

Protecting National Park System Buffer Zones: Existing, Proposed, and Suggested Authority

*John W. Hiscock**

I. INTRODUCTION

Since the inception of the National Park System there has been conflict between strict preservation of the parks and inherently adverse development within and adjacent to them. Many of the earlier established parks were protected from disruption for many years, due to their remoteness from urban America and the resource consumption that its development demanded. As the country's population has burgeoned, however, the need for raw materials has increased, fueled by technological advances in resource exploitation and transportation. Consequently, in more instances of greater magnitude, resource development has threatened the preservation of unique cultural and natural attributes preserved in park system areas.

In response to those threats to our nation's treasures, individuals concerned with the protection of our parks, monuments and other areas within the system have utilized statutory mandates and judicially developed theories in attempts to require maintenance of the pristine, untrammelled environments of the park system. Those measures have proven inadequate, in many instances, to forestall the sometimes indifferent, inexorable, steamroller effect of modern resource exploration. As a result, proposals for more far reaching park protection recently have come before Congress. The protective "buffer zones" that this type of legislation advocates would undoubtedly have a significant effect on resources and energy development in the vicinity of units of the National Park System and is therefore worthy of critical assessment.

This Article will review the existing legal modes of forcing federal action to protect the parks from threats related to development

* Concessions Management Specialist for Zion National Park; J.D., University of Utah College of Law 1985; B.A., History, University of California, Santa Barbara 1976.

The views expressed in this article represent the opinion of the author and not the National Park Service. This article was written before the author obtained his present position with the National Park Service and subsequent changes have been made on the author's personal time.

within or outside of them.¹ After scrutinizing these methods, the need for, and means of providing any additional legislative protection will be assessed.

II. BACKGROUND

A. *The National Park System: Origin, Purpose and Growth*

The preservation of examples of our diverse natural, cultural and historical environments was not, by any means, an inevitable result of the formation of our nation. The protection of these resources was an insightful gift bestowed upon Americans through the wisdom, intellect and planning of some of our nation's most respected thinkers; men such as Henry David Thoreau, John Muir and Frederick Law Olmstead.² The philosophic ideals of these and other original preservationists were argued, refined and institutionalized by late nineteenth and early twentieth century bureaucrats such as John Wesley Powell, Gifford Pinchot and Stephen Mather, as well as notably concerned political figures such as President Theodore Roosevelt.³

The idea of preserving outstanding examples of our nation's scenic grandeur was first formalized in 1872, when President Ulysses S. Grant signed the act setting aside Yellowstone National Park.⁴ As unlikely as it may seem in view of Yellowstone's relative isolation in 1872, this seminal authorization for preservation was a response to threats to the scenic curiosity of the area's geysers, hot springs and waterfalls, through privatization and commercial exploitation.

In 1890, largely through the efforts of John Muir and journalist Robert Underwood Johnson, Yosemite National Park was set aside by Congress, specifically protecting the area's wilderness attributes heralded by Muir.⁵ Other parks and monuments were created in the

¹ An analysis of some of these same problems with a different perspective is provided in Comment, *Protecting National Parks From Developments Beyond Their Borders*, 132 U. PA. L. REV. 1189 (1984). See also, *National Parks In Crisis*, at 211-218 (E. Connally 1982).

² For a thorough overview of the preservationist movement in this country, see R. NASH, *WILDERNESS AND THE AMERICAN MIND* (1976).

³ For histories of the institutionalization of conservationist and preservationist ideals see *id.*; and J. SAX, *MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS* (1980); D. STRONG, *THE CONSERVATIONISTS* (1971). See also C. COGGINS AND C. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCES LAW* (1981).

⁴ Act of March 1, 1872, ch. 24, 17 Stat. 32 (codified as amended at 16 U.S.C. §§ 21, 22 (1974)).

⁵ Act of October 1, 1890, ch. 1263, 26 Stat. 650. Biographies of John Muir are provided in L. WOLFE, *SON OF THE WILDERNESS: THE LIFE OF JOHN MUIR* (1945); and W. BADE, *THE LIFE AND LETTERS OF JOHN MUIR* (1923).

late nineteenth and early twentieth century with Muir's goal of strict preservation in mind.⁶ There was no set policy for protective management, however, until 1916. In the interim it became clear that the country's infant national parks were susceptible to numerous threats. These included logging in Sequoia National Park, poaching of Yellowstone's abundant wildlife and most devastating of all, the flooding of Hetch Hetchy Valley in Yosemite National Park.⁷

Partly due to the tragic inundation of Hetch Hetchy Valley in 1913, Stephen Mather, who became the first director of the national parks in 1915, pushed a bill through Congress in 1916 creating the National Park Service (NPS) as an agency within the Department of the Interior.⁸ The bill directed the Secretary of the Interior to manage the parks in such a way as to "conserve the scenery and the natu-

⁶ These included Sequoia National Park in 1890, Act of September 25, 1890, ch. 926, 26 Stat. 478 (codified as amended at 16 U.S.C. §§ 41, 43 (1974)); General Grant National Park in 1890, Act of October 1, 1890, ch. 1263, § 3, 26 Stat. 650 (later added to Kings Canyon National Park by the Act of March 4, 1940, ch. 40, § 2, 54 Stat. 43 (codified as amended at 16 U.S.C. § 80a (1974)); Mt. Rainier National Park in 1899, Act of March 2, 1899, ch. 377, 30 Stat. 993 (codified as amended at 16 U.S.C. §§ 91, 92 (1974)); Crater Lake National Park in 1902, Act of May 22, 1902, ch. 820, 32 Stat. 202 (codified as amended at 16 U.S.C. §§ 121, 122-123 (1974 & Supp. 1984)); Platt National Park in 1902, Act of July 1, 1902, ch. 1362, 32 Stat. 655 (codified as amended at 16 U.S.C. 151 (1974 & Supp. 1984)) (redesignated as Chickasaw National Recreation Area, 16 U.S.C. § 460hh-4 (Supp. 1984)); Wind Cave National Park in 1903, Act of January 9, 1903, ch. 63, 32 Stat. 765 (codified as amended at 16 U.S.C. §§ 141-146 (1974)); Glacier National Park in 1910, Act of May 11, 1910, ch. 226, 36 Stat. 354 (codified as amended at 16 U.S.C. §§ 161, 162 (1974)). In addition, Mesa Verde National Park was established in 1906 in order to preserve unique prehistoric cultural ruins. Act of June 29, 1906, ch. 3607, 34 Stat. 616, 617 (codified as amended at 16 U.S.C. §§ 111, 112-114 (1974)).

Under the authority granted the President by the Act of June 8, 1906, ch. 3060, 34 Stat. 225 (codified as amended at 16 U.S.C. §§ 431, 432-433 (1974)), various monuments were established during this early period as well. They included Devils Tower, Petrified Forest, Montezuma Castle, El Morro - 1906; Chaco Canyon, Lassen Peak, Cinder Cone, Gila Cliff Dwellings, Tonto - 1907; Muir Woods, Grand Canyon, Pinnacles, Jewel Cave, Natural Bridges, Lewis and Clark Cavern, Tumacacori Mission, Wheeler Peak - 1908; Mount Olympus, Navajo, Shoshone Cavern, Oregon Caves, Gran Quivira, Casa Grande Ruin - 1909; Sitka, Rainbow Bridge, Big Hole Battlefield - 1910; Colorado, Devils Postpile - 1911; Cabrillo - 1913; Papago Saguaro - 1914; and Dinosaur, Walnut Canyon - 1915.

For an excellent history of the establishment of the early national parks and monuments, and the administration of the National Park Service through the 1950's, see J. ISE, *OUR NATIONAL PARK POLICY: A CRITICAL HISTORY* (1961).

A sampling of Muir's writings include J. MUIR: *THE STORY OF MY BOYHOOD AND YOUTH* (1913); *A THOUSAND MILE WALK TO THE GULF* (W. Bade ed. 1916); *THE YOSEMITE* (1912); *OUR NATIONAL PARKS* (1901); *THE MOUNTAINS OF CALIFORNIA* (1894); *MY FIRST SUMMER IN THE SIERRA* (1911).

⁷ A detailed account of Muir's efforts to save Hetch Hetchy Valley from inundation brought about by the construction of a dam by the City of San Francisco, is provided in R. NASH, *supra* note 2, at 161-81.

