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## Protecting the Wildlife Resources of National Parks From External Threats

*George Cameron Coggins\**

To many casual visitors, the opportunity to see wildlife is the main reason for visiting the parks. Visitors stop their cars along Yellowstone roads to view bison, elk, bear, and moose, and they ride rafts through Grand Teton in hopes of seeing an eagle. Bus tours through Denali feature caribou, moose, ptarmigan, wolves, and many other species. Some tourists even walk, and some are delighted to see common species such as jays or ground squirrels. In Yellowstone, Glacier, and Denali, thousands of people are obsessed with the possibility of encountering a grizzly bear.

These, of course, are only the more spectacular instances of wildlife watching in the national parks, but they illuminate the fact that, for many, wildlife is the park. Many species of wildlife are abundant in national parks compared to other similar areas for two reasons: hunting has been outlawed in parks since 1894;<sup>1</sup> and the National Park Service (NPS) has tried to manage for wildlife welfare in various ways since its creation in 1916.<sup>2</sup>

This paper is concerned with external threats to park wildlife resources. The topic is inherently artificial and arbitrary, because threats to wildlife cannot be separated from threats to other park resources, and

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1. This rule originated in an amendment to the Yellowstone Act, 16 U.S.C. § 26 (1982), and has been faithfully observed by the Park Service in parks and monuments proper, although hunting and trapping has been allowed in recreational units of the Park System. See generally National Rifle Ass'n v. Potter, 628 F. Supp. 903 (D.D.C. 1986); Coggins & Ward, *The Law of Wildlife Management on the Public Lands*, 60 OR. L. REV. 59, 116-27 (1981).

2. See generally Coggins & Ward, *supra* note 1; Swanson, *Wildlife on the Public Lands*, in WILDLIFE AND AMERICA 428 (H. Brokaw ed. 1978). For criticism of the NPS efforts, see the authorities cited *infra* notes 11-13.

park wildlife cannot be considered separately from wildlife resources in general. We are really talking about threats to the qualities of parks that make them national parks. The overall subject of external threats to park resources is so broad, however, that this paper must ignore or pass over lightly many of the more generic issues arising from that broader subject.<sup>3</sup>

The first section of this paper summarizes some of the threats to national park wildlife emanating from sources located outside the parks. It concludes that the most serious threat is the aggregate impact of developmental activities on adjacent public and private lands that destroy wildlife habitat. Section II briefly describes the existing federal law that applies to some external threats. It concludes that certain wildlife, environmental, and public land management statutes provide some situation-specific remedies, but that only a more active role by the NPS can provide the focus necessary for effective action. The third section investigates Park Service power to regulate or abate external threats on adjacent private lands. It concludes that such a power exists, but that it is far too limited to deal with most threats to wildlife. Section IV examines existing NPS options under existing law to combat threats on adjacent public lands. It concludes that existing options can be helpful in some circumstances but are insufficient as general solutions. These conclusions lead to the question of remedies. The fifth section recounts various proposals for legislative reform, and the Conclusion offers guidelines for constructing a statutory framework for preventing and abating external threats to the wildlife resources of national parks.

## I. EXTERNAL THREATS TO WILDLIFE RESOURCES OF NATIONAL PARKS

Wildlife species neither observe human laws nor honor human boundaries. It therefore is misleading to speak of "national park wildlife resources," because wildlife is simply wildlife. Some animals reside permanently within park boundaries, but many if not most animals are found where nature, whim, or circumstance direct them. The point of this truism is that any threat to the well-being of a wildlife species anywhere may be a threat to park wildlife as well.

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3. Those issues were aired in depth at the Conference, *supra* note \*. It featured the following legally-oriented presentations, among many others:

Keiter, *Jurisdictional and Institutional Issues: Public Lands*;  
 Magraw, *International Law and External Threats to National Parks*;  
 Mantell, *The National Park System and Development on Private Lands: Opportunities and Tools to Protect Park Resources*;  
 Mastbaum, *A Simple Solution for the Thorny Problem of Park Protection: Focusing on Alternatives*.  
 Ross, *Legal Issues Associated with Protecting Park Resources: Air Quality and Related Values*;  
 Tarlock, *Protection of Waters Within and Without Park Boundaries to Support National Parks and Other Units on the National Park System*.

The outlines of these presentations with supporting materials are available from the Natural Resources Law Center of the University of Colorado Law School, Boulder, Colorado.

Some species that spend parts of their lives in parks also migrate great distances and are vulnerable to hunting far away from parks.<sup>4</sup> Thus, for example, whether a California park enjoys an annual visitation by certain duck species may depend on regulation of the duck harvest in Alaska, Canada, or other points north.<sup>5</sup> The NPS is not in a position to influence national or statewide wildlife hunting regulation.<sup>6</sup> Still, the geographical magnitude of the problem indicates some of the difficulties in promulgating protective measures.

Similarly, many non-hunting threats are far removed from the parks. For instance, power plants hundreds of miles away emit acid-causing pollutants that can kill lakes in the parks.<sup>7</sup> Similarly, disasters such as the selenium poisoning at the Kesterson National Wildlife Refuge<sup>8</sup> may so deplete a particular species population that few individuals from that population will visit parks on usual migration routes. Some parks, because of remoteness and elevation, are relatively immune to some threats. Others, however, are especially vulnerable. Probably the best-known instance is the diversion of waters that formerly fed into Everglades National Park; man's engineering is changing the entire park ecosystem to the detriment of resident wildlife.<sup>9</sup>

No matter how good its intentions, the NPS does not have the capacity to contemplate, much less deal with, a problem of such magnitude as national wildlife habitat and population maintenance. Threats that affect all wildlife are the responsibility of the whole American society. This paper therefore limits its consideration to threats located on private and public land adjoining, adjacent to, or in fairly close proximity to the national parks.<sup>10</sup> Most public lands adjoining national parks are managed by the Forest Service and—to a lesser extent except in Alaska—by the Bureau of Land Management.

4. For instance, the migration of elk herds from Yellowstone necessitated the creation of wildlife refuges near the park to protect them in the winter. Grizzly bears also roam over wide areas without regard for park boundaries. Outside parks, game species are far more vulnerable to hunting and other pressures.

5. Under the Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-711 (1982), *see infra* notes 43-46, the Interior Department has authority to regulate all hunting of migratory birds; it typically regulates on a regional basis with state-by-state quotas. *See* Coggins & Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165 (1979). For nonavian species, however, there is no such national oversight mechanism, except for endangered or threatened species. *See infra* notes 48-62 and accompanying text. Consequently, when state regulation allows declines in species (such as mountain lions or bobcats, *see* *Defenders of Wildlife v. Endangered Species Scientific Auth.*, 659 F.2d 168 (D.C. Cir. 1981)), the effects are felt in park populations of those species.

6. One reform notion described but not espoused in this paper is the merger of the NPS with the Fish and Wildlife Service so that the combined agency would have nationwide jurisdiction over wildlife. *See infra* § V, C(3).

7. *See, e.g.*, Ross, *supra* note 3.

8. *See, e.g.*, Schneider, *Crisis at Kesterson*, AMICUS J. 22 (Fall 1985).

9. *See, e.g.*, Whitfield, *Restoring the Biological Integrity of Everglades National Park*, Conference, *supra* note \*.

10. While "adjacent" is broader than "adjoining," as the former includes "close to," and while "fairly close proximity" is scarcely definitive, those three descriptive phrases in combination should adequately define the relevant threat area.

The threats to wildlife resources from activities on adjacent private and public lands run the gamut of threats to wildlife populations generally. These threats fall into two main categories: direct killing and habitat destruction. Of the two, the latter is the more serious problem.

### A. *Hunting, Fishing, and Predator/Pest Control*

The national parks are the only federal properties in which general hunting is unambiguously outlawed, which accounts for the relative abundance (and occasional overabundance) of wildlife populations in the parks.<sup>11</sup> The NPS attempts to manage "naturally," leaving the animals to their own survival devices for the most part.<sup>12</sup> Internal park wildlife difficulties are often caused by management of predatory species. The eradication of large predators earlier in the century has left some park ecosystems out of balance,<sup>13</sup> and the Park Service effort to preserve grizzly bears while protecting people from them has not been an unqualified success.<sup>14</sup> Park wildlife also suffers from poaching, but the extent of illegal killing is undetermined.<sup>15</sup> Although internal park wildlife management is beyond the scope of this paper, internal management problems cannot be neatly divorced from external threats; human actions both internal and external to the park may affect the same wildlife population.

Wildlife usually resident in parks is subject to hunting on adjacent private or public land under state law when animals leave the park.<sup>16</sup> The threat from hunting on adjacent lands is exemplified in the recent Bison brouhaha. According to news reports, Montana game officials decided to allow hunters to shoot bison wandering out of Yellowstone National Park for fear that the bison might infect cattle with brucellosis.<sup>17</sup> Litigation over the Great Montana Buffalo Hunt had not been resolved as of September 1986, and the Park Service, after fruitless discussions with

11. To the surprise of many, hunting and fishing are not prohibited generally either in wilderness areas or in national wildlife refuges. See M. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW*, 119-34, 171-76 (2d ed. 1983); Coggins & Ward, *supra* note 1. On surpluses of some animals in parks, see, e.g., A. CHASE, *PLAYING GOD IN YELLOWSTONE* (1986).

12. See Swanson, *supra* note 2.

13. Not until the 1960's, however, did the NPS officially reject its practice of eradicating predatory species. See Coggins & Evans, *Predators' Rights and American Wildlife Law*, 24 ARIZ. L. REV., 821, 848-52 (1982).

14. See generally A. CHASE, *supra* note 11.

15. See, e.g., *United States v. Sanford*, 547 F.2d 1085 (9th Cir. 1976). See generally NATIONAL PARK SERV., U.S. DEP'T OF THE INTERIOR, STATE OF THE PARKS 1980: A REPORT TO THE CONGRESS (1980) [hereinafter STATE OF THE PARKS 1980].

