§ 23-1-101 to -901 (1977).

138. *Id.* § 23-1-302(a)(i) (Supp. 1985).

139. *Id.* § 23-1-101(a)(xii). The grizzly bear can be hunted because it is a protected rather than endangered species under the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982). Strickland, *supra* note 37, at 23. The United States Fish and Wildlife Service, however, strictly limits the conditions under which grizzly bears may be legally killed. See 50 C.F.R. § 17.40(b) (1985).

140. WYO. STAT. § 23-1-302(a)(ix), (xi) (Supp. 1985).

The exercise of this authority contributed to a successful example of federal and state cooperation in the Yellowstone ecosystem, the Interagency Grizzly Bear Management Committee (IGBC).¹⁴¹ Comprised of the National Park Service, the United States Fish and Wildlife Service, and the states of Idaho, Montana and Wyoming,¹⁴² the IGBC began in 1974 as a research study team to develop information on the Yellowstone grizzly population.¹⁴³ The IGBC expanded its role to coordinate state and federal management of the bear and other resources in bear habitat.¹⁴⁴

As part of this effort, the Wyoming Fish and Game Department prepared a plan to manage the grizzly bear in areas of Wyoming included in the Yellowstone ecosystem.¹⁴⁵ The plan's goal is to manage the Yellowstone grizzly bear population and, in cooperation with private landowners and public land management agencies, to encourage distribution of the grizzly bear throughout its optimum habitat.¹⁴⁶

The plan's first objective is to maintain a pre-denning winter population of three hundred grizzlies in the Yellowstone population.¹⁴⁷ One key to the recovery of the grizzly bear is its proper distribution within its ideal habitat, and Yellowstone National Park is believed to be too small to sustain the targeted number of bears within its boundaries.¹⁴⁸ The Department's second objective was therefore to reestablish grizzly bears in areas of Wyoming outside of Yellowstone, including the drainages of the Greybull, Wood and Wind rivers.¹⁴⁹ These areas are grazed by cattle and sheep, and the plan was vehemently opposed by local ranchers as "another burden" on agriculture.¹⁵⁰ Thus, effective state participation in decisions regarding the Yellowstone ecosystem can be frustrated by parochial interests and political pressure.¹⁵¹

141. See T. McNAMEE, *supra* note 97, at 89-90. The Interagency Grizzly Bear Management Committee's efforts to obtain data necessary to preserve the grizzly have been characterized as crucial to the bears' survival. Jubak, *supra* note 31, at 25.

142. Jubak, *supra* note 31, at 25.

143. Strickland, *supra* note 37, at 18.

144. *Id.*

145. STATE OF WYOMING, DEPARTMENT OF GAME AND FISH, GRIZZLY BEAR MANAGEMENT PLAN FOR WYOMING (1985) [hereinafter cited as GRIZZLY BEAR MANAGEMENT PLAN].

146. *Id.* at 1. The Game and Fish Commission is authorized to engage in activities aimed at management and protection of game animals by Wyo. STAT. § 23-1-302(a)(iii)(B) (Supp. 1985).

147. GRIZZLY BEAR MANAGEMENT PLAN, *supra* note 145, at 1. This goal corresponds to the stated goal of the United States Fish and Wildlife Service in its Grizzly Bear Recovery Plan. UNITED STATES FISH AND WILDLIFE SERVICE, DEP'T OF INTERIOR, GRIZZLY BEAR RECOVERY PLAN (1982).

148. Telephone interview with Dale Strickland, Assistant Chief Game Warden, Wyoming Game and Fish Dept. (Jan. 7, 1986). See also GRIZZLY BEAR MANAGEMENT PLAN, *supra* note 145, at 2.

149. GRIZZLY BEAR MANAGEMENT PLAN, *supra* note 145, at 3.

150. Laramie Daily Boomerang, Nov. 30, 1985, at 5, col. 1.

151. The Wyoming Game and Fish Department official responsible for the plan said that local opposition to the plan would diminish the probability of successfully meeting the plan's objectives and preclude reintroduction of the grizzly bear into the Washakie Wilderness. This, he said, could lead to further grizzly bear losses in the Yellowstone ecosystem. Telephone interview with Dale Strickland, Assistant Chief Game Warden, Wyoming Game and Fish Dept. (Jan. 7, 1986).