⁸ Mather's life and accomplishments are detailed in R. SHANKLAND, *STEVE MATHER OF THE NATIONAL PARKS* (1951).

ral 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."⁹ The Act delivered a dual mandate to the NPS; "to provide for the enjoyment" of visitors, yet only to the extent that the parks would remain "unimpaired," or preserved.¹⁰ Although occasionally faltering in its course, the NPS has interpreted the Act to mandate the strict preservation of the resources that parks, monuments and other areas under its control were set aside to protect. In its management policies, the NPS has recognized that "[i]n all areas of the National Park System, primary emphasis is upon preservation of significant natural and historic resources."¹¹ This administrative policy internally promotes the ecological, geological and historical integrity of the parks for all future generations of Americans.

Since the creation of the National Park Service in 1916, the number and type of areas under its management have grown to previously unforeseen extremes. In addition to national parks and monuments, the NPS now has administrative and management responsibility for national preserves, lakeshores, rivers, seashores, recreation areas, historic sites, and military parks, spread from the Virgin Islands to Alaska to Guam, as well as national capital parks, including the

⁹ 16 U.S.C. § 1 (1974).

¹⁰ *Id.*

¹¹ NATIONAL PARK SERVICE, U.S. DEPT OF THE INTERIOR, MANAGEMENT POLICIES I-3 (1975) (emphasis added). That policy handbook also stated "in all areas . . . preservation of historic and/or natural features for a variety of uses based upon continued preservation, are the central concern of the National Park Service." *Id.* Mindful of this primary duty to preserve park resources, the management policy guidelines of the NPS call for classification of parks in natural, historic, development, and special zones. *Id.* at II-3.

Although the development of recreational facilities in the parks was advocated much more strongly in the early years of the National Park System than presently, it has always been subsidiary to the primary concern of protection of park resources. In a letter to Stephen Mather in 1918, Franklin K. Lane, the Secretary of the Interior, stated "the national parks must be maintained in absolutely unimpaired form for the use of future generations as well as those of our own time . . ." Letter, Franklin K. Lane, Secretary of the Interior to Stephen T. Mather, Director, NPS, May 13, 1918, in ADMINISTRATIVE POLICIES FOR NATURAL AREAS OF THE NATIONAL PARK SYSTEM app. A-1, 68 (NPS ed. 1970). In addition, Newton B. Drury, Director of the NPS in 1949 stated:

The "enjoyment" envisioned in the act creating the National Park Service is refreshment of mind and spirit as well as physical refreshment, and for that reason development for recreational use (i.e., outdoor sports) must be subordinated to the preservation and interpretation of the significant natural and historical features. The physical recreational use is an important by-product, but one which must not be permitted to affect adversely the primary use of the national parks, and monuments.

EXPLORING OUR NATIONAL PARKS AND MONUMENTS 213 (D. Butcher ed. 1949). Of course, the preservation of park resources has become an even greater concern in more recent years as an awareness of the fragility of those resources had developed.

White House and the National Mall in Washington, D.C. The total acreage administered by the National Park Service as of January, 1982, was approximately seventy-nine million acres.¹² This unrestrained growth of the system, at times motivated by irrational political considerations, has presented and continues to present challenges for the NPS in managing such a fragmented collection of areas. Developing service-wide policies and regulations for protecting areas as diverse as historic buildings and homes; recreational areas encompassing manmade reservoirs; and great wilderness parks, such as Gates of the Arctic, is not an easy task. It is questionable whether we need or want to apply the same level of protection to urban parks such as Golden Gate National Recreation Area, as should be applied to ecological preserves such as Yellowstone National Park. Clearly, the present diversity of the National Park System must be accounted for in any proposal to more stringently protect its resources.¹³

B. *Threats to the National Park System*

Inherent in the creation of even the first national parks was the realization that the resources identified for protection in any individual park could be altered or lost due to some type of development. The task entrusted to the NPS in 1916 of protecting the resources of the national parks from alteration or loss, has become more complicated and difficult with each successive year. The relatively few parks that existed at that time were remote, seldom visited, and normally surrounded by national forests or "public lands."¹⁴ Under these conditions the parks were less susceptible to serious disruption from ei-

¹² See NATIONAL PARK SERVICE, U.S. DEP'T OF THE INTERIOR, INDEX: NATIONAL PARK SYSTEM AND RELATED AREAS 10 (1982). It is worthy of mention that neither the NPS nor the Department of the Interior has control over what or how many government withdrawals come under their management jurisdiction. That determination is controlled by the political considerations of either the enacting President or Congress.

¹³ The growth of the National Park System was recognized as a potential problem as early as 1949. Devereux Butcher, Executive Secretary of the National Parks Association, categorized unrestrained growth as a threat, stating that "inclusion of inferior (substandard) areas in the National Park System . . . would lower the quality of the system as a whole." D. BUTCHER, EXPLORING OUR NATIONAL PARKS 8 (1949).

In addition to the diversity and resultant administrative problems that have accompanied the growth of the National Park System, the NPS has faced greater and greater financial hurdles to managing the large system. Although the system has grown in size and diversity, the appropriations necessary for management of that system have not kept pace. Therefore, the NPS, while faced with the burden of protecting a greater amount of land, sadly lacks the manpower and tools to do so. See generally Lienesch, *How Much Will We Pay to Save the Parks?*, in NATIONAL PARKS IN CRISIS 147 (E. Connally ed. 1982).

¹⁴ The term "public lands" is herein used to refer to lands now under control of the Bureau of Land Management (BLM).

ther internal or external threats.

Population growth and industrial development have increased the pressure on our nation's preserves throughout this century.¹⁵ Population centers and resource development have not only crept closer to the older parks, but new parks have been created closer to established cities and industry.

Ironically, the virtual flood-tide increase in visitation to the parks in the last twenty years has resulted in the threat of visitors "loving the parks to death" by over-burdening the carrying capacities of the ecosystems or cultural remains we seek to preserve.¹⁶ The attraction we Americans have for travel, recreation and outdoor pursuits, although well intentioned, can, in the aggregate, have a profound and adverse impact on park resources. Many trails and campgrounds have become eroded scars on the landscape. Extensive and irrevocable damage is also constantly done to historic structures subject to the footsteps and ever curious touch of tourists.

More obvious in nature is the damage to the parks caused by industrial and commercial development, and resource exploitation. In parks that were established with legislative provisions allowing mining, grazing and other uses, those uses pose internal threats to the integrity of the areas.¹⁷ The potential energy development and natural resource acquisition allowed on the lands managed by the Bureau of Land Management (BLM) and the United States Forest Service (USFS) have lured enterprising Americans, from independent prospectors to corporate energy concerns, to the fringes of park system

¹⁵ In 1949, Devereux Butcher took a mid-century look at the parks and the threats to their preservation that then existed. Included in the threats mentioned by Butcher were: road building in Acadia and Great Smoky Mountains National Parks; proposed Army Corps of Engineers reservoirs, and resultant flooding of portions of Glacier and Mammoth Cave National Parks; inhaling despoilment in Mt. Rainier and Olympic National Parks; and possible damming of the outlet of Yellowstone Lake in Yellowstone National Park. BUTCHER, *supra* note 12.

¹⁶ For a discussion of the impact and suggested administrative solutions see Loomis, *Park Crowds Are Pushing The Limits NPCA Has A Plan*, NAT'L PARKS, Jan./Feb. 1985, at 13.