16. Congress could preempt state power to regulate hunting on federal lands, *Kleppe v. New Mexico*, 426 U.S. 529 (1976), but Congress has usually chosen not to do so except in national parks. Instead, Congress typically preserves preexisting jurisdictional relationships without ever defining what those relationships were or are. E.g., 16 U.S.C. §§ 528, 668dd(c) (1982 & Supp. III 1985); 43 U.S.C. § 1732(b) (1982). See *Defenders of Wildlife v. Andrus*, 627 F.2d 1238 (D.C. Cir. 1980).

17. See *Park is Trying to Keep Bison From Roaming*, N.Y. Times, Sept. 13, 1986, at 36, col. 1; Robbins, *Bison Hunt is Over But Debate Lives*, *id.*, Apr. 5, 1986, at 31, col. 1; *Bison Wander From Yellowstone and Are Killed in Montana Hunt*, *id.*, Dec. 29, 1985, at 5, col. 2. This sort of buffalo hunt can hardly be considered "sport," "sitting ducks" or "fish in a barrel" are more apt similes.

state officials, decided to erect a fence to keep the unfortunate animals within protected park boundaries,<sup>18</sup> an unsatisfactory solution to a pathetic problem.

The bison incident illustrates that hunting in areas adjacent to parks deserves special consideration from state fish and game agencies. Such consideration is not always forthcoming, perhaps because many state game agencies tend to be more utilitarian than preservational.<sup>19</sup> The states now attempt to manage for sustainable harvests of game species, but overhunting and consequent population declines are not uncommon.<sup>20</sup> State regulatory systems also often lack sufficient biological information necessary to avert population declines in vulnerable species.<sup>21</sup> The problem is exacerbated by the attitudes of some hunters who pay little heed to state wildlife conservation laws.<sup>22</sup>

State control of hunting on federal lands raises interjurisdictional problems. Whether the Forest Service and the BLM can close areas under their jurisdiction to hunting for protection of wildlife migrating out of adjacent national parks remains open to some doubt.<sup>23</sup> The uncertainty stems from a narrow and confusing interpretation of the Federal Land Policy and Management Act (FLPMA) by the District of Columbia Circuit in 1980.<sup>24</sup> In any event, the FLPMA does not specifically cite protection of park wildlife resources as a reason to forbid hunting, and neither the Forest

18. Conversations with federal land managers at the Conference, *supra* note \*.

19. Some state agencies remain hostile to predators. Minnesota, for instance, has persistently sought sport hunting seasons on endangered and now threatened timber wolves. See *Sierra Club v. Clark*, 755 F.2d 608 (8th Cir. 1985). Measures to curtail hunting or trapping for preservational reasons are frequently opposed by state agencies. See *supra* note 13; *infra* notes 20-27. State game agencies are guided by the credo that wildlife species are "crops" to be "harvested;" that credo is buttressed by the fact that hunting and fishing license fees finance agency operations. See, e.g., Coggins & Ward, *supra* note 1, at 73-75.

20. Wildlife management is not and cannot be an exact science; there is some question whether it is a science at all. See Coggins and Ward, *supra* note 1, at 64-75. Further, because state game agencies often give hunters' satisfaction top priority, miscalculations are inevitable.

21. See, e.g., *Defenders of Wildlife v. Endangered Species Scientific Auth.*, 659 F.2d 168 (D.C. Cir. 1981); cf. *Committee for Humane Legislation, Inc. v. Richardson*, 540 F.2d 1141 (D.C. Cir. 1976); *Fund for Animals v. Frizzell*, 530 F. 2d 982 (D.C. Cir. 1975).

22. The extent of this problem is unknown, but anyone familiar with attitudes in the backcountry will agree that the problem is real.

23. The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (1982) [hereinafter FLPMA], provides that, with respect to wildlife management by the BLM and the Forest Service:

nothing in this Act shall be construed . . . as enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife. However, the Secretary concerned may designate areas of public land . . . where, and establish periods when, no hunting or fishing will be permitted for reasons of public safety, administration, or compliance with provisions of applicable law.

24. In *Defenders of Wildlife v. Andrus*, 627 F.2d 1238 (D.C. Cir. 1980) [hereinafter *Alaska Wolf*], the court ruled that Alaska could proceed with its program to kill wolves on federal land because the National Environmental Policy Act did not require the Secretary to prepare an environmental impact statement on the "nonaction" of his failure to object to the state program. The court then discussed § 1732(b) and indicated in apparent dicta that the section gives states preeminence in wildlife management. *Id.* at 1247. In fact, the statute on its face purports to preserve preexisting jurisdictional arrangements; those arrangements between states and the federal multiple use agencies contemplated state regulation of hunting and federal management of habitat. See Gottschalk, *The State-Federal Partnership in*

Service nor the BLM has shown any inclination to do so. For many sport species such as deer and elk, hunting on adjacent lands has relatively little effect on population levels, but for rarer species such as mountain lions or grizzly bears, hunting could be devastating.

Killing practices other than sport hunting also threaten park wildlife resources. Predator control by means such as denning (killing all the pups in a den), poisoning, or shooting from airplanes is just as deadly.<sup>25</sup> Although predator control practices seem to make little impact on coyote populations, they can make and have made severe inroads on other predators such as eagles and wolves. Further, predator poisoning has been notorious for killing "nontarget" species.<sup>26</sup> Reinstitution of widespread predator poisoning programs—actions sporadically supported by the present Administration—could exacerbate external threats to park wildlife.

### *B. Habitat Destruction and Modification*

Hunting as an external threat to park wildlife resources pales in comparison to developmental and like activities that destroy wildlife habitat. "Habitat," as used here, means the sum of the attributes of an area that assist in a species' survival, including food, shelter, cover, and solitude.<sup>27</sup> Virtually all human activities, if of sufficient magnitude, can adversely affect one or more habitat attributes.

When the parks were established, particularly those in the West and Alaska, the surrounding areas were largely wilderness, like the parks themselves. In the West, a strong correlation between parks and national forests is evident; some parks, such as Yellowstone, are almost completely surrounded by national forests; other parks have been created from former national forests. In Alaska, many parks have similar relationships with BLM lands. Eastern parks were created long after white settlement and thus tend to abut mostly private lands. None of these generalities is a rule: the ownership or management of lands adjacent to or near parks frequently is mixed.<sup>28</sup>

Developmental activities on private lands are ordinarily governed only by state law and local zoning codes, although federal pollution law also may affect whether and to what extent such activities may proceed. Most

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*Wildlife Conservation*, in WILDLIFE AND AMERICA 290 (H. Brokaw ed. 1978). A highly persuasive argument could have been made that elimination of wolves to increase caribou or moose populations is more in the nature of habitat manipulation than sport hunting. In spite of its evident shortcomings, the *Alaska Wolf* decision remains the leading judicial interpretation of the pertinent section. See Coggins & Evans, *supra* note 13, at 868-71.

25. See generally Coggins & Evans, *supra* note 13.

26. *Id.* at 837-43. In 1963 alone, the official (and thus likely very conservative) estimate for killing pursuant to the federal predator control program included 842 bears, 20,780 bobcats, 89,653 coyotes, 2771 red wolves, 8 grey wolves, 294 mountain lions, and 76,415 "nontarget" species (badgers, beavers, skunks, raccoons, foxes, opossums, etc.). Cain, *Predator and Pest Control*, in WILDLIFE AND AMERICA 379, 391 Table 2 (H. Brokaw ed. 1978).

27. See generally R. WHITTAKER, COMMUNITIES AND ECOSYSTEMS (1975); R. DASMANN, ENVIRONMENTAL CONSERVATION (3d ed. 1972).

28. On park creation, see generally W. EVERHART, THE NATIONAL PARK SERVICE (rev. ed. 1983) and A. RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE (1979).

such activities on Forest Service or BLM lands are usually allowed only in the discretion of those agencies,<sup>29</sup> but some pursuits, such as recreation<sup>30</sup> and hardrock mining,<sup>31</sup> are treated by statute or custom as rights of sorts.<sup>32</sup> In the aggregate, developmental activities that detrimentally affect habitat constitute the most serious threat to park wildlife resources and to many other aesthetic, biological, and physical park resources.

Space precludes an exhaustive cataloguing. Suffice it to say that logging, road-building, recreation (especially motorized recreation), oil and gas drilling, water resource development, mineral exploration and production, and livestock grazing all can and do contribute to habitat destruction. These and similar activities, projects, and proposals are proliferating in areas near parks. Many of these threats are documented in the NPS Report on *State of the Parks 1980*<sup>33</sup> and in other less comprehensive studies.<sup>34</sup> The NPS identified 130 such instances threatening mammals and plants alone.<sup>35</sup> Among the better-known threats to wildlife and other park amenities are proposals for geothermal development near Yellowstone, a nuclear waste site near Canyonlands, logging near Redwood and Mt. Rainier, oil and gas drilling near Glacier, and resort development near Rocky Mountain. The parks are no longer isolated.

No generalization can cover the nature and type of all such threats to wildlife welfare. In some cases, just the human presence may render an area uninhabitable to certain species.<sup>36</sup> In others, grazing or logging may cause erosion that silts up streams to the detriment of spawning fish.<sup>37</sup> Threats to park wildlife vary, depending on the intensity of the activity, the park configuration, the species, and many other factors.

No one can define precisely the contours of all threats to park wildlife resources, yet no one can deny the existence of such external threats. The range and magnitude of external threats to park wildlife seems to require a broad and flexible remedy in the form of new legislation. But before examining visionary legislative proposals, existing law should be surveyed to determine whether less drastic alternatives are available.

29. Multiple-Use, Sustained-Yield Act, 16 U.S.C. §§ 528-531 (1982); Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1784 (1982 & Supp. III 1985). 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).