STATE SOLUTIONS AND FEDERAL PREEMPTION

Assuming that the problems identified in the previous discussion are resolved, state legislation must surmount another barrier. The supremacy clause¹⁵² limits the reach of state solutions to the problems facing the grizzly bear. Early in its history, the United States Supreme Court recognized that as to:

[A]cts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary to the laws of congress, made in pursuance of the constitution . . . the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of its powers not controverted, must yield to it.¹⁵³

State laws actually conflicting with a valid act of Congress must yield to the federal legislation.¹⁵⁴ An actual conflict exists if compliance with both federal and state law is impossible¹⁵⁵ or if state law frustrates the objectives of federal legislation.¹⁵⁶ Even where no actual conflict exists, state laws are superseded if Congress clearly expresses an intent to usurp local power¹⁵⁷ or if pervasive federal regulation leaves no room for local regulation.¹⁵⁸ Rules promulgated by federal agencies have the force of congressional legislation and thus also preempt state legislation frustrating the purpose of the rules or unreasonably burdening parties governed by them.¹⁵⁹

Three sources of congressional power require consideration.¹⁶⁰ The cession clause¹⁶¹ permits federal jurisdiction over land ceded to it by the states.¹⁶² Federal jurisdiction may be exclusive or concurrent.¹⁶³ Congress' jurisdiction is exclusive if the state consents to a cession of exclusive federal jurisdiction.¹⁶⁴ The state may, however, condition cession upon

152. U.S. CONST. art. VI, cl. 2. The supremacy clause provides in relevant part that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

153. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).

154. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

155. *McDermott v. Wisconsin*, 228 U.S. 115, 131 (1913).

156. *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 239 (1967).

157. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). *But see Florida Lime & Avocado Growers*, 373 U.S. at 142 (congressional intent to occupy the field not easily inferred).

158. *Pennsylvania v. Nelson*, 350 U.S. 497, 502-04 (1956).

159. *Farmers Union v. WDAY, Inc.*, 360 U.S. 525, 535 (1959).

160. *See Shepard*, *supra* note 23, at 486-504.

161. U.S. CONST. art. I, § 8, cl. 17. The cession clause empowers Congress:

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

Id.

162. *Kleppe v. New Mexico*, 426 U.S. 529, 542 n.11 (1976).

163. *Id.* at 542.

164. *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 537-38 (1885).

retention of jurisdictional power over the federal enclave; but the exercise of state jurisdiction must be consistent with the federal purpose in establishing the enclave.¹⁶⁵

A second source of federal power is the property clause.¹⁶⁶ Congress has broad power to protect federal lands¹⁶⁷ and to determine how they will be used.¹⁶⁸ A state's police power over federal lands must not interfere with federal legislation¹⁶⁹ or regulations protecting and limiting the use of public lands.¹⁷⁰ The supremacy clause preempts inconsistent or conflicting state laws.¹⁷¹

Third, the commerce clause¹⁷² empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹⁷³ Congress' power to regulate commerce is upheld even if the activity is intrastate¹⁷⁴ or only marginally affects interstate commerce.¹⁷⁵ The commerce clause has been used to uphold federal environmental legislation.¹⁷⁶

In 1897, Wyoming ceded to the United States the right to acquire land within the state.¹⁷⁷ Jurisdiction over the acquired land was surrendered to the United States,¹⁷⁸ subject to the retention of state concurrent jurisdiction in certain civil and criminal matters.¹⁷⁹ On achieving statehood, however, Wyoming ceded exclusive jurisdiction over Yellowstone Park (and future additions to it) to the federal government.¹⁸⁰ Wyoming thus lacks any jurisdiction within Yellowstone Park, and therefore the reach of state regulations is limited to the federal and private landholdings surrounding the park. The scope of state power over federal land outside the park in turn depends on whether Congress "occupied the field" and on whether pervasive federal regulation precludes state controls. Whether the state's retained jurisdiction over federal land outside the boundaries

165. *Paul v. United States*, 371 U.S. 245, 265 (1963).

166. U.S. CONST. art. IV, § 3, cl. 2. The property clause states that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

167. *Camfield v. United States*, 167 U.S. 518, 526 (1897).

168. *Light v. United States*, 220 U.S. 523, 536 (1911).

169. *United States v. California*, 332 U.S. 19, 36 (1947).

170. *United States v. Petersen*, 91 F. Supp. 209, 212-13 (S.D. Cal. 1950).

171. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404-05 (1916).

172. U.S. CONST. art. I, § 8, cl. 3.

173. *Id.*

174. *Fry v. United States*, 421 U.S. 542, 547 (1975).

175. *Wickward v. Filburn*, 317 U.S. 111, 127-28 (1942). Congress may thus exercise its commerce power for purposes unrelated to commerce per se. *See, e.g.*, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964)(civil rights); *Katzenbach v. McClung*, 379 U.S. 294 (1964)(civil rights); *Perez v. United States*, 402 U.S. 146 (1971)(criminal loan sharking).

176. *See, e.g.*, *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978).

177. WYO. STAT. § 36-10-101 (1977).

178. *Id.* § 36-10-102.

179. *Id.* § 36-10-103.

180. 26 Stat. 222, ch. 664 (1890). *See also* WYO. STAT. §§ 36-10-106 to -109 (1977).

of Yellowstone Park allows the state to protect the grizzly bear on federal land is thus uncertain.¹⁸¹

What is clear, however, is that state legislation must be consistent with the purposes of relevant federal laws and regulations.¹⁸² The grizzly bear, for example, is a threatened species under the Endangered Species Act.¹⁸³ Any attempt by the state to control the grizzly bear on federal or state land must be consistent with the Endangered Species Act or be preempted under the supremacy clause. Thus, one constraint on state solutions to the problems facing the Yellowstone ecosystem is that local action must be harmonized with federal law.

THE EFFECTIVENESS OF STATE PARTICIPATION IN MITIGATING EXTERNAL THREATS

The example of the grizzly bear illustrates the flaws in relying too heavily upon state solutions to the problems confronting the Yellowstone ecosystem. State solutions are limited by the narrow scope of existing state legislation. The predominance of federal landholdings in the Yellowstone region and the parochial nature of Wyoming's interests also limit the impact of state participation in policy making concerning the Yellowstone region.

The most serious deficiency in current state legislation is its lack of focus on the Yellowstone ecosystem. The statutes were not enacted in response to the dangers facing the grizzly bear but to solve other problems. In addition, Wyoming's policy makers have not made the fundamental decision of whether the grizzly bear should be protected. Several problems flow from the lack of overall policy guidance.

Existing legislation sets no priorities among competing land uses. Wyoming's forestry statutes, for example, fail to indicate what action the state forester should take when preserving grizzly habitat conflicts with promoting the forest industry.¹⁸⁴ Another deficiency is the hodgepodge of state agencies and their respective jurisdictions. While the Wyoming Oil and Gas Conservation Commission, for example, might play an effective role in preserving grizzly habitat, it has no authority to deal with man-caused grizzly bear mortalities. The Game and Fish Department possesses the statutory mandate to control the killing of grizzly bears but lacks the power to regulate other problems, such as oil and gas exploration, which may threaten the bears' habitat. The absence of coordinated state planning, coupled with the fragmented jurisdiction of state regulatory agencies, could result in those agencies working at cross pur-

181. Whether federal law preempts state action is largely a question of statutory construction and cannot be reduced to a general test. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 377 (1978). Thus, the validity of state legislation affecting the grizzly bear must be determined by comparing that legislation with all relevant federal laws and regulations, a task beyond the scope of this comment.

182. *Paul v. United States*, 371 U.S. 245, 265 (1963).

183. 16 U.S.C. §§ 1531-43 (1982). See 50 C.F.R. § 17.11(h) (1985).

184. See *supra* text accompanying notes 132-33.

poses. The possibility exists, for example, that the Game and Fish Department might attempt to reintroduce grizzly bears into a new habitat, while at the same time the Oil and Gas Conservation Commission might make decisions increasing the accessibility of the area to energy exploration.

State solutions to the problem of preserving the grizzly bear are subject to other constraints. Most of the land bordering Yellowstone Park is federally owned.¹⁸⁵ State attempts to regulate activities on these lands could be preempted by federal legislation.¹⁸⁶ The predominance of federal landholdings further suggests that the problems facing the Yellowstone area originate in federal policy and require federal responses. Yellowstone is a national resource and resolution of the problems facing it should be made with input from the broadest national constituency. In contrast, participation by Wyoming and the communities bordering Yellowstone is more likely to promote a narrow range of interests. Nothing illustrates this better than the dispute concerning the closing of the Fishing Bridge tourist development within the park.