¹⁷ Parks left open to mining under the Mining Law of 1872, 30 U.S.C. § 22 (1974), include Crater Lake National Park (*see* 16 U.S.C. § 123 (1974)), Coronado National Memorial (*see* 16 U.S.C. § 450y-2 (1974)), Death Valley National Monument (*see* 16 U.S.C. § 447 (1974)), Glacier Bay National Park (*see* 43 Stat. 1988 (1925)), Mount McKinley National Park (now Denali National Park) (*see* 16 U.S.C. § 350a-3 (1974)), and Organ Pipe Cactus National Monument (*see* 16 U.S.C. § 450z (1974)). Development of mining claims in these areas is regulated by 16 U.S.C. §§ 1901-1912 (1985). Mining in the parks is discussed in Novak, *Mining and the National Park System*, 2 J. ENERGY L. POL'Y 165 (1982). Certain national recreation areas such as Glen Canyon (*see* 16 U.S.C. § 460dd-2 (1974)), and Lake Mead (*see* 16 U.S.C. § 460n-3 (1974)), are also open to mining and mineral leasing. Other national park service areas were left open to certain multiple uses in their enabling legislation. An example is Capitol Reef National Park in Utah, which is open to limited grazing. *See* 16 U.S.C. § 273b (1974).

areas. Furthermore, development of private lands adjacent to park system areas has increased and carries with it the same potential for harm.¹⁸

The increased threats to our nation's parklands have not gone unnoticed. Those citizens concerned with adequate protection for the parks have made their voices heard in both the courts and Congress. On the heels of such Supreme Court decisions as *Sierra Club v. Morton* in 1972,¹⁹ threats to many National Park System areas have been countered by litigation from environmental organizations. Also indicative of the public reaction to existing and potential encroachment on our parks was the increase in environmentally protective legislation during the 1960's and 1970's.²⁰ Portions of this legislation were specifically aimed at increased protection for parklands.²¹

In reaction to a growing consciousness concerning the plight of our parks in this technological age, Congress set into motion an accounting of the problem at hand. In 1979 the House committee on Interior and Insular Affairs requested a report from the NPS on existing and threatened degradation of resources in the National Park System. That study, delivered in 1980, was titled *State of The Parks-1980*.²² The report consisted of a summarized overview of the number and type of threats to NPS areas. The study's data was collected by sending questionnaires to persons in charge of resource management at each area. A total of 4,325 specific threats to the resources of the nation's 320 park units were listed.²³ The threats categorized ranged from the obviously ecologically disruptive (land development, ero-

¹⁸ Discussions of existing modes of protecting the parks from adverse development on private lands are provided in Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 Mich. L. Rev. 239 (1976); and Comment, *supra* note 1.

¹⁹ *Sierra Club v. Morton*, 405 U.S. 727 (1972). This was, in fact, a suit brought by the Sierra Club to prevent development of Forest Service lands at Mineral King. The development, it was felt, would pose a major threat to nearby Sequoia National Park. The *Morton* decision impliedly expanded the concept of standing to bring litigation to include those conservationist groups with members who used Federal lands merely for enjoyment and recreation. *Id.* at 741.

²⁰ The acts passed during this period included amongst others the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321-4370 (1977 & Supp. 1984)); The Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (codified as amended at 42 U.S.C. §§ 7401-7642 (1983 & Supp. 1984)); the Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1543 (1974 & Supp. 1984)); and the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 447 (codified at 30 U.S.C. §§ 1201-1328 (Supp. 1983)).

²¹ See, e.g., Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(a)(3)(B); and Clean Air Act, 42 U.S.C. §§ 7470-7491.

²² NATIONAL PARK SERVICE, U.S. DEP'T OF THE INTERIOR, STATE OF THE PARKS - 1980, A REPORT TO THE CONGRESS (1980) [hereinafter cited as NPS].

²³ *Id.* at 4.

sion, air pollution, mineral extraction and oil and gas extraction and pollution) to the more innocuous (seismic blasting shocks, radioactive pollution, thermal discharge and weather modification).²⁴ More specifically, the report listed such threats as the following:

At Big Bend and Organ Pipe, CACTUS COLLECTORS are poaching such large quantities of plants that the natural scene is being changed.

At Bandelier, Olympic and other parks, increased numbers of CAMPERS and BACKPACKERS are damaging the area's wilderness character.

At Great Smoky Mountains, exotic EUROPEAN BOARS continue to destroy that park's unique vegetation and wildlife.

At North Cascades, planned DAM CONSTRUCTION on Copper Creek will impact many unique park resources.

Water quality of Chattahoochee River is seriously impacted by RAW SEWAGE and CHEMICAL RUNOFF from adjacent lands.

OIL, GAS, COAL and URANIUM DEVELOPMENTS are all impacting the significant cultural resources at Chaco Canyon.

At Glacier, an OPEN-PIT COAL MINE is planned near the northwest corner.

GEOHERMAL DEVELOPMENTS are scheduled along Bandelier's western border and not far from Yellowstone and Grand Teton.

At Acadia, a proposed POWER PLANT at Sears Point will degrade the Park's Class 1 air standards.²⁵

²⁴ *Id.* at 9-10. The listed threats were made known to the general public through an article focusing on the plight of Glacier National Park, which tallied a total of 56 threats, appearing in *Life* magazine in July of 1983. Haupt, *Nature Under Siege*, *LIFE*, July, 1983, at 106.

Numerous other articles have addressed more specific threats and resolution of the problem. See, e.g., Schneider, *Yellowstone - As the Frantic Search for Energy Comes to Yellowstone, We Must Ask: What Will We Risk?*, *NAT'L PARKS*, Jan.-Feb. 1982, at 20 (addressing threats from potential development of geothermal resources); *Those "Crown Jewel" Parks*, *Pittsburgh Post-Gazette*, Aug. 8, 1984, at 6; Thorne, *Areas Around National Parks Being Studied - Buffers Could be Protected*, *Ogden Standard-Examiner*, Aug. 23, 1984, at 12; Siehl, *Protecting America's National Parklands*, *CONG. RESEARCH SERV. REV.*, Sep. 1984; Hill, *"Mining" Crater Lake For Energy Debated*, *The Oregonian*, Sep. 20, 1984; *Leave Canyonlands Alone*, *The Denver Post*, Oct. 11, 1984 (editorial addressing potential nuclear waste dump outside park); Robbins, *Coalition Says Yellowstone Needs Elbow Room*, *The New York Times*, Oct. 21, 1984, at 52; Yates, *Saga of the Glades Continues*, *AUDUBON*, Jan.-Feb. 1985, at 34; *Air Quality for Park at Issue*, *The Denver Post*, Jan. 24, 1985 (regarding Colorado National Monument); Foster, *Wilderness Society Opposes Sled Dog Race in Parkland*, *Anchorage Daily News*, Feb. 5, 1985 (regarding opposition to commercialized sled dog racing and snowmobile use in wilderness area of Gates of the Arctic National Park).

²⁵ NPS, *supra* note 22, at 20-23.

In reaction to the NPS report and the Watt administration's seemingly pro-development and anti-environmental stance, Congressmen John Sieberling (D-Ohio), Pat Williams (D-Mont.), and Douglas Bereuter (D-Neb.) introduced bills affording greater protection to the park system in 1982.²⁶ Oversight and legislative hearings were held on the state of the park system and potential threats to its resources during February, March and June of 1982.²⁷ In response to inaction on the 1982 bills, similar legislation was reintroduced in 1983.²⁸ The more recent bill, the National Park System Protection and Resources Management Act of 1983 (H.R. 2379), incorporated the purposes of the 1982 bills (these purposes are resource management, accountability, and protection) into one proposal. H.R. 2379 called for intricate federal assessments of the impact upon park resources from any development involving federal action within or adjacent to parklands. These assessments were to include a balancing of developmental benefits against environmental costs, with the strict preservation of park environments being the prime concern.

As might have been expected, the major opposition to H.R. 2379 came from energy and natural resources concerns. Industries opposing the Bill included those dealing in the extraction and development of coal, oil, natural gas, geothermal, and hydropower resources. The Bill also drew the attention of political representatives of such energy rich western states as Utah, Wyoming and Colorado, where further legislative hurdles to resource and energy development on federal lands are a major concern. After passing in the House,²⁹ the bill lost momentum in the Senate and failed to pass before the adjournment of the Ninety-eighth Congress, in the fall of 1984.

²⁶ The bills introduced in 1982 were: H.R. 5162, calling for an annual state of the parks report to be submitted to Congress (H.R. 5162, 97th Cong., 1st Sess.); H.R. 5552, titled the *National Park System Protection Act of 1982* (H.R. 5552, 97th Cong., 2d Sess.); H.R. 5973, calling for an annual state of the parks report to be submitted to Congress (H.R. 5973, 97th Cong., 2d Sess.); and H.R. 5976, titled the *National Park System Resources Evaluation and Management Act of 1982* (H.R. 5976, 97th Cong., 2d Sess.). The purpose of H.R. 5552 was to guarantee stringent evaluative and protective measures for the parks on the part of the Secretary of the Interior, whereas the purpose of H.R. 5976 was to "provide for the development of a comprehensive program for the evaluation and management of the natural and cultural resources of the national park system." H.R. 5976, 97th Cong., 2d Sess. 1 (1982).