30. *E.g.*, United States v. Curtis-Nevada Mines, Inc., 611 F.2d 1277 (9th Cir. 1980).

31. The General Mining Law of 1872, 30 U.S.C. § 22 (1982 & Supp. III 1985). See generally 1 AMERICAN LAW OF MINING (2d ed. 1984).

32. See generally G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW (2d ed. 1986).

33. STATE OF THE PARKS 1980, *supra* note 15, at 25.

34. See Keiter, *On Protecting the National Parks From the External Threats Dilemma*, XX LAND & WATER L. REV. 355, 359 nn.22, 23 (1985) (citing W. SHANDS, AN ISSUE REPORT—FEDERAL RESOURCE LANDS & THEIR NEIGHBORS 3 (1979); NPCA Surveys, NATIONAL PARKS AND CONSERVATION MAGAZINE 4 (Mar. 1979); *id.* at 4 (Apr. 1979); *id.* at 21 (Nov. 1979)).

35. STATE OF THE PARKS 1980, *supra* note 15, at 25.

36. *Cf.* Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson, 685 F.2d 678 (D.C. Cir. 1982).

37. *E.g.*, Northwest Indian Cemetery Protective Ass'n v. Peterson, 764 F.2d 581 (9th Cir. 1985); National Wildlife Fed'n v. United States Forest Serv., 592 F. Supp. 931 (D. Or. 1984) (appeal pending).



## II. EXISTING WILDLIFE PROTECTION LAW WITH SITUATIONAL APPLICABILITY TO EXTERNAL THREATS

Congress has never passed a single, general law to deal with external threats to park wildlife. Various federal statutes, as supplemented by state enforcement programs, can nevertheless operate to prevent, abate, or mitigate some of the worst threats if adequately implemented. This section very briefly summarizes these federal laws, grouped loosely into the categories of wildlife laws, general environmental laws, and public land management statutes.

### A. Federal Wildlife Laws

Congress has passed, at odd intervals, a series of statutes intended to protect certain wildlife species—and, occasionally, their habitats.<sup>38</sup> These laws provide park partisans with legal means for averting threats in some instances, but, even taken together, the federal wildlife laws do not offer a comprehensive solution. Three of the dozen or so federal statutes in this area<sup>39</sup> deserve at least brief mention because their impact could be the most direct. By chronological order of enactment, they are the Migratory Bird Treaty Act of 1918,<sup>40</sup> the Marine Mammal Protection Act of 1972,<sup>41</sup> and the Endangered Species Act of 1973.<sup>42</sup>

1. *The Migratory Bird Treaty Act (MBTA)*. The MBTA is in several respects the most comprehensive of the federal wildlife statutes. Under it, the Fish and Wildlife Service (FWS) in the Department of the Interior is authorized to determine hunting seasons and other protective measures for all species of migratory birds in this country regardless of population status.<sup>43</sup> No one can kill, hunt, sell, or possess any listed bird without FWS permission.<sup>44</sup> The agency attempts to limit the take of each hunted species to a number that will insure adequate flights the following year.<sup>45</sup> The

38. Congressional concern for wildlife has focused primarily on species preservation, with habitat or ecosystem protection a distant second. See Smith, *The Endangered Species and Biological Conservation Act*, 57 S. CAL. L. REV. 361 (1984).

39. Wild and Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (1982); Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407 (1982 & Supp. III 1985) [hereinafter MMPA]; Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1982 & Supp. III 1985) [hereinafter ESA]; Bald Eagle Protection Act of 1940; 16 U.S.C. §§ 668-668d (1982); Federal Aid in Wildlife Restoration Act (Pitman-Robertson Act), 16 U.S.C. §§ 669-669i (1982 & Supp. III 1985); Federal Aid in Fish Restoration Act (Dingell-Johnson Act), 16 U.S.C. §§ 777-777k (1982); Fish and Wildlife Coordination Act of 1958, 16 U.S.C. §§ 661-667e (1982); Anadromous Fish Conservation Act of 1965, 16 U.S.C. § 57b (1982); Migratory Bird Treaty Act, 16 U.S.C. § 703-712 (1982) [hereinafter MBTA]; Fish and Wildlife Conservation Act of 1980, 16 U.S.C. §§ 2901-2911 (1982); The Lacey Act of 1900, 16 U.S.C. §§ 667e, 701 (1982); Migratory Bird Conservation Act, 16 U.S.C. §§ 715-715r (1982); Wetlands Loan Act of 1961, 16 U.S.C. §§ 715k-3 to -5 (1982 & Supp. III 1985); Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-1882 (1982 & Supp. III 1985).

40. 16 U.S.C. §§ 703-711 (1982).

41. *Id.* §§ 1361-1407.

42. *Id.* §§ 1531-1543.

43. See generally Coggins & Patti, *supra* note 5.

44. 16 U.S.C. § 703 (1982).

45. See Coggins & Patti, *supra* note 5; see, e.g., *Fund for Animals v. Frizzell*, 530 F.2d 982 (D.C. Cir. 1976).

MBTA also assesses liability against those whose activities cause foreseeable bird mortality, even if the killing is only negligent or accidental.<sup>46</sup> To the extent that the FWS is successful in maintaining healthy avian populations, bird watching in the parks should remain profitable.

2. *The Marine Mammal Protection Act (MMPA)*. The MMPA is directly relevant only to oceanfront parks such as Arcadia, Olympic, and Kenai Fjords. The statute imposes a flat ban on the killing or harassment of seals, sea lions, manatees, walruses, polar bears, sea otters, whales, dolphins, and other such seagoing mammals.<sup>47</sup> Observance of the MMPA should guarantee the continued presence of these fascinating creatures in the offshore waters.

3. *The Endangered Species Act (ESA)*. The 1973 ESA protects habitat as well as the species designated as endangered or threatened. As such, the Act has considerable potential for independently shielding some species of park wildlife from indirect threats as well as from outright killing. Unfortunately, only relatively small numbers of species resident in parks qualify for ESA protection,<sup>48</sup> but some, such as grizzly bears, eagles, wolves, and peregrine falcons, are officially listed as endangered or threatened.<sup>49</sup>

The ESA instructs all federal agencies to "insure" that their actions do not jeopardize listed species or adversely affect their "critical habitat."<sup>50</sup> The latter term is now defined somewhat narrowly in the Act to mean designated areas crucial to a species' survival but not necessarily crucial to its recovery.<sup>51</sup> The Act also compels all agencies to carry out programs for the "conservation" of listed species,<sup>52</sup> which means taking all steps necessary for their recovery to nonendangered and nonthreatened status.<sup>53</sup> Many agencies have not yet fully developed procedures to carry out their affirmative conservation duties.<sup>54</sup>

Several recent cases illustrate the potential of the ESA for preserving park wildlife resources. The leading case is, of course, *TVA v. Hill*,<sup>55</sup> in which the United States Supreme Court ruled that the Act's commands are near-absolute and that species preservation takes precedence over all

46. *United States v. Corbin Farm Serv.*, 578 F.2d 259 (9th Cir. 1978); *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978); see Coggins & Patti, *supra* note 5, at 182-90.

47. 16 U.S.C. § 1362 (1982); see M. BEAN, *supra* note 11, at 281-317.

48. Unlike the MBTA, which covers all migratory birds, and unlike the MMPA, which protects all marine mammals, the ESA does not afford protection to any species until it is officially listed. 16 U.S.C. § 1533 (1982). See generally M. BEAN, *supra* note 11, at 318-83; Coggins & Russell, *Beyond Shooting Snail Darters in Pork Barrels: Endangered Species and Land Use in America*, 70 GEO. L.J. 1433 (1982).

49. The list is found at 50 C.F.R. § 17.11 (1986).

50. 16 U.S.C. § 1536(a)(2) (1982).

51. *Id.* § 1532(5).

52. *Id.* § 1536(a)(1).

53. *Id.* § 1532(3); see *Sierra Club v. Clark*, 755 F.2d 608 (8th Cir. 1985).

54. See France & Tuholske, *Stay the Hand: New Directions for the Endangered Species Act*, 7 PUB. LAND L. REV. 1 (1986).

55. 437 U.S. 153 (1978).

other considerations. In *Thomas v. Peterson*,<sup>56</sup> the Ninth Circuit Court of Appeals took that notion a step further when it ruled that a proposal to build a logging road must be enjoined for failure to ensure that the project would not harm the Rocky Mountain grey wolf, a species long thought to be extinct.<sup>57</sup> Similarly, the Eighth Circuit has held that regulated sport taking of the eastern timber wolf is unlawful because it contravenes the Act's definition of conservation.<sup>58</sup> On the other hand, the District of Columbia Circuit affirmed a decision allowing mineral exploration in an area thought to be inhabited by grizzly bears because the court regarded mitigation measures imposed by the agency as, in effect, "substantial compliance" with the statute under a relaxed standard of review.<sup>59</sup>

The ESA offers park partisans several means to combat external threats. When any project or activity threatens the welfare of an officially listed species, they can challenge the project in the agency and in the courts.<sup>60</sup> Even if the project or activity will not jeopardize the species or affect designated critical habitat, it still may constitute a prohibited "taking,"<sup>61</sup> a term that includes harassment as well as killing or harming. For unlisted species, any person may petition the Department of the Interior to have the species declared endangered or threatened; listing, however, can be a tortuous, uncertain process.<sup>62</sup> In sum, the ESA provides stringent protection to a very limited category of wildlife species wherever they are found.

Federal wildlife laws will be an adequate response to certain external threats only in two situations: when the FWS successfully manages an avian species generally so that its abundance is reflected in the parks; and when a particular threat adversely affects an endangered or threatened species and someone pursues the matter in the agency or in the courts.

### B. General Environmental Laws

The fabric of environmental law that Congress has woven in the past two decades contributes to wildlife welfare in several ways, depending

56. 753 F.2d 754 (9th Cir. 1985).