In 1981, the National Park Service and the United States Fish and Wildlife Service confirmed an agreement allowing completion of the Grant Village development inside the park's boundaries.¹⁸⁷ Completion of Grant Village was allowed only on condition that the Fishing Bridge development be removed.¹⁸⁸ The United States Fish and Wildlife Service considered removal of Fishing Bridge necessary to avoid jeopardizing the grizzly bear at higher than existing levels.¹⁸⁹ Fishing Bridge is an important natural grizzly habitat, and the presence of both Fishing Bridge and Grant Village would, in the opinion of the National Park Service, have a disastrous cumulative effect on the grizzly bear.¹⁹⁰ The National Park Service decided to close Fishing Bridge and move its facilities twenty-five miles south to Grant Village.¹⁹¹ The closing, however, was blocked by businessmen in Cody, Wyoming and Wyoming's congressional delegation, pending further study of the effects of the closure.¹⁹² Some fear that closing Fishing Bridge, the closest overnight spot in Yellowstone to Cody, will shift tourists away from Cody and into other gateway towns.¹⁹³

The economies of the gateway communities are inextricably tied to Yellowstone National Park. The question is whether the interests of these communities outweigh the national interest in the park itself. Stringent measures designed to protect the greater Yellowstone ecosystem could relegate the gateway communities to ecological museums.¹⁹⁴ Yellowstone

185. See *supra* text accompanying notes 135-36.

186. See *supra* text accompanying notes 152-83.

187. FISHING BRIDGE REPORT, *supra* note 13, at 1.

188. Peterson, *supra* note 21, at col. 3.

189. FISHING BRIDGE REPORT, *supra* note 12, at 1.

190. *Id.*

191. *Id.* at 109-10. These findings, however, are disputed by several groups. See Peterson, *supra* note 21, at col. 2.

192. Peterson, *supra* note 21, at col. 1.

193. *Id.* at col. 2.

194. See Sax, *Do Communities Have Rights? The National Parks as a Laboratory of New Ideas*, *supra* note 29, at 508-09.

Park was created as a public park,¹⁹⁵ not for the benefit of the gateway communities, but for "the common benefit of all the people of the United States"¹⁹⁶ and for future generations.¹⁹⁷ Legal and political solutions to the problems facing Yellowstone Park must incorporate this fundamental policy.

Local participation can play an important role in policy decisions affecting Yellowstone Park. If the decline of the grizzly bear is attributable to external activities such as poaching, mistaken kills and habitat threats, then livestock growers, outfitters, hunters, and energy explorers must acknowledge the problem and participate in its solution. Laws and regulations protecting the grizzly bear require some local support to succeed.

One of three basic choices must be made concerning the status of the grizzly bear in the Yellowstone region. The first is to maintain the status quo. A second choice is to eliminate the grizzly because it threatens man's enjoyment of the area.¹⁹⁸ The third option is to enact new protections for the bears.

The interests of the states bordering the park should not determine which choice is made. Because Yellowstone Park is a national resource, the interests of the park's entire constituency must be considered. This constituency consists of all the people of the United States, as well as future generations. The policy decisions concerning Yellowstone Park in general and the grizzly bear in particular must be made in a national forum reflecting all of the interests involved, not merely those of the people living near the park.

CONCLUSION

There are serious deficiencies in current state legislation as a solution to external threats to Yellowstone National Park. The numerous state environmental and land use planning statutes provide no clear authority for any state agency to supply comprehensive solutions to threats originating outside park boundaries. State and local participation in federal policy making concerning Yellowstone is necessarily part of a political solution. This, however, cannot end the analysis.

The input of affected localities is a political, not a legal solution to the external threats posed to the park system. Participation by itself is not a complete answer to those problems and does not obviate the need for legal solutions. More importantly, local participation must contribute to a solution, not merely be a pretext for business as usual in the Yellowstone ecosystem.

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195. 16 U.S.C. § 21 (1982).

196. *Id.* § 1a-1.

197. *Id.* § 1. Further, the park may be considered not merely a national resource, but also part of a world heritage. See *supra* note 12.

198. Bechtold, *Standoff in Grizzly Country*, 91 AMERICAN FORESTS 34, Aug. 1984, at 38-39, 46. The author points out that many disagree that the grizzly bear should be saved, because their presence conflicts with man's use of the Yellowstone region. *Id.* at 46.