²⁷ *Public Land Management Policy: Hearings on H.R. 5162, H.R. 5552, H.R. 5973, and H.R. 5976 Before the Subcomm. on Public Lands and National Parks of the House Comm. on Interior and Insular Affairs*, 97th Cong., 2d Sess. (1982).

²⁸ H.R. 2379, 98th Cong., 1st Sess. (1983).

²⁹ 129 Cong. Rec. H7931 (daily ed. Oct. 4, 1983).

C. *The Need for Protection*

Clearly acknowledged threats to the National Park System indicate that the time is ripe for analyzing whether additional protection is necessary, or indeed, is advisable. To determine whether further legislative protection is needed, the existing statutes and judicially developed theories mandating protective federal management of parklands will be reviewed below. In light of these existing protective measures, the scope of further legislation will be scrutinized and suggestions for alternative legislation will also be proposed.³⁰

In order to conduct such an analysis it is necessary to keep in mind the preservationist purpose of the National Park System, as distinguished from the primarily multiple use purpose of other Federal land management.³¹ As previously stated, the National Park Service Organic Act of 1916 called for preservation of units of the National Park System in an unimpaired state, whether they be ecological, natural preserves, or historic parks set aside to maintain forever a cultural episode of our past. The management policies of the NPS have always supported such an interpretation of the Act.³² The purpose behind such preservation is to provide for the enjoyment of the nation's citizens by protecting outstanding unique areas both for recreation and as living museums available for edification, introspection and reflection. With the onslaught of industrialization and its sometimes callous effects on people and the environment, the importance of preserving the parks for solitude, for research, and as reserves for vanishing species has also become extremely important.

Other federal lands, such as those managed by the USFS and BLM, are in large part open to multiple use. This means that they are managed in an attempt to provide for resource removal by mining, grazing and logging for example, as well as to provide for substantially unlimited recreational uses. Many of these uses can, and do, exist side by side on our public lands. Multiple use planning requires some uses to be compromised to accommodate other uses.

The concept of preserving the ecological, geological or cultural integrity of an area, such as an NPS area, however, cannot tolerate the existence of other uses that may have a disruptive effect on the totality of what is preserved. Admittedly, it seems clear that the National Park System cannot be perfectly preserved as if each of its units ex-

³⁰ See generally Comment, *supra* note 1.

³¹ See, e.g., Multiple-Use Sustained-Yield Act of 1960 (MUSY), 16 U.S.C. §§ 528-531 (1974); Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-1784 (Supp. 1984).

³² *Supra* note 10.

ists in a vacuum. However, the intent of Congress, in its 1916 mandate to keep park resources inviolate, seems clear.³³ That ideal of preserving the resources of the parks has normally been supported by the majority of the country's citizens.

III. ANALYSIS OF EXISTING AUTHORITY FOR THE PROTECTION OF THE NPS SYSTEM

Generally, there is no one specific statutory source consistently mandating that the protection of park resources shall take precedence over federal activities posing a threat to those resources. There are, however, a number of federal statutes which require administering departments or agencies to consider the possible impact of their activities on park resources. If those activities are found to be damaging to park resources, these statutes require the federal agencies involved to forego the damaging activities in certain situations.

This protective legislation can be broken down into four categories. First and most obvious are those acts which specifically mandate the proper administration of National Park Service areas. These include the National Park Service Organic Act of 1916 and its amendments,³⁴ the Antiquities Act³⁵ and the various enabling acts for each individual park.³⁶ Second, there are comprehensive planning statutes that call for recognition of environmental values, such as the National Environmental Policy Act of 1969 (NEPA),³⁷ and more specific planning acts which create management guidelines for the Fish and Wildlife Service, the BLM and the USFS.³⁸ Third are statutes protecting specific resources frequently found within parks. This category includes such statutes as the Endangered Species Act,³⁹ the Natural Historic Preservation Act⁴⁰ and even the Clean Air Act.⁴¹ The final category includes those statutes regulating specific aspects of development.

³³ *Supra* note 8.

³⁴ 16 U.S.C. §§ 1-20 (1974 & Supp. 1984).

³⁵ 16 U.S.C. §§ 431-433 (1974).

³⁶ *See, e.g.*, 16 U.S.C. §§ 21-460kk (1974 & Supp. 1984).

³⁷ 42 U.S.C. §§ 4321-4370 (1977 & Supp. 1984).

³⁸ These include those that by their existence more or less create mandatorily enforceable buffer zones, such as the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1974 & Supp. 1984); and the National Wildlife Refuge Administration Act of 1966, 16 U.S.C. §§ 668dd-669ee (1974); as well as those creating broader management objectives such as, the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-1784 (Supp. 1984); and USFS management statutes, 16 U.S.C. §§ 528-531, 1600-1687 (Supp. 1984).

³⁹ 16 U.S.C. §§ 1531-1543 (1974 & Supp. 1985).

⁴⁰ *Id.* at §§ 470-470w-6 (1974 & Supp. 1985).

⁴¹ 42 U.S.C. §§ 7401-7642 (1983 & Supp. 1985).

This category includes the Mineral Lands Leasing Act,⁴² and the Surface Mining and Reclamation Act of 1977.⁴³ In the following sections of this Article each of these categories will be reviewed, and the sufficiency of its protective mandates toward safeguarding park resources will be assessed.

A. *Administration of the National Park System*

There is not much doubt that the Department of the Interior, and specifically the Director of the NPS, have a responsibility to manage the National Park System in such a way as to protect the System's resources from alteration or damage. The authority requiring the Director to provide protection is the National Park Service Organic Act. That Act states that the NPS

*shall promote and regulate the use of the Federal areas known as National parks, monuments, and reservations hereinafter specified . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is 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.*⁴⁴

This congressional charge of preservation was strengthened in the Act of March 27, 1978, which states:

Congress further reaffirms, declares, and directs that the promotion and regulation of the various areas of the National Park System, as defined in section 1c of this title, shall be consistent with and founded in the purpose established by section 1 of this title, to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in degradation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.⁴⁵

If there is any question as to what areas under the control of the NPS are to be managed for preservation, it is answered in 16 U.S.C. § 1c which states: "The 'national park system' shall include any area of

⁴² 30 U.S.C. §§ 181-287 (1971 & Supp. 1985).

⁴³ 30 U.S.C. §§ 1201-1328 (Supp. 1985).

⁴⁴ 16 U.S.C. § 1 (1974) (emphasis added).

⁴⁵ 16 U.S.C. § 1a-1 (Supp. 1984).

land and water now or hereafter administered by the Secretary of the Interior through the National Park Service for park, monument, historic, parkway, recreational, or other purposes."⁴⁶

Normally, these statutory guidelines and the idealism of the staff of the National Park Service have been sufficient to preclude any threats to park system resources arising from internal management decisions. The critical question is whether the legislative mandate to protect the parks *requires* the Secretary of the Interior to evaluate what consequences a development adjacent to a park system area⁴⁷ might have on preservation of the park's resources. Furthermore, if such an evaluation were to conclude that the development would impair park resources, the ultimate question of whether the mandate to protect the parks *requires* the Secretary to preclude such development, or mitigate its impact, arises.

The judiciary has seldom used the National Park Service Organic Act to force the Secretary of the Interior to prevent disruptive activities. The reason for that trend is that there is a lack of any forceful, decipherable precedent to follow. Authority that has been utilized in judicial review is conflicting at best. Nevertheless, the theories that have been pursued are worthy of comment.

The courts flirted with the concept of a Secretarial obligation to provide buffer zone protection for parks, where it was within his authority to do so, in *Sierra Club v. Department of Interior*.⁴⁸ In that case, the Sierra Club brought suit against the Department of the Interior to force the Secretary to protect Redwood National Park from the erosional effects of logging carried on upstream from the park on private land. The Sierra Club argued that the Secretary was vested with the specific authority to protect the park from outside threats through the Redwood National Park Act,⁴⁹ by: (1) modifying the park boundaries,⁵⁰ and (2) acquiring interests in private land outside the park or entering into contracts and cooperative agreements with external interests to prevent damage.⁵¹ In an earlier, preliminary decision, the court had characterized these secretarial powers as discretionary,⁵² but stated that the Secretary's inaction in this case would

⁴⁶ 16 U.S.C. § 1c (1974).