57. The area in question had been identified by the FWS as a "recovery corridor" for the Rocky Mountain gray wolf, but there was no indication in the opinion that anyone had actually seen wolves in the area. Other studies indicate that a few wolves may still inhabit remote parts of Idaho. See France & Tuholske, *supra* note 54, at 14 n.76.

58. *Sierra Club v. Clark*, 755 F.2d 608 (8th Cir. 1985).

59. *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982). The court ruled that review of agency compliance with the ESA would be judged under the lenient "arbitrary and capricious" standard, apparently forgetting that the Act as construed in *TVA v. Hill* commands a strict substantive standard from which the agencies cannot deviate. Since *Hill*, the agencies must go through the complex "God Committee" procedures to gain an exemption. 16 U.S.C. § 1536 (1982). See generally Coggins & Russell, *supra* note 48.

60. See, e.g., *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976 (9th Cir. 1985); *Roosevelt Campobello Int'l Park Comm'n v. United States EPA*, 711 F.2d 431 (1st Cir. 1983).

61. 16 U.S.C. § 1538(a)(1) (1982); see *Palila v. Hawaii Dep't of Land & Nat. Resources*, 639 F.2d 495 (9th Cir. 1981); cf. *TVA v. Hill*, 437 U.S. 153, 184, n.30 (1978).

upon the circumstances. Pollution laws can abate or mitigate some threats to habitat inside and outside of parks. And the National Environmental Policy Act (NEPA)<sup>63</sup> provides a procedural avenue for the NPS or its champions to participate in decisions of other agencies that might harm national park wildlife resources.

1. *Federal Pollution Laws.* Most of the federal pollution laws are intended to protect human health, but their success has salubrious side effects for many species of wildlife as well. The Clean Air Act<sup>64</sup> and especially the Clean Water Act,<sup>65</sup> by removing pollutants from those media, create better living conditions for all sorts of wildlife, especially fish and other aquatic creatures. Acid rain, however, remains a serious problem: when trees and lakes die from acid rain, some wildlife species feel the effects far more than people.<sup>66</sup>

Several federal pollution laws contain provisions specifically directed at park protection. The Clean Air Act, for instance, directs special protection for visibility in parks.<sup>67</sup> Although it is unlikely that park resources will ever be completely protected from pollution, a few hopeful straws are in the wind. One such instance was litigated in *Utah International, Inc. v. Department of the Interior*.<sup>68</sup> UII owned federal coal leases on lands near Bryce Canyon National Park. Conservationists petitioned the Interior Secretary under provisions of the Surface Mining Control and Reclamation Act<sup>69</sup> to declare those lands unsuitable for strip-mining because of their proximity to the park and the probable impact of mining on park resources. Secretary Andrus granted the petition, and UII sought remand to allow then-new Secretary Watt reexamine the unsuitability decision. The court tentatively upheld the Andrus determination, denying remand, and indicated that the action probably did not constitute a fifth amendment taking.<sup>70</sup>

Probably the most notable instance of the pollution laws benefiting wildlife was the ban on DDT use, compelled by litigation under the Federal Insecticide, Fungicide, and Rodenticide Act<sup>71</sup> in the early 1970's. Several avian species, including the bald eagle, have recovered considerably since, and presumably as a result of, that ban.<sup>72</sup> In spite of that and other

62. 16 U.S.C. § 1533(b)(3) (1982); see M. BEAN, *supra* note 11, at 334-42.

63. 42 U.S.C. §§ 4321-4335 (1982 & Supp. III 1985).

64. *Id.* §§ 7401-7642 (1982).

65. 33 U.S.C. §§ 1351-1376 (1982 & Supp. III 1985).

66. *E.g.*, *Patterns and Trends in Data for Atmospheric Sulphates and Visibility*, in *ACID DEPOSITION: LONG TERM TRENDS* 109-27 (1986).

67. See Ross, *supra* note 3.

68. 553 F. Supp. 872 (D. Utah 1982).

69. Surface Mining Control and Reclamation Act of 1977, § 522(a), 30 U.S.C. § 1272(a) (1982).

70. *Utah Int'l*, 553 F. Supp. at 882.

71. 7 U.S.C. §§ 136-136y (1982 & Supp. III 1985). Environmental plaintiffs forced the federal government to consider the banning of, and then to ban, DDT use. See *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971).

72. See, *e.g.*, *Rise in Bird Populations Attributed to Decline in Environmental DDT Levels*, 12 *Env't Rep.* (BNA) No. 48, at 1555 (Mar. 26, 1982) (Current Developments section).

success stories, however, federal pollution laws in the aggregate respond only to a small number of external threats and then only in a limited indirect fashion.

2. *The National Environmental Policy Act (NEPA)*. NEPA offers a procedural avenue to combat many site-specific external threats. If the proposed project posing the threat is to be located on federal lands or requires federal approval, anyone interested may join the fray and attempt to change the authorizing agency's mind on the matter.<sup>73</sup> Despite NEPA's lack of substantive standards,<sup>74</sup> its procedural mechanisms can be powerful tools when challengers are able to demonstrate the existence and extent of the threat. NEPA is ubiquitous; courts have enforced it in many situations likely to threaten wildlife habitat, including road-building,<sup>75</sup> logging operations,<sup>76</sup> livestock grazing,<sup>77</sup> oil and gas drilling,<sup>78</sup> and forest planning.<sup>79</sup> There is no good reason why the Park Service cannot actively participate in other agencies' decisionmaking under NEPA.<sup>80</sup>

### C. Federal Land Management Statutes

Like the other categories of federal statutes with potential to relieve some external threats problems, the subject of federal land management laws can only be skimmed in this space. Aggressive, creative use of those laws, however, may provide the NPS or park partisans with remedies in some specific threat situations. For these purposes, the relevant federal law may be broken down into buffer zone creation, land management mandates, and resource-specific laws and doctrines.

1. *Buffer Zone Mechanisms*. Much public land surrounding national parks remains in a more or less wild state. The Wilderness Act of 1964<sup>81</sup> creates a mechanism for designating such areas as official wilderness.<sup>82</sup> Wilderness designation, of course, operates to preclude most potentially harmful developments.<sup>83</sup> If, therefore, sizable amounts of land adjacent to parks are so designated, those areas will buffer the parks from incompatible developments. To a lesser extent, the same result obtains when

73. NEPA requires the responsible agency to prepare an environmental impact statement whenever its proposed action will be major and have significant environmental effects. 42 U.S.C. § 4332(2)(C) (1982). If the project in question threatens park wildlife resources, it is almost by definition major and significant. Cf. *Foundation for N. Am. Wild Sheep v. United States Dep't of Agriculture*, 681 F.2d 1172 (9th Cir. 1982).

74. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980); see also *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

75. *Foundation for N. Am. Wild Sheep*, 681 F.2d 1172.

76. *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985).

77. *National Resources Defense Council v. Morton*, 388 F. Supp. 829 (D.D.C. 1974).

78. *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983).

79. *National Wildlife Fed'n v. United States Forest Serv.*, 592 F. Supp. 931 (D. Or. 1984).

80. See *infra* notes 147-58 and accompanying text.

81. 16 U.S.C. §§ 1131-1136 (1982 & Supp. III 1985).

82. See, e.g., *California v. Block*, 690 F.2d 753 (9th Cir. 1982).

83. 16 U.S.C. § 1133 (1982). See COGGINS & WILKINSON, *supra* note 32, at ch. 11.

Congress declares rivers near parks wild or scenic under the Wild and Scenic Rivers Act of 1968.<sup>84</sup>

The Ninth Circuit, in its 1982 *California v. Block*<sup>85</sup> decision, ruled that the one-third of the entire national forest system which technically qualified for wilderness designation must be preserved undeveloped pending completion of an adequate environmental impact statement on the proposal to return them to multiple use, sustained yield management.<sup>86</sup> Reacting to that decision, Congress accelerated the designation process and soon should substantially complete it for western national forests.<sup>87</sup> For parcels not included in the Wilderness Preservation System and on which harmful developments are threatened, any person is free to ask Congress to designate such areas as wilderness.

In this regard, congressional choices for classification of Alaska lands deserve notice. Following the example it had earlier set by establishing the Big Cypress National Preserve adjacent to Everglades National Park in Florida,<sup>88</sup> Congress in the Alaska National Interest Lands Conservation Act of 1980<sup>89</sup> created a series of national preserves in conjunction with designation of national parks in Alaska.<sup>90</sup> National preserve status is a hybrid category that protects the values and characteristics of the area while allowing some activities, notably hunting, that Congress deems compatible with park preservation.<sup>91</sup>

Designation of wilderness and creation of national preserves are types of federal land classification (which, effectively, is a form of zoning), that can only be accomplished by Congress. Given the sanctity with which the public regards national parks, however, such political remedies are not necessarily beyond reasonable contemplation.<sup>92</sup>

*2. Federal Land Management Statutes.* A spate of novel land management laws enacted in the mid-1970's established new and more environmentally sensitive management standards for the Forest Service and the BLM. The National Forest Management Act of 1976<sup>93</sup> imposes a series of constraints on timber harvests in the national forests, some of which

84. 16 U.S.C. §§ 1271-1287 (1982 & Supp. III 1985); see generally Fairfax, Andrews & Buchsbaum, *Federalism and the Wild and Scenic Rivers Act: Now You See It, Now You Don't*, 59 WASH. L. REV. 417 (1984).

85. 690 F.2d 753 (9th Cir. 1982).

86. *Id.* at 768.

87. See COGGINS & WILKINSON, *supra* note 32, at 1016.

88. Big Cypress National Preserve Act, 16 U.S.C. § 698f (1982).

89. 16 U.S.C. §§ 3101-3233 (1982 & Supp. III 1985).

90. *Id.* § 3201 (1982).

91. "A National Preserve in Alaska shall be administered and managed as a unit of the National Park System in the same manner as a national park except . . . that the taking of fish and wildlife for sport purposes and subsistence uses, and trapping shall be allowed" under applicable law, with the Secretary retaining the power to close areas when necessary. *Id.* By contrast, most activities are allowed in the Big Thicket Preserve subject to the Secretary's control. *Id.* § 698(c).

92. See *infra* at notes 147-58 and accompanying text.

93. 16 U.S.C. §§ 1600-1614 (1982 & Supp. III 1985).

might profitably be used by park advocates in certain situations.<sup>94</sup> If, for instance, the Forest Service could be convinced that lands adjacent to a park were "marginal" within the meaning of the NFMA, logging on those areas likely would be prohibited, thus averting whatever threats the logging operations might pose to park wildlife.<sup>95</sup> Similarly, if new controls on clearcutting succeed in avoiding erosion and stream siltation in areas adjacent to parks, habitat attributes for some park-dwelling creatures would be enhanced.<sup>96</sup>

The Federal Land Policy and Management Act of 1976<sup>97</sup> is not nearly so detailed in its mandate to the BLM. Nevertheless, in requiring the BLM to manage for multiple use and sustained yield,<sup>98</sup> and in commanding the agency to avoid "unnecessary and undue" degradation of the environment,<sup>99</sup> the FLPMA gives park champions grounds to argue that particular projects or activities on BLM lands contravene these broader standards when they threaten park wildlife.<sup>100</sup> The FLPMA also governs livestock grazing and rights-of-way far more stringently than before.<sup>101</sup>

Both statutes require the multiple use agencies to engage in extensive land use planning.<sup>102</sup> Forest Service and BLM planning processes promise to be the key stage in future public land management.<sup>103</sup> The NPS and its surrogates can best prevent new external threats by participating in the planning of the multiple use agencies and by convincing the latter to build park protection into their plans.<sup>104</sup>

3. *Related Laws and Doctrines.* Additionally, various other statutes, executive orders, judicial doctrines, and other legal flotsam offer some protection to park wildlife in some situations—usually resource-specific situations. Federal implied reserved water rights clearly protect park watercourses from diversions that might harm park wildlife.<sup>105</sup> Maintenance of instream flows within parks will also contribute to better conditions for wildlife above and below the parks.<sup>106</sup> Executive Order No.

94. See generally Wilkinson & Anderson, *Land and Resource Planning in the National Forests*, 60 OR. L. REV. 1 (1985).

95. Land that does not meet certain NFMA standards must be classified as unsuitable for timber production. 16 U.S.C. § 1604(g), -(k) (1982). That and other limitations on timber harvesting are discussed in depth in Wilkinson & Anderson, *supra* note 94.

96. Cf. *National Wildlife Fed'n v. United States Forest Serv.*, 592 F. Supp. 931 (D. Or. 1984) (appeal pending).

97. 43 U.S.C. §§ 1701-1784 (1982 & Supp. III 1985).

98. *Id.* § 1732(a).

99. *Id.* § 1732(b).

100. See generally Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVTL. L. 1 (1983).

101. 43 U.S.C. §§ 1751-1753, 1761-1765 (1982 & Supp. III 1985); see Coggins, *supra* note 100; Martz, Love & Kaiser, *Access to Mineral Interests by Right, Permit, Condemnation, Or Purchase*, 28 ROCKY MTN. MIN. L. INST. 1075 (1983).

102. 16 U.S.C. § 1604 (1982 & Supp. III 1985); 43 U.S.C. §§ 1711-1712 (1982).

103. See generally Coggins, *supra* note 100; Wilkinson & Anderson, *supra* note 94.

104. See *infra* notes 147-58 and accompanying text.

105. *Cappaert v. United States*, 426 U.S. 128 (1976); *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982).

106. See Tarlock, *Appropriation for Instream Flow Maintenance: A Progress Report on "New" Public Western Water Rights*, 1978 UTAH L. REV. 211.

11644,<sup>107</sup> if ever fully implemented,<sup>108</sup> should cut down damage to wildlife habitat wreaked by off-road vehicles.

Hardrock mining operations are no longer beyond the reach of reasonable environmental regulation. FLPMA,<sup>109</sup> NEPA,<sup>110</sup> the Forest Service's Organic Act,<sup>111</sup> and the 1955 Surface Resources Act<sup>112</sup> have combined to create new controls on mining operations that ultimately should benefit wildlife in mineral areas.<sup>113</sup> A graphic example is *Cabinet Mountains Wilderness v. Peterson*.<sup>114</sup> The court ruled that a mining exploration program could proceed but only after the agency imposed a series of measures intended to mitigate possible adverse effects for grizzly bear populations.

These and other emerging controls over potentially harmful activities should help protect wildlife and wildlife habitat in some situations. But, like the wildlife and pollution statutes, they are often uncertain, ad hoc remedies that can alleviate some symptoms while ignoring many basic causes. Protection of park wildlife or other resources requires a more stringent and focused effort which only NPS leadership can provide.

### III. NATIONAL PARK SERVICE POWER TO PREVENT, ABATE, OR CONTROL EXTERNAL THREATS TO PARK WILDLIFE RESOURCES FROM ADJACENT PRIVATE LANDS

The NPS clearly has plenary and pre-emptive power to manage for wildlife preservation within parks.<sup>115</sup> Its organic statute specifies that this power must be exercised to preserve wildlife.<sup>116</sup> Except where authorized by Congress, sport and commercial hunting and trapping have long been prohibited, although fishing is sometimes allowed within parks.<sup>117</sup> The Park Service power over wildlife within parks supersedes and overrides any contrary state law or regulation.<sup>118</sup>

Courts in several recent cases have upheld NPS regulations tightening controls over wildlife taking in Park System units. In *National Rifle*

107. 3 C.F.R. § 332 (1974).

108. The efforts to do so (or to avoid doing so) can be traced through *National Wildlife Fed'n v. Morton*, 393 F. Supp. 1286 (D.D.C. 1975); *American Motorcyclist Ass'n v. Watt*, 534 F. Supp. 923 (C.D. Cal. 1981), *aff'd*, 714 F.2d 962 (9th Cir. 1983); *American Motorcyclist Ass'n v. Watt*, 543 F. Supp. 789 (C.D. Cal. 1982); *Sierra Club v. Clark*, 756 F.2d 686 (9th Cir. 1985). *Cf. Wilderness Pub. Rights Fund v. Kleppe*, 608 F.2d 1250 (9th Cir. 1979), *cert. denied*, 446 U.S. 982 (1980) (limits on access to Grand Canyon).

109. 43 U.S.C. §§ 1732(b), 1744 (1982 & Supp. III 1985).

110. 42 U.S.C. § 4332(2)(c) (1982).

111. 16 U.S.C. § 497 (1982).

112. 30 U.S.C. § 612 (1982).

113. See J. LESHY, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* (1987); COGGINS & WILKINSON, *supra* note 32, at ch. 6, § A(7).

114. 685 F.2d 678 (D.C. Cir. 1982).

115. *Kleppe v. New Mexico*, 426 U.S. 529 (1976); *New Mexico State Game Comm'n v. Udall*, 410 F.2d 1197 (10th Cir. 1969), *cert. denied*, 396 U.S. 961 (1970).

116. 16 U.S.C. § 1 (1982 & Supp. III 1985).

117. See *National Rifle Ass'n v. Potter*, 628 F. Supp. 903 (D.D.C. 1986).

118. *Kleppe v. New Mexico*, 426 U.S. 529 (1976).



*Association v. Potter*,<sup>119</sup> the court ruled that the Service could and should outlaw hunting and trapping in all recreational areas of the Park System unless Congress affirmatively commanded those uses.<sup>120</sup> The Eleventh Circuit upheld a flat ban by the NPS on commercial fishing in Everglades National Park despite contentions that the ban contravened both an earlier agreement and the custom of a half-century.<sup>121</sup> In *Voyageurs National Park Association v. Arnett*,<sup>122</sup> the court overturned an NPS determination that would have allowed trapping in an area ceded back to the state.<sup>123</sup> The tradition proscribing the killing of wildlife in the National Park System appears stronger than ever.

The question therefore is not NPS power to manage its own lands for wildlife welfare, but rather the extent of its power, if any, over other lands and associated activities that pose threats to park wildlife. Limiting the inquiry to lands reasonably proximate to parks, such lands can be categorized as private inholdings, adjacent private lands, and adjacent public lands. Because adjacent public lands are also owned and controlled by the United States, the power question involves only NPS power over activities on privately owned lands within and without park boundaries.

The statutes governing Park Service operations are silent on this question. The main statutory command is that the NPS must use such measures as conform to the fundamental purpose of conserving park wildlife for the enjoyment of future generations.<sup>124</sup> Management "shall be conducted in light of the public value and integrity of the National Park System. . . ." <sup>125</sup> But the mandate is not wholly preservational in the strictest sense: the Secretary of the Interior "may also provide in his discretion for the destruction of such animals and plant life as may be detrimental to the use of any of said parks . . ." <sup>126</sup> The authorizing legislation for many individual Park System units contains specific wildlife provisions.<sup>127</sup>

Professor Keiter argues that the statutes invest the NPS with an affirmative duty to combat external threats to park resources.<sup>128</sup> The evidence for that position is tenuous, and it is counterbalanced somewhat by statutory language apparently indicating that Congress only con-

119. 628 F. Supp. 903 (D.D.C. 1986).

120. While hunting and trapping are outlawed in the parks proper, Congress has allowed or commanded hunting in some but not all recreation units of the System. The question in *Potter* was whether the Park Service could establish a presumption against hunting and trapping when Congress was silent or ambiguous. The court upheld the NPS regulations establishing that presumption. *Id.* at 910-12.

121. *Organized Fishermen of Florida v. Hodel*, 775 F.2d 1544 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 2890 (1986).

122. 609 F. Supp. 532 (D. Minn. 1985).

123. *Id.* at 541.

124. 16 U.S.C. § 1 (1982 & Supp. III 1985).