⁴⁷ These adjacent areas would include Federal land, state land, and private land. Development on state and private land adjacent to park service areas, in some instances, requires a Federal permit.

⁴⁸ *Sierra Club v. Department of Interior*, 398 F. Supp. 284 (N.D. Cal. 1975).

⁴⁹ 16 U.S.C. §§ 79a-79q (1974 & Supp. 1984).

⁵⁰ 16 U.S.C. § 79b(a).

⁵¹ 16 U.S.C. § 79c(e), *amended by* 16 U.S.C. § 79c(e) (Supp. 1981).

⁵² *Sierra Club v. Department of Interior*, 376 F. Supp. 90, 94 (N.D. Cal. 1974).

still be reviewable in light of the "entire statutory scheme."⁵³ The court found an important part of the statutory scheme to be "a general trust duty imposed upon the National Park Service . . . by the National Park System Act, 16 U.S.C. § 1 et seq. . . ." and its purpose of maintaining park resources intact and unimpaired.⁵⁴

This "public trust doctrine" had first been recognized by the courts in *Knight v. United Land Association*,⁵⁵ where the Supreme Court stated that "the secretary is the guardian of the people of the United States over the public lands . . . obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted . . ."⁵⁶ *Sierra Club v. Department of Interior* implied that where an NPS area is threatened, the Organic Act operates to activate the public trust doctrine to require the Secretary to do all he is authorized to do to keep park resources undisturbed, even if his authority is discretionary.⁵⁷

The continued survival of the federal public trust doctrine as a separate source of authority for park protection is at this point highly questionable. Although the doctrine has been referred to in cases subsequent to *Sierra Club v. Department of Interior*, it has not been the primary rationale for forcing the Department of the Interior's hand.⁵⁸ Furthermore, one court has limited the public trust doctrine in regard to national parks. In *Sierra Club v. Andrus*,⁵⁹ the Sierra Club sought to force the NPS to protect federally reserved water rights to safeguard park resources. The Federal District Court for the District of Columbia found that "trust duties distinguishable from statutory duties" of the Department of the Interior simply do not

⁵³ *Id.* The court cited *Rockbridge v. Lincoln*, 449 F.2d 567, 570 (9th Cir. 1971), as authority for allowing review where the specific statute grants the Secretary discretionary power.

⁵⁴ *Sierra Club v. Department of Interior*, 398 F.Supp. 284, 287 (N.D. Cal. 1975).

⁵⁵ 142 U.S. 161 (1891).

⁵⁶ *Id.* at 181; see also *Utah Power & Light v. United States*, 243 U.S. 389, 409 (1916); and *Davis v. Morton*, 469 F.2d 593, 597 (10th Cir. 1972). For excellent reviews of public trust doctrine, see Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471; Cohen, *The Constitution, the Public Trust Doctrine and the Environment*, 1970 UTAH L. REV. 388; Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C.D. L. REV. 269 (1980); and Note, *Proprietary Duties of the Federal Government Under the Public Land Trust*, 75 MICH. L. REV. 586.

⁵⁷ Ultimately, although the Secretary of the Interior complied with the court's order to do all in his power to protect the park under directives of the Organic Act and the Redwood National Park Act, the lack of congressional funding prevented protection of the park's resources. See *Sierra Club v. Department of the Interior*, 424 F.Supp. 172 (N.D. Cal. 1976).

⁵⁸ See *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277 (9th Cir. 1980); and *Commonwealth of Mass. v. Andrus*, 594 F.2d 872 (1st Cir. 1979).

⁵⁹ 487 F. Supp. 443 (D.D.C. 1980). *Sierra Club v. Andrus* is reviewed in Wilkinson, *supra* note 56, at 290-93.

exist.⁶⁰ The court reached this conclusion by examining the 1978 amendment to the National Park Service Organic Act, 16 U.S.C. § 1a-1.⁶¹ The legislative history of that amendment includes the statement "that litigation with regard to Redwood National Park and other areas of the system may have blurred the responsibilities articulated by the 1916 Act creating the National Park Service"⁶² Such a conclusion definitely limits the application of the public trust doctrine as a means of forcing affirmative secretarial protective action in favor of the parks.

Although the Court's opinion in *Sierra Club v. Andrus* may have put an end to the public trust doctrine as a means of forcing the Secretary to protect parks from external threats, the case clarified the Secretary's duties under the Organic Act. The Court stated that those duties comprise "all the responsibilities which [the Secretary] must faithfully discharge."⁶³

In addressing the scope of the Secretary's duties under the Organic Act, reference was made to the Act's legislative history. The Court quoted the Senate Report on 16 U.S.C. § 1a-1 which states: "The Secretary has an absolute duty, which is not to be compromised, to fulfill the mandate of the 1916 Act to take whatever actions and seek whatever relief as will safeguard the units of the National Park System."⁶⁴ The statements of the Federal District Court for the District of Columbia in *Sierra Club v. Andrus* clarify the absolute duty of the Secretary to protect the parks from internal as well as external threats. However, that court's interpretation of the Secretary's duties has yet to be tested.

Many of the more recent enabling acts place greater protective obligations on the Secretary of the Interior. The acts thereby provide a procedural route by which environmentally concerned citizens can force a recalcitrant Secretary to make wise management decisions.

An excellent example of recent legislation expanding the Secretary's responsibility to include efforts to preclude adverse development on private and federal lands outside a park, is the Act of December 19, 1980, creating the Chaco Culture National Historic

⁶⁰ 487 F. Supp. at 449.

⁶¹ 16 U.S.C. § 1a-1.

⁶² S. Rep. No. 95-528, 95th Cong., 1st Sess. (1978).

⁶³ 487 F. Supp. at 449.

⁶⁴ *Id.* at 448 (quoting S. Rep. No. 95-528, 95th Cong., 1st Sess. 9 (Oct. 21, 1977)). That report also stated: "The Secretary is to afford the highest standard of protection and care to the natural resources within Redwood National Park and the National Park System. No decision shall compromise these resource values except as Congress may have specifically provided." *Id.* at 14.

Park.⁶⁵ The Act abolished Chaco Canyon National Monument, created a larger and more comprehensive Chaco Culture National Historic Park, and identified thirty-three outlying sites on private and federal land as Chaco Culture Archeological Protection Sites.⁶⁶ The Act mandates secretarial protection of the sites outside the park by stating: "The Secretary shall protect, preserve, maintain, and administer the Chaco Culture Archeological Protection Sites, in a manner that will preserve the Chaco cultural resource and provide for its interpretation and research."⁶⁷ This mandate essentially orders the Secretary to manage non-park lands to ensure their preservation, in recognition of the fact that their value is inextricably linked to the archeological values the park itself protects. Furthermore, the Act orders the Secretary to seek to enter into cooperative agreements with the owners of properties located in whole or in part within the park or within the archeological protection sites. The purposes of such agreements shall be to "protect, preserve, maintain and administer the archeological resources and associated sites regardless of whether title to the property or site is vested in the United States."⁶⁸ This section should be interpreted as an affirmative obligation upon the Secretary to seek agreements with certain private landholders to better preserve the park resources.

Another recent example of legislation extending the Secretary's obligatory duty of protection is the Act of November 10, 1978, creating John Lafitte National Historic Park.⁶⁹ That Act not only established a historical park and natural preserve, but set up a "park protection zone" around the federally owned lands comprising the park. In respect to this "park protection zone," the Act obligates the Secretary to consult "with affected state and local units of government, [and] develop a set of guidelines or criteria applicable to the use and development of properties within the park protection zone to be enacted and enforced by the State or local units of government."⁷⁰ The purpose of such guidelines "shall be to preserve and protect the . . . fresh water drainage pattern[,], . . . vegetative cover[,], . . . integrity of ecological and biological systems; and . . . water and air quality"

⁶⁵ 16 U.S.C. §§ 410ii-410ii-7 (Supp. 1984). Chaco Canyon and its surrounding archaeological sites are located in northwestern New Mexico and are some of the finest examples of Anazazi surface sites preserved.

⁶⁶ *Id.* at § 410ii-1(a) and (b).