125. *Id.* § 1a-1.

126. *Id.* § 3.

127. *See, e.g., id.* § 26 (Yellowstone National Park).

128. Keiter, *On Protecting the National Parks from the External Threats Dilemma*, XX LAND & WATER L. REV. 355, 369-75 (1984).

templated protection of wildlife within parks.<sup>129</sup> Nevertheless, the NPS is facing a new generation of threats, and its basic mission justifies its efforts to eliminate external threats, even if the law does not absolutely command it to do so. The NPS cannot fulfill to its mission unless it uses every measure at its command to protect the resources entrusted to its care.

Previous attempts by the NPS and park partisans to combat external threats have had mixed success.<sup>130</sup> A seeming watershed that never quite materialized was the Redwood Park litigation.<sup>131</sup> There, the court first found that the NPS had a duty to attempt abatement of destructive logging operations on adjacent lands, a duty it extrapolated from the Park Service Organic Act, the Redwood Park Act, and, significantly, the public trust doctrine.<sup>132</sup> Ultimately, however, the court held that the NPS lacked power to comply with the court's earlier order, and it dismissed the suit.<sup>133</sup> Over the past decade, the public trust doctrine as the source of affirmative protective duties has been much discussed<sup>134</sup> but has not made much if any difference in reported litigation.<sup>135</sup> The public trust issue is not dead, however, because the 1978 amendments to the organic act may have been an attempt to codify the doctrine.<sup>136</sup>

The powers of federal land management agencies to control adjacent private activities has also been a hot topic in legal journals,<sup>137</sup> again with few concrete results in practice or lawsuits.<sup>138</sup> Without repeating that debate, the upshot from the relatively few decided cases, some going back to the 19th century, is that such a power does exist, but that its nature, scope, and contours are murky.<sup>139</sup> So far, the power has been used successfully only to abate or to punish closely-adjacent, nuisance-like

129. For instance, the basic statement of purpose in 16 U.S.C. § 1 speaks of the "wild life therein."

130. See *United States v. County Board of Arlington County*, 487 F. Supp. 137 (E.D. Va. 1979); Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239 (1976).

131. *Sierra Club v. Department of the Interior*, 376 F. Supp. 90 (N.D. Cal. 1974).

132. *Id.* at 95-96.

133. *Sierra Club v. Department of the Interior*, 424 F. Supp. 172, 174-75 (N.D. Cal. 1976).

134. Jawetz, *The Public Trust Totem in Public Land Law*, 10 *ECOLOGY L.Q.* 455 (1982); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980); Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269 (1980).

135. See *Sierra Club v. Block*, 622 F. Supp. 842, 866 (D. Colo. 1985); *Sierra Club v. Andrus*, 487 F. Supp. 443 (D.D.C. 1980), *aff'd on other grounds sub nom. Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981).

136. Letter from James D. Webb, former Associate Solicitor for Conservation & Wildlife, Department of the Interior, to Professor Robert Keiter, University of Wyoming ("I got out Sax's article [Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970)], went to his description of the elements of a public trust, and wrote each of them into a provision that became Section 1a-1.").

137. See Sax, *supra* note 130; Gaetke, *The Boundary Waters Canoe Area Wilderness Act of 1978: Regulating Non-Federal Property Under the Property Clause*, 60 OR. L. REV. 157 (1981).

138. Many of the cases are collected in COGGINS & WILKINSON, *supra* note 32, at 203-09.

139. See generally Sax, *supra* note 130; Keiter, *supra* note 128; Comment, *Protecting National Parks from Developments Beyond Their Borders*, 132 U. PA. L. REV. 1189 (1984).

activities.<sup>140</sup> Whether it will ever be expanded into something more significant is in part a function of agency willingness to assert it, a willingness heretofore largely lacking.

Inholdings are a special category over which the NPS may exercise enhanced powers. Not only do restrictive NPS regulations apply to private actions within park boundaries,<sup>141</sup> but the NPS holds the threat of condemnation over the heads of nonconforming inholders.<sup>142</sup>

As matters now stand, the NPS has relatively few options for dealing with external threats to park wildlife resources stemming from activities on adjacent private lands. In a few cases, the Park Service can condemn properties posing a threat if Congress has authorized purchase. Condemnation is self-evidently an inadequate general remedy because funds are and will be far too limited,<sup>143</sup> and because the government cannot regulate solely by purchase. The NPS might also define "nuisance" by regulation, a difficult task in itself, and then seek to prevail upon the Justice Department to sue for abatement against nonconforming activities on adjacent private lands. This approach offers promise in at least the most glaringly offensive situations, but problems would abound. Legally, it is not clear whether the NPS has statutory authority to promulgate such regulations.<sup>144</sup> Practically, obtaining necessary cooperation from the Justice Department and other interested governmental entities could be difficult, as the Redwood Park experience demonstrates.<sup>145</sup>

Another option revolves around cooperation with or coercion of local zoning and land use officials. This approach has had some success in inholdings situations where it was backed by the coercion implicit in statutory "sword of Damocles" provisions. These provisions suspend NPS authority to condemn private inholdings as long as local land use bodies refuse to prohibit developments that do not conform to park plans and regulations.<sup>146</sup> Certainly a local community has a considerable economic stake in the continued well-being and popularity of its national park; many

140. See, e.g., *United States v. Lindsey*, 595 F.2d 5 (9th Cir. 1979); *United States v. Brown*, 552 F.2d 817 (8th Cir.), cert. denied, 431 U.S. 949 (1977).

141. See, e.g., *United States v. Brown*, 552 F.2d 817 (8th Cir.), cert. denied, 431 U.S. 949 (1977).

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

143. The source of funds for park land acquisition is the Land and Water Conservation Fund, 16 U.S.C. §§ 4601-4 to 4601-11 (1982). The decline in money available for expenditure on acquisitions is traced in Glicksman & Coggins, *Federal Recreational Policy: The Rise and Decline of the Land and Water Conservation Act*, 9 COLUM. J. ENVTL. L. 125 (1984).

144. See *supra* notes 128-29 and accompanying text.

145. See *Sierra Club v. Department of the Interior*, 424 F. Supp. 172 (N.D. Cal. 1976) (all federal, state, and private entities involved with the problem refused to assist the NPS in meeting the terms of the court's original order). In addition, the NPS would probably have to circumvent the political appointees in the higher echelons of the Interior Department. At present, it is clear that such appointees are hostile to any approach that might be viewed as restricting use of private property. Address of Allen K. Fitzsimmons, Special Assistant to the Assistant Secretary for Fish and Wildlife and Parks, Conference, *supra* note \* (Sept. 16, 1986).

146. See Sax, *supra* note 130, at 252 (this remedy is often limited and ineffective).

such towns depend economically on tourists drawn to the parks. History, however, demonstrates that the prospects for preventing and abating threats through intergovernmental cooperation alone are bleak. The activity posing the threat will also contribute to the local economy, and economic development is seldom taken for granted as parks usually are. Political feelings, especially in the rural West, often rage against land use control and especially against any federal regulation. Further, the Park Service lacks the power over areas outside park boundaries to make its threats credible.

The main conclusion that emerges from the uninformative statutes, voluminous commentary, fragments of litigation, political crosscurrents, and agency reluctance to assert powers over external private lands is that present NPS power is wholly inadequate to combat the increasingly broad range of threats to park resources, including wildlife. If the Park Service is to lead such an effort effectively, legislative authorization must first be forthcoming.

#### IV. PARK SERVICE OPTIONS UNDER EXISTING LAW FOR PRESERVING WILDLIFE RESOURCES FROM THREATS ARISING ON OTHER PUBLIC LANDS

In the West and Alaska, much national park wildlife is at the mercy of the managers of adjacent public lands. Both the Forest Service and BLM lands are governed by multiple use, sustained yield statutory mandates.<sup>147</sup> These vague laws were supposed by Congress to be environmentally-oriented conservation statutes, but the Forest Service and BLM, in differing degrees, more often treat them as commodity production commands.<sup>148</sup>

Until Congress declares otherwise, the only power the Park Service has to avert threats from adjacent federal lands is the power of persuasion. That power, such as it is, is enhanced by the special place of national parks in the psyche of the American people, but it is also diminished by the historic attitudes and practices of the multiple use agencies. Both the Forest Service and the BLM historically have evinced considerable hostility to preservation-oriented management. The Forest Service long opposed the creation of (and even the idea of) national parks, it first opposed wilderness designation by Congress for national forests, and then it dragged its feet in implementing the Wilderness Act.<sup>149</sup> The primary efforts of the Forest Service in recent decades have been directed at timber production.<sup>150</sup> The BLM has long been captive to the two main economic

147. 16 U.S.C. §§ 528-531 (1982); 43 U.S.C. §§ 1702(c), -(h), 1732(a) (1982).

148. See generally Coggins, *supra* note 29.

149. See, e.g., *California v. Block*, 690 F.2d 753 (9th Cir. 1982); McClosky, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288 (1966); Wood, *Pinchot and Mather: How the Forest Service and Park Service Got That Way*, in *NOT MAN APART* (Dec. 1976).

150. See, e.g., *West Va. Div. of the Izaak Walton League of Am., Inc. v. Butz*, 522 F.2d 945 (4th Cir. 1975); see generally Huffman, *A History of Forest Policy in the United States*, 8 ENVTL. L. 239 (1978).

interests, mining and livestock grazing, that it is supposed to regulate, and it has little experience with resource protection or preservation of any kind.<sup>151</sup> Even the Fish and Wildlife Service (FWS) may have trouble cooperating with the NPS because of FWS predisposition in favor of hunting and its tolerance for development on national wildlife refuges.<sup>152</sup> In the same vein, Park Service relationships with state fish and game agencies have not always been cordial.<sup>153</sup> Further, the NPS is sometimes constrained by intragovernmental relationships with other federal agencies, notably the Office of Management and Budget, and by shifting political currents.<sup>154</sup> Consequently, an era of cooperation and harmony, in which other land management agencies voluntarily and zealously make every effort to safeguard park wildlife resources, is not on the immediate horizon.