⁶⁷ *Id.* at § 410ii-5(b). This section also specifically orders the management of such lands in accordance with FLPMA directives contained in 43 U.S.C. § 1702(e).

⁶⁸ 16 U.S.C. § 410ii-4.

⁶⁹ *Id.* at §§ 230-231d (Supp. 1985).

⁷⁰ *Id.* at § 230a(b).

values of the protection zone.⁷¹

The additional protective considerations required of the Secretary by such legislation are intended to afford those parks greater protection from external threats to their resources. Such measures are admirable, but they do not solve the problems facing many of the other older parks facing the same type of external threats. It is clear that the National Park System administrative and enabling acts obligate the Secretary of the Interior to manage the parks themselves in such a way as to preserve their resources. However, those acts cannot necessarily be relied upon as mandating secretarial action to prevent damage to park resources occasioned by activities outside their boundaries.

B. *Federal Planning Act*

1. *National Environmental Policy Act.* Probably the most comprehensive environmental planning act ever passed in this country is the National Environmental Policy Act (NEPA) of 1969.⁷² Clearly, NEPA affords national park areas some measure of protection through procedural planning.

The declared purpose of NEPA appears to support the strict protection of park resources against all threats. The first section of the Act states that the purpose of the legislation is "to promote efforts which will prevent or eliminate damage to the environment and biosphere" and also "to enrich the understanding of the ecological systems and natural resources important to the nation."⁷³ Furthermore, it is declared to be the "continuing responsibility of the Federal government . . . to improve and coordinate Federal plans" to achieve the goal of preserving "important historic, cultural, and natural aspects of our national heritage"⁷⁴

Procedurally, whenever a proposal for "major Federal action significantly affecting the quality" of the environment is made, NEPA mandates that an environmental impact statement (EIS) be drawn up.⁷⁵ The statement is to detail "environmental impacts" and "adverse environmental effects" of the proposal; "alternatives" to the proposal; and, possibly most applicable to the protection of park resources, "any irreversible and irretrievable commitments of re-

⁷¹ *Id.* at § 230a(c).

⁷² 42 U.S.C. §§ 4321-4370.

⁷³ *Id.* at § 4321.

⁷⁴ *Id.* at § 4331(b).

⁷⁵ *Id.* at § 4332(2)(C).

sources" that the proposal would cause.⁷⁶ NEPA also requires the federal agency involved in the proposal to consult with other federal agencies that have expertise in the environmental ramifications of the proposal.⁷⁷ That provision theoretically ensures that consultation with the NPS will take place when federal actions are considered which are adjacent to parks, and are found to require the preparation of an EIS.

Once completed, the EIS is "to accompany the proposal through the existing agency review processes" regarding whether to proceed with the proposed action or not.⁷⁸ The federal courts have declared that it was the intent of Congress in drafting NEPA "that the federal government use all practicable means and measures to protect environmental values."⁷⁹ In addition, the courts have stated that the language requiring the EIS to accompany the proposal through the review processes *requires* the acting agency to consider the EIS findings in rendering a decision on the proposal.⁸⁰

At first glance it appears NEPA requires the preparation of an EIS whenever park resources are threatened by any major federal action. One might reach such a conclusion based upon the congressional declaration in all park enabling acts that the park therein established is created to preserve unique, and consequently, irreplaceable natural, historical, or cultural resources. Any adverse effect on park resources would, therefore, seemingly constitute a "significant adverse effect." Furthermore, in consideration of the "superlative" collection of National Park System areas, their "superb environmental quality" individually,⁸¹ and the irreplaceable nature of their resources, one might expect that any EIS which ascertained that damage would be done to park resources would function to prevent the contemplated Federal action. Neither of these assumptions, however, can be relied upon to protect park service areas.

First, exactly what federal proposals constitute "major federal actions significantly affecting the quality of the human environment" is not clear cut. Many federal actions can feasibly have documented deleterious effects on park resources, yet not be considered "major" or of "significant" effect on the environment. Therefore, those actions

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Calvert Cliffs Coordinating Committee, Inc. v. United States Atomic Energy Comm.*, 449 F.2d 1109 (D.C. Cir. 1971).

⁸⁰ *Id.* at 1117-18.

⁸¹ 16 U.S.C. § 1a-1.

do not require preparation of an EIS. A good example of such a possibility would be the BLM's issuance of an Application for Permit to Drill (APD) for oil or gas. The grant of these drilling permits has normally been found not to constitute major federal action of a type significantly affecting the environment.⁸² However, in the hypothetical event that drilling results in an oil spill polluting a river running through a park, the impact may be monumental.

Arguably, any federal action taken in close proximity to a National Park System area should be considered to be accompanied by the possibility of a significant adverse effect and, therefore, require the preparation of an EIS. Such a position is supported by the Council on Environmental Quality regulations established pursuant to the Act. These regulations provide that, in determining whether an action has a significant effect, the intensity or severity of the possible impacts must be evaluated. In evaluating intensity, the regulations state that "unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild scenic rivers, or ecologically critical areas" should be considered.⁸³ Similarly, the regulations also state that "[t]he degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historic resources" should be addressed.⁸⁴ Any federal action in close proximity to a park which may result in loss or destruction of scientific or historical resources the park was created to protect should automatically be considered potentially damaging and require preparation of an EIS. Nevertheless, the BLM's policy concerning APDs demonstrates the unreliability of such a conclusion.

Akin to this oversight in the interpretation of NEPA is the failure of the Act to address federal inaction on a matter which might drastically affect a natural preserve. This inadequacy was demonstrated in *Defenders of Wildlife v. Andrus*, where the Federal Circuit Court for

⁸² Applications for permission to drill are normally categorically excluded from the preparation of an EIS by the BLM. An example of an APD which was granted by the BLM and resulted in an impact upon Glen Canyon National Recreation Area in the form of alterations to a road through the park, was an application filed by Megadon Energy Corporation on Lease No. U-18644 in Utah. In that case, an environmental assessment (EA) concluded that no significant impact would result. Therefore, the BLM approved the application without an EIS. See APD, Lease No. U-18644, Well No. 2-20, filed with the United States Geological Survey, Salt Lake City, Utah, Feb. 17, 1981.

⁸³ 40 C.F.R. § 1508.27(b)(3) (1984) (emphasis added).

⁸⁴ *Id.* at § 1508.27(b)(8).

the District of Columbia held that the Secretary of the Interior's failure to intervene to prevent an Alaska state wolf kill on federal lands did not require the preparation of an EIS.⁸⁵ It is patently obvious in this and similar situations that federal inaction in the face of environmentally disruptive activities could result in damaging repercussions to adjacent parklands.

Second, even when an EIS has been prepared and it notes possible adverse effects on park resources due to the proposed federal action, there is no guarantee that the course of action will be abandoned. Although consideration of the adverse impacts documented in an EIS is nondiscretionary, the significance and weight that an agency gives to an adverse effect is viewed with great deference by the courts.⁸⁶ When the noted adverse effect is balanced against the consequences of not proceeding with the proposal, or pursuing an alternative, more costly approach, an agency's decision may be to allow the disruptive activity. Normally, decisions made by land management agencies are not subject to formal hearings on the record. Unless such a determination is adjudged arbitrary and capricious by a court reviewing whatever record may exist, including the EIS, it will be allowed to stand.⁸⁷

Even in light of these shortcomings, the substantial benefits of NEPA's protective mandates to the National Park System cannot be denied. Where major federal actions are considered that would have a significant effect on a park, the Act assures that the impact will be assessed and considered in the final analysis of whether to proceed with the proposal. The determination that an EIS is necessary also ensures that the public will have a chance to provide input and possibly influence the ultimate agency decision.

Where the federal action might not otherwise be considered to significantly affect the environment, it can also be argued that the ongoing federal policy of preserving the "historic, cultural, and natural aspects of our national heritage," mandated by the Act,⁸⁸ elevates any possible effect on a park to the status of a significant adverse

⁸⁵ 627 F.2d 1238 (D.C. Cir. 1980).

⁸⁶ See, e.g., *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 453 F.2d 463 (2d Cir. 1971); *Sierra Club v. Morton*, 510 F.2d 813 (5th Cir. 1975); and *South Louisiana Envtl. Council, Inc. v. Sand*, 629 F.2d 1005 (5th Cir. 1980).

⁸⁷ The Administrative Procedure Act calls for judicial review of informal agency action based upon the deferential arbitrary and capricious standard. 5 U.S.C. § 706 (1977). Where agency action is subject to a hearing on the record, the standard is more stringent, based upon a review of whether the agency's decision is supported by substantial evidence on the record. *Id.* at § 706(2)(E).

⁸⁸ 42 U.S.C. § 4331(b).

effect. Such an argument is supported by the Council on Environmental Quality regulations established under the Act. Potentially, any action that might have an effect on a National Park System area could be considered to require an EIS. Nevertheless, there is no guarantee embodied in NEPA ensuring that a federal agency will abandon its action even where possible adverse effects upon a park are documented in an EIS.

2. *The Wilderness Act of 1964 and National Wildlife Refuge System Administration Act of 1966.* The Wilderness Act of 1964 was enacted to set aside and preserve federal lands "designated by Congress as 'wilderness areas'" and to administer such lands "for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness."⁸⁹ The National Wildlife Refuge System Administration Act of 1966 created a National Wildlife Refuge System, each unit of which was established to protect the habitat of various types of wildlife.⁹⁰ Where either wilderness areas or wildlife refuges are located adjacent to units of the National Park System, development adverse to the park's resources normally is precluded and an enforceable buffer zone created.

Pursuant to the Wilderness Act of 1964, wilderness areas can be established on any type of Federal land, be it managed by the Bureau of Land Management (BLM), National Park Service (NPS), United States Forest Service (USFS), or United States Fish and Wildlife Service (USFWS). Most of the wilderness areas designated under the Act to this date are on USFS lands, and many of those areas border National Park System areas.⁹¹

Generally, the Wilderness Act precludes roads and commercial enterprises from being established in wilderness areas.⁹² Other than where mining claims and valid existing rights to mineral leasing were established prior to January 1, 1984, no mining activity is allowed in designated wilderness areas.⁹³ Even where mineral rights were estab-

⁸⁹ 16 U.S.C. § 1131. The Act defines "wilderness" as "an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain." *Id.* at § 1131(c).

⁹⁰ *Id.* at §§ 668dd-668ee.

⁹¹ Examples are the Absaroka-Beartooth, Absaroka, and Teton Wilderness Areas adjacent to Yellowstone National Park in Montana and Wyoming, and the John Muir Wilderness Area adjacent to Sequoia and Kings Canyon National Parks in California.

⁹² 16 U.S.C. § 1133(c). Where private rights existed at the time a wilderness was designated, commercial activities and roads may exist. Subject to those existing private rights and necessary measures for management of the areas, no motorized or mechanical transport, or structures and installations are allowed in wilderness areas either. *Id.*

⁹³ *Id.* at § 1133(d)(3).

lished prior to 1984, the development of claims or mineral leases is subject to stringent protective guidelines.⁹⁴ The only significant allowances for use of wilderness areas that could result in damage are for water resource development and grazing.⁹⁵ Other than those two exceptions, any significant development in designated wilderness areas that might adversely affect adjacent parklands and their resources is precluded by the Wilderness Act.

Protection is afforded the parks which adjoin the National Wildlife Refuge Systems in similar fashion.⁹⁶ The National Wildlife Refuge Administration Act directs the Secretary of the Interior to limit the use of areas within the system to those uses which "are compatible with the major purposes for which such areas were established."⁹⁷ The courts have stated, in accordance with USFWS regulations, that "[a]ll wildlife refuges are maintained for the primary purpose of preserving, protecting and enhancing wildlife and other natural resources and developing a national program of wildlife and ecological conservation and rehabilitation."⁹⁸ The Act's exclusion of all uses incompatible with that purpose effectually protects not only the wildlife refuge from the deleterious effects connected to development, but any adjacent parklands as well.⁹⁹

The very existence of wilderness areas and wildlife refuges on the fringes of National Park Service areas, therefore, creates legally enforceable buffer zones. The existence of these buffer zones adjacent to parklands, however, is a limited happenstance and, therefore, will not ensure protection of the entire park system.

3. *Federal Land Policy and Management Act.* Probably the most comprehensive land management planning act passed in this country to date is the Federal Land Policy and Management Act of 1976

⁹⁴ See *id.* The courts have held that "[w]here there is a conflict between maintaining the primitive character of the area and between any other use, including that of timber, the general policy of maintaining the primitive character of the area must be supreme." *Minnesota Public Interest Research Group v. Butz*, 401 F. Supp. 1276 (D. Minn. 1975), *rev'd on other grounds*, 541 F.2d 1292 (1976), *stay denied*, 429 U.S. 935 (1976).

⁹⁵ 16 U.S.C. § 1133(d)(4). Grazing in wilderness areas was further regulated by the Act of December 22, 1980, Pub. L. No. 96-560, Title I, § 108, 94 Stat. 3271.

⁹⁶ Examples are the Cabeza Prieta National Wildlife Refuge adjacent to Organ Pipe Cactus National Monument in Arizona; the Chincoteague National Wildlife Refuge adjacent to Assateague Island National Seashore in Virginia; and the Tule Lake National Wildlife Refuge adjacent to Lava Beds National Monument in California.

⁹⁷ 16 U.S.C. § 668dd(d)(1).

⁹⁸ *Defenders of Wildlife v. Andrus*, 11 E.R.C. 2098 (D.D.C. 1978); see also 43 C.F.R. § 25.11(b)(1984); *Defenders of Wildlife v. Andrus*, 455 F. Supp. 446 (D.D.C. 1978).

⁹⁹ In addition, the Code of Federal Regulations prohibits mineral leasing in withdrawn "wildlife refuge lands." 43 C.F.R. § 101.3-3(a)(1) (1984). This regulation has been supported by decisions in *D. M. Yates*, 82 IBLA 389 (1984); and *Altex Oil Corp.*, 73 IBLA 73 (1983).

(FLPMA).¹⁰⁰ The land management directives delivered to the Secretary through FLPMA, in and of themselves, arguably mandate his protection of fragile park resources through wise supervision of adjacent public lands. Furthermore, when considered in conjunction with the preservationist purpose of the National Park Service Organic Act, even defensible discretionary powers of the Secretary under FLPMA take on a more obligatory countenance.

Included in FLPMA's congressional declaration of policy is the statement that:

the public lands be managed in a manner that will protect the quality of scientific, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, *where appropriate, will preserve and protect certain public lands in their natural condition*; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use¹⁰¹

This portion of the Act can be read to imply that the protection of valuable park resources is an objective to strive for through wise public land management. Where appropriate, it even contemplates strict preservation of public lands, arguably as a means of shielding adjoining parklands. The declaration also provides that "regulations and plans for the protection of public land areas of critical environmental concern be promptly developed" ¹⁰² Areas of "critical environmental concern" are defined to be:

areas within the public lands where special management is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes¹⁰³

In innumerable instances, the public lands neighboring the national parks fall within this characterization and deserve the protection intended by FLPMA.

In addition to proclaiming these protective goals of public land management, however, FLPMA also calls for management policies that recognize the need for the utilization of public land resources such as timber and minerals.¹⁰⁴ Although seemingly incompatible, the

¹⁰⁰ 43 U.S.C. §§ 1701-1784.

¹⁰¹ *Id.* at § 1701(a)(8) (emphasis added).

¹⁰² *Id.* at § 1701(a)(11).

¹⁰³ *Id.* at § 1702(a).

¹⁰⁴ *Id.* at § 1701(a)(12).