Nevertheless, aggressive forms of cooperation between the NPS (and its partisans) and the other agencies offer the most promising avenues under existing law for preventing and abating threats to park wildlife. The public land management statutes and NEPA establish mechanisms by which the NPS can participate, formally and informally, in the decisionmaking processes of the Forest Service and the BLM. Under NEPA, of course, these agencies must prepare environmental impact statements (EISs) whenever their actions significantly affect the environment.<sup>155</sup> The NPS may also argue that certain actions should be accompanied by EISs because of their possible effect on park-related resources.<sup>156</sup>

There is no legal or logical reason why the NPS should not take an active role in the land use planning processes for areas managed by the Forest Service or the BLM that are in close proximity to parks. The planning laws command that these processes be open to participation by anyone interested, including other federal agencies.<sup>157</sup> Convincing the multiple use agency to build protection for park resources into its plan is critical, because the agency must conform its subsequent management of the adjacent area to the plan.<sup>158</sup>

151. See generally Coggins, *supra* note 29.

152. See generally COGGINS & WILKINSON, *supra* note 32, at ch. 9.

153. Gottschalk, *The State-Federal Partnership in Wildlife Conservation*, in WILDLIFE AND AMERICA 290 (H. Brokaw ed. 1978).

154. See, e.g., *Sierra Club v. Department of the Interior*, 424 F. Supp. 172 (N.D. Cal. 1976). Even in the post-Watt era, the current Administration apparently will oppose all efforts to enhance protection of parks from external threats if the proposed remedy would require expenditure of federal funds, impinge in any way on private property, or increase NPS jurisdiction at the expense of other agencies. Fitzsimmons Address, *supra* note 145. Needless to say, no strategy is likely to work if it fails to consider these three elements.

155. See *supra* notes 73-80.

156. The question whether an action has a significant effect is largely circumstantial. An action that affects park resources is a circumstance that tends toward an affirmative answer. Cf. *Foundation for N. Am. Wild Sheep v. United States Dep't of Agriculture*, 681 F.2d 1172 (9th Cir. 1982); *Utah Int'l, Inc. v. Department of the Interior*, 553 F. Supp. 872 (D. Utah 1982).

157. FLPMA, 43 U.S.C. §§ 1701(a)(5), 1711, 1712 (1982); National Forest Management Act, 16 U.S.C. §§ 1601(c), 1604(a), -(d), 1612(a) (1982).

158. 16 U.S.C. § 1604(i) (1982); 43 U.S.C. § 1732(a) (1982); see Coggins, *supra* note 100, at 98-100.

Agencies and developers likely will object to this modest proposal on the grounds that federal agencies have little inclination to interfere with the management initiatives of other agencies and that the NPS is ill-equipped to interfere even if it was so inclined. In the modern park context, these objections are largely specious. Whether or not the National Park Service Act affirmatively directs the Park Service to combat external threats, the NPS is derelict in its duty to safeguard park resources if it fails to act when the means for action, however limited, are at hand. The Interior Department is now creating some formal, if primitive, consultation mechanisms among its agencies for protection of park resources; given the attitudes of the political appointees in the Interior Department, however, the prognosis for these efforts is grim.<sup>159</sup>

Ultimately, the Park Service's power of persuasion with other agencies is buttressed by public regard for the national parks and the wildlife they shelter. The NPS could harness that regard by publicizing projects that threaten park resources. It seems unlikely, for instance, that geothermal development on national forest lands near Yellowstone will go forward so long as they might affect Old Faithful's fragile plumbing or similar park attractions. Public pressure is mainly responsible for the elaborate and costly plans to save the Everglades from dehydration. Similarly, if the NPS publicly fought the Forest Service over proposed logging that would affect grizzly bear habitat near a park, odds would be high that public outcry would change the Forest Service's mind. The power of persuasion in this instance is a real power; no agency wants to be accused of ruining a national park.

In the end, however, protection of park wildlife resources from external threats should not rest on such tenuous means. Title 16 of the United States Code should be amended to make clear the NPS powers and duties in responding to external threats. The following section describes several past and pending proposals for legislative reform and then considers some more radical notions along this line.

#### V. PROPOSALS FOR LEGISLATIVE REFORM

Several conclusions can be drawn from the foregoing discussion. First, the problem of external threats to park wildlife and other resources is real, though its magnitude probably cannot be measured precisely. Further, the problem will worsen as the parks become less isolated. Second, existing federal law may ameliorate some threats at times, but it clearly falls short of a comprehensive solution to the overall problem. Third, the NPS has a limited power to abate nuisances on adjacent private lands, but the nature, scope, and bases of that power are so obscure that it offers little help except in a few sharply defined circumstances. Fourth, the NPS

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159. Mr. Fitzsimmons, *supra* note 145, announced that the Department was forming an interagency task force to consider responses to external threats. His remarks, however, made it clear that the task force would be given neither the authority nor the means to pursue any aggressive remedies.

possesses only the power of persuasion to avert threats on adjacent public lands. These conclusions lead ineluctably to the judgment that legislative revision is the best hope for combatting external threats to park wildlife.

This latter conclusion is not novel. Commentators long have advocated clarifying or reforming statutory amendments, and legislators have introduced bills on the subject. This section first discusses these proposals and then raises other and more drastic reform possibilities.

#### A. *Prior Park Protection Bills*

Sparked by the *State of the Parks 1980* report and by fears of Secretary James Watt's stewardship,<sup>160</sup> several senators and many representatives decided that the parks need additional legal protection from external threats. They introduced two different kinds of bills to address this problem. To date, Congress has not adopted either version.

1. *The Park Protection Act.* By resounding margins, the House of Representatives has twice passed bills for a "Park Protection Act" (PPA).<sup>161</sup> The PPA bills had two main provisions directed at external threats. First, whenever the Secretary of the Interior had discretion to issue leases, grant permits, or take similar actions on lands adjoining national parks, and the action might have a "significant adverse effect" on park resources, he would have been required to balance the harm to the park against the economic and social value of the proposed action.<sup>162</sup> If he found that the value of the park resources "significantly outweighs" the benefits of the action, the Secretary was required to deny permission for the proposed activity.<sup>163</sup> Second, the Park Service would be given an official consultative role in decisionmaking over development on adjacent public lands that threatened park resources.<sup>164</sup>

Obviously, these provisions are innocuous; they would have added very little to powers already possessed by the Secretary and the NPS. The Secretary has the power and, arguably, the duty to consider whether projects on other lands under Interior Department jurisdiction will harm park resources and to factor that consideration into his discretionary decisionmaking.<sup>165</sup> No law prevents the Park Service from making its position known to any other federal agency whose actions jeopardize park resources. Neither PPA provision would have substantively barred nonconforming developments; both were couched in the language of balancing, reporting, consideration, cooperation, and so forth.<sup>166</sup> Despite the ex-

160. See Comment, *supra* note 139, at 1212 n.141 (quoting remarks of Rep. Seiberling).

161. See H.R. REP. NO. 170, 98th Cong., 1st Sess. 2-4 (1983).

162. H.R. 2379, 98th Cong., 1st Sess. § 10(b) (1983).

163. *Id.*; see Comment, *supra* note 139, at 1206-11.

164. H.R. 2379, 98th Cong., 1st Sess. § 11 (1983); see Keiter, *supra* note 128, at 396-403.

165. The statutes outlining the preservation mandate for parks speak of the Secretary's duty to implement that mandate. *E.g.*, 16 U.S.C. § 3 (1982).

166. See Keiter, *supra* note 128, at 396-99. Keiter also lists other data-gathering and reporting provisions of the bills.

ceeding modesty, if not timidity, of the PPA provisions, the Department of the Interior and the NPS opposed the bill both times.<sup>167</sup>

2. *The "Wildlife and the Parks" Bill.* On the Senate side, Senator Chaffee in 1984 introduced a bill entitled "Wildlife and the Parks Act of 1984,"<sup>168</sup> which, as its title implies, focused more on wildlife protection. The essence of the Chaffee bill was its provision prohibiting federal expenditures for activities within designated "wildlife resource habitat areas" in and contiguous to parks unless the Secretary determined that the activity would not detrimentally affect park wildlife resources.<sup>169</sup> The Secretary could veto expenditures by other agencies under those circumstances, subject to several exceptions.<sup>170</sup> The Chaffee bill was modeled after the Coastal Barrier Resources Act of 1982,<sup>171</sup> and it applied to private as well as public land within the designated area.<sup>172</sup>

The Chaffee wildlife-oriented proposal improved upon the House Park Protection Act bill in several respects. The former required designation of habitat areas, which would necessitate structured consideration of the more serious threats to wildlife, while the latter would only institute an ad hoc response mechanism to consider ad hoc threats. The Chaffee bill also had a coercive element— withholding federal funds—that is missing from the PPA.

Both proposals, however, offer only partial solutions to the general problem. The shortcomings of the Chaffee bill from the conservationist standpoint are summarized by Professor Keiter:

First, the bill applied only to park units which exceed 5000 acres in size. 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 or fish . . . . 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.<sup>173</sup>

The Chaffee approach tried to accomplish the end of wildlife protection indirectly and without cost. A more direct and more coercive statute is necessary to achieve that goal.

167. *Id.* at 399. The Department claimed that the new authority was unnecessary.

168. S. 978, 98th Cong., 1st Sess. §§ 601-607, 130 CONG. REC. S2929-21 (daily ed. Mar. 20, 1984) (Chaffee Amendment No. 2807).

169. *Id.* § 604(a)(1).

170. *Id.* §§ 604, 606(b).

171. 16 U.S.C. §§ 3501-3510 (1982 & Supp. III 1985).

172. S. 978, *supra* note 168, at § 604(a)(2).

173. Keiter, *supra* note 128, at 405.



### B. Proposals for Legislative Changes

Authors of three recent commentaries on external threats to parks propose three different approaches for Congress and the NPS. Each fits a certain pattern of legal evolution, but none provides a fully comprehensive and effective solution.

1. *The Nuisance Approach.* A decade ago, Professor Sax analyzed the powers of the NPS to abate nuisance-like activities on the borders of the national parks.<sup>174</sup> Subsequent cases have confirmed Sax's conclusion that such a power exists, but the power remains largely undefined and unused.<sup>175</sup> The author of a comment in the *University of Pennsylvania Law Review* proposed that Congress should engraft onto the Park Protection Act bill a provision imposing on the Interior Secretary the duty to promulgate regulations which would restrict threatening activities on adjacent lands.<sup>176</sup> Essentially, this concept would codify the nuisance-abatement theory in a somewhat open-ended, or flexible, fashion.

The comment writer was somewhat vague about details. He specified only that the regulations must be premised upon "a nexus between the regulated conduct and the federal land" and be "necessary" to protect the parks.<sup>177</sup> Apparently, the proposal would give the Secretary veto power over activities on adjacent lands defined in advance as nuisances.

2. *The Creative Alternatives Approach.* David Mastbaum, after reciting a parade of horrors, advocated a nonlegislative approach in which the Park Service would be a more aggressive and creative steward.<sup>178</sup> He would have the NPS concentrate on why the threatening project is needed and then seek out alternative means by which the project sponsors could be satisfied without harming park resources. As the "paradigm" of an aggressive Park Service strategy, Mastbaum cites the example of the NPS finding alternative supplies and substitute materials for the Sitka spruce sought to be harvested from Olympic National Park during World War II.<sup>179</sup>

3. *The Legislative Combination Approach.* Professor Keiter, after analyzing the earlier legislative proposals, combined, refined, and expanded them into a more comprehensive package.<sup>180</sup> Instead of Senator Chafee's "wildlife resource habitat areas," Keiter would have Congress designate adjacent federal lands as "national resource areas," premised on ecosystem characteristics.<sup>181</sup> These areas would be managed by the same agency as before, but with a management standard emphasizing preservation over other uses, somewhat in the fashion of national recrea-

174. Sax, *supra* note 130.

175. See *supra* notes 137-40 and accompanying text.

176. Comment, *supra* note 139, at 1211-16.

177. *Id.* at 1213.

178. Mastbaum, *No Park is an Island: A Simple Solution for the Thorny Problem of Park Protection*, 9 RESOURCE L. NOTES 7 (U. Colo., Nat. Resources L. Center Aug. 1986.)

179. *Id.* at 10.

180. Keiter, *supra* note 128, at 409.

181. *Id.*

tion areas.<sup>182</sup> To control threats on private lands, Keiter recommends authorizing the Secretary to use more Land and Water Conservation Fund moneys to condemn adjacent private lands, to require NPS participation in local zoning decisions, and, perhaps, to "implement a limited federal zoning scheme."<sup>183</sup> He also uses the Chaffee approach of denying federal funds to any incompatible activities.<sup>184</sup> Finally, Keiter notes the possibility of denying federal grants to a state under the Land and Water Conservation Fund Act unless the state adopts a zoning plan for park resource protection.<sup>185</sup> Keiter stops short of specifically recommending all of these elements in a legislative reform package but calls upon Congress to enact something resembling it.

### C. Other Possible Approaches

There are very few constitutional limits on the actions Congress can take to protect the national parks from external threats.<sup>186</sup> The question, rather, is one of political choice. This subsection outlines several other, more radical routes Congress might take if so inclined.

1. *Expand the Parks.* Instead of creating new federal land categories such as national resource areas, Congress could simply expand the parks by including in them whichever lands, public or private, posed the threats to wildlife and other park resources. Many parks were created with boundaries that followed survey lines, not ecological or watershed delineations. There is no good reason why Congress could not or should not redraw those boundaries to achieve more fully the original preservation purpose. Alternatively, Congress might use the recently popular device of designating disputed lands as national preserves under NPS jurisdiction.<sup>187</sup> The latter course of action would permit the NPS to allow some activities, including hunting, on those lands, but all such activities would be subservient to the preservation mandate. The key element is control by the Park Service; without it, bureaucratic obstacles and turf battles likely would be interminable.

2. *Merge the FWS into the NPS.* Most federal responsibilities for wildlife outside parks are in the hands of the Fish and Wildlife Service, another Interior Department agency under the same Assistant Secretary as the NPS. Although their missions, mandates, and practices substantially differ, both agencies have a considerable stake in wildlife preservation. If Congress merged the two agencies, the new National Park and Wildlife Service would have primary authority over implementation of all federal wildlife law and thus an expansive consultative role in many major agency decisions affecting wildlife.

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182. *Id.* at 410.

183. *Id.* at 415.

184. *Id.* at 415-16.

185. *Id.* at 417.

186. *See supra* note 115.

187. *See supra* notes 81-84 and accompanying text.

3. *Assert Federal Ownership Over Park Wildlife.* Congress could declare that all wildlife resident in national parks for part of the year is owned by the United States in trust for the people and cannot be killed, harmed, or harassed by anyone while outside the parks. Congressional power to assume ownership and control of wildlife for this purpose has never been explicitly upheld because the question has never been squarely presented.<sup>188</sup> Considerable judicial authority on analogous questions, however, supports the existence of such a federal power.<sup>189</sup> Congress might also ally the declaration of ownership with a scheme similar to that of the Endangered Species Act for protecting the designated species from taking and its habitat from destruction.<sup>190</sup>

4. *Federal Zoning of Lands Surrounding National Parks.* Less radically, Congress might institute a federal zoning scheme for areas surrounding national parks.<sup>191</sup> Alternatively, and going beyond the PPA or Chaffee proposals, Congress could simply give the NPS a veto power over all developments within certain distances from park boundaries. Either comprehensive zoning, or spot-zoning through a veto power, are far simpler and easier to implement than indirect means such as withholding federal financing.

None of these proposals is necessarily a good idea. Each has significant political and practical drawbacks. The parks vary greatly, as do the external threats to them. It is highly unlikely that any one solution will be appropriate in all situations.

## VI. CONCLUSION: IN SEARCH OF THE OPTIMUM REMEDY

If one accepts the propositions that protection of national park resources should be a high national priority and that preserving park wildlife is central to that priority, then it is inescapable that existing law is inadequate to achieve those purposes and that legislative revision is in order. The question of an appropriate solution to the problem of external threats is one more of politics than of power: as a constitutional matter, Congress can do pretty much what it wishes, but its wishes to date have been limited at best. Given the present Senate's disinclination to act in this area, the innocuous PPA or the "cost-free" approach of the Wildlife and the Parks bill may be the most that is politically possible.

Any proposal that promises to be effective is bound to inspire considerable political opposition. After all, the external threats usually arise from activities that generate profits and economic benefits for the area. Any effective approach must necessarily deny someone the right to do

188. *Kleppe v. New Mexico*, 426 U.S. 529, 537 n.8 (1976).

189. *Kleppe*, 426 U.S. 529 (1976); *Palila v. Hawaii Dep't of Land & Nat. Resources*, 471 F. Supp. 985 (D. Ha. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981). See generally *Coggins, Wildlife and the Constitution: The Walls Come Tumbling Down*, 55 WASH. L. REV. 295 (1980).

190. In other words, Congress could decree that no agency could jeopardize the designated species or its habitat, and no person could take (kill, harm, or harass) such species. See *supra* notes 48-62 and accompanying text. Needless to say, this notion would involve many difficult implementation problems.

191. See generally *Sax, supra* note 130.

what they want to do, whether it is riding snowmobiles or drilling oil wells. Further, a strong current in American politics automatically opposes any federal regulation of any private economic activity on philosophical grounds. Finally, the delicate balance of rivalries among the federal land management agencies will be upset by any comprehensive proposal. Unless Reagan Administration officials in the Interior Department have a change of heart, reform will be further complicated by the probability that the Park Service and the Department, the entities whose resources will be protected, will lead the opposition. Consequently, any proposal of this nature must overcome not only the usual economic interests and reflexive conservative opposition, it probably will also alienate states, localities, and other federal agencies—and, quite likely, the Park Service itself.

Politics should be left to the politicians. This paper therefore assumes a congressional willingness to confront and resolve the problem of preventing damage to park wildlife resources. It concludes by outlining some important criteria for guiding the choice of a protection strategy.

First, any strategy should have explicit congressional sanction. Congress should cure the haphazard nature and uncertainties characteristic of present law by clearly stating its purpose on this issue. Second, a program to combat external threats should have some elements of coercion. Reliance on voluntary cooperation alone has never worked well, and there is no reason to believe it will in this charged milieu. Cooperative and consultative mechanisms will always be necessary, but the NPS must have at least one big stick to back up its rhetoric. Third, the strategy should be comprehensive, encompassing not only today's known threats, but also the unknown threats of tomorrow. An understandable lack of foresight in creating the parks contributed to the present state of near-crisis; we should try to avoid repeating that mistake. Fourth, a prevention and abatement program should be sufficiently flexible to account adequately for the differences among the parks, their wildlife species, and the threats to them. Fifth, any new program should clearly define administrative responsibilities and be relatively easy to administer. A bill that merely institutes complex new procedures hardly improves the present situation. Sixth, a law for protecting parks from external threats should be substantively unambiguous. Everybody, land management agencies and developers alike, should know just exactly where they stand.

No easy road to protection of park wildlife from external threats is readily discernible. Yet public pressure for a solution will mount as public awareness of the problem increases. The "sides" in this controversy need to be realistic about the bounds of the possible, but reform proposals should not be rejected merely because they appear novel or radical. This paper does not attempt to define an ideal solution. Instead, its purpose is to air some ideas that might contribute to a new protection program.