Act's authors harmonized its protective objectives with resource appropriation goals by utilizing the concept of multiple use.¹⁰⁵ Multiple use is described as a "combination of balanced and diverse resource uses that take into account the long term needs of future generations for renewable and nonrenewable resources . . ." including "scenic, scientific, and historic values" as well as serviceable resources.¹⁰⁶ It is also made clear that multiple use can include "the use of some land for less than all of the resources."¹⁰⁷ Thus, the statute allows for the management of some lands exclusive of developmental considerations and supports such management to protect the values already specified. Any question of whether BLM multiple use lands could be devoted to as few as one of the purposes decreed by FLPMA was clarified by the courts in *State of Utah v. Andrus*.¹⁰⁸ In weighing the wilderness values of BLM lands against potential mineral development, the court reached the obvious conclusion that "[a] parcel of land cannot both be preserved in its natural character and mined."¹⁰⁹ The court was also careful to explain, however, that such a conclusion does not defeat the multiple use purpose of FLPMA if that aim is "viewed as applying to *all* public lands" and not necessarily to each and every select parcel, independently.¹¹⁰

In recognition and furtherance of the multiple use policies declared to be the objectives of public land management, FLPMA orders the Secretary to develop and revise land use plans for the public lands.¹¹¹ In devising those plans, the Secretary is to "give priority to the designation and protection of areas of critical environmental concern."¹¹² Furthermore, the Secretary is to "coordinate" BLM land use plans with the "land use planning and management programs of other federal departments and agencies," presumably including the National Park Service.¹¹³ Therefore, the plans developed for the management of BLM lands should take into account the protection of park resources mandated by the NPS Organic Act. Indeed, the courts have concluded that FLPMA creates a secretarial duty to protect public lands by a variety of means. Those means could arguably include instances where foregoing such protection would result in damage to

¹⁰⁵ *Id.* at § 1701(a)(7).

¹⁰⁶ *Id.* at § 1702(c).

¹⁰⁷ *Id.*

¹⁰⁸ 486 F. Supp. 995 (D. Utah 1979).

¹⁰⁹ *Id.* at 1003.

¹¹⁰ *Id.*

¹¹¹ 43 U.S.C. § 1712(a).

¹¹² *Id.* at § 1712(c)(3).

¹¹³ *Id.* at § 1712(c)(9).

the public lands and consequential damage to adjoining parklands.¹¹⁴

Most importantly, in regard to the protection of nearby parks and their resources, FLPMA dictates that the Secretary's actions in managing the public lands are subject to the directives of FLPMA and must be consistent with other applicable law.¹¹⁵ Considering the protective concern expressed in FLPMA and the preservationist intent of the NPS Organic Act, the Secretary should be precluded from making management decisions for public lands that adversely affect nearby parks.

Conclusively, FLPMA clarifies the duty of the Secretary of the Interior to use all means within his power to preclude threats to the national parks originating on BLM lands. Therefore, the existence of BLM lands adjacent to National Park System areas should act to create a *de jure* buffer zone. As is the case under the Organic Act, however, the Secretary's obligation to protect public lands from adverse development on adjacent BLM land has never been tested.

4. *The Forest Service Organic Act, Multiple-Use Sustained-Yield Act, and National Forest Management Act.* The Forest Service Organic Act of 1897,¹¹⁶ the Multiple-Use Sustained-Yield Act of 1960 (MUSY)¹¹⁷ and the National Forest Management Act of 1976 (NFMA)¹¹⁸ order the Secretary of Agriculture to take certain actions to protect the national forests. Where a threat to a national forest also may threaten an adjoining national park, the obligation imposed upon the Secretary of Agriculture to take measures to protect forest resources may be beneficial to the neighboring park as well.

The USFS Organic Act directs the Secretary of Agriculture to protect the forests against "destruction by fire and depredation."¹¹⁹ Therefore, when activities to be conducted on USFS land threaten the timber resource and also nearby park resources, the Secretary of Agriculture's obligation to take measures to prevent "depredation upon the . . . national forests" may also benefit the park resources.¹²⁰

Further directives for the management of the national forests were

¹¹⁴ *Sierra Club v. Andrus*, 487 F. Supp. 443, 449 (D.D.C. 1980). The Court stated that "while the protection, management and administration of . . . Bureau of Land Management resources require the exercise of broad discretion, such discretion is not unlimited," and is restrained by the "operational directive to manage, protect, and administer the relevant resources in accordance with enunciated statutory standards." *Id.*

¹¹⁵ 43 U.S.C. § 1732(b).

¹¹⁶ 16 U.S.C. § 551 (1982).

¹¹⁷ *Id.* at §§ 528-531.

¹¹⁸ *Id.* at §§ 1600-1687 (Supp. 1984).

¹¹⁹ 16 U.S.C. § 551.

¹²⁰ *Id.*

provided by the Multiple-Use Sustained-Yield Act of 1960.¹²¹ That Act states, "[i]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."¹²² In three separate instances the courts have held that the failure of the Secretary to consider all of the purposes of the national forests outlined in MUSY when taking any action affecting the forests would be in violation of his obligations.¹²³ The consideration of the stated resources that MUSY obligates the Secretary to make clearly benefits adjacent parks and their resources.

Like FLPMA, the National Forest Management Act requires the Secretary of Agriculture to "develop, maintain, and as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of . . . other federal agencies" presumably including the NPS.¹²⁴ The Secretary is required to:

. . . assure that such plans -

(1) provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C.A. §§ 528-531], and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.¹²⁵

The fact that the Secretary must consider alternative values in planning for the national forests provides some degree of protection to parks adjacent to these forests. Even more important, the coordination provision of NFMA's planning process suggests the USFS plans should be harmonious with the preservation of neighboring NPS lands and resources.

Of particular value to the protection of adjoining parklands are the restrictions placed upon the harvesting of timber under NFMA. Timber harvesting can only be allowed by the Secretary of Agriculture where "soil, slope or other watershed conditions will not be irreversibly damaged"¹²⁶ and "water conditions" will not be adversely af-

¹²¹ Pub. L. No. 86-517, 74 Stat. 215 (codified at 16 U.S.C. §§ 528-531 (1974)).

¹²² *Id.* at § 528.

¹²³ See *Dorothy Thomas Foundation, Inc. v. Hardin*, 317 F. Supp. 1072 (D.N.C. 1970); *Parker v. United States*, 307 F. Supp. 685 (D. Colo. 1969); and *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alaska 1971).

¹²⁴ 16 U.S.C. § 1604(a). NFMA calls for the revision of land and resource management plans at least every fifteen years. *Id.* at § 1604(f)(5).

¹²⁵ *Id.* at § 1604(e)(1).

¹²⁶ *Id.* at § 1604(g)(3)(E)(i).

fects.¹²⁷ Therefore, where timber harvesting may adversely affect downstream park resources, the Secretary should preclude such activities. In addition, the controversial technique of clearcutting is allowable only where "it is determined to be the optimum method" of cutting and is carried out in a manner "consistent with the protection of soil, watershed, fish, wildlife, recreation, and esthetic resources"¹²⁸ It follows that if clearcutting would be inconsistent with the preservation of neighboring park resources, then it should not be allowed.

The USFS planning acts do afford adjoining parks a certain measure of procedural protection where adjacent forest activities present a threat. There is, however, no apparent statutory obligation on the part of the USFS or Secretary of Agriculture to affirmatively prevent activities on the national forests that are potentially damaging to the national parks. Therefore, although these acts provide a certain measure of protection to adjoining park system areas, they do not provide a comprehensive system of protection for parks from outside threats.

C. *Resource Protection Acts*

Some federal environmental and preservation statutes are specifically aimed at protecting certain resources. These acts include the Endangered Species Act,¹²⁹ the National Historic Preservation Act,¹³⁰ and the Clean Air Act.¹³¹ The three acts cited here will be briefly discussed because they either specifically, or by implication, provide for the protection of resources commonly found in parks. All three effectively and affirmatively protect park resources, within the scope of their coverage, from damage due to internal or external threats.

1. *The Endangered Species Act.* The Endangered Species Act (ESA) states that it is the "policy of Congress that *all* federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter."¹³² The purposes of the Act are intended "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved"¹³³ The "Definitions" section of the Act explains that the term

¹²⁷ *Id.* at § 1604(g)(3)(E)(iii).

¹²⁸ *Id.* at § 1604(g)(3)(F).

¹²⁹ 16 U.S.C. §§ 1531-1543.

¹³⁰ 16 U.S.C. §§ 470-470w-6 (1974 & Supp. 1984).

¹³¹ 42 U.S.C. §§ 7470-7642.

¹³² 16 U.S.C. § 1531(c) (emphasis added).

¹³³ *Id.* at § 1531(b).

"conserve" contemplates the utilization of all measures available, including "regulated taking" to ensure the rehabilitation of an endangered species to a point where protection is no longer necessary.¹³⁴

The Act provides a process by which the Secretary shall identify endangered and threatened species and, in relation to those species, any critical habitat necessary for their protection.¹³⁵ The section of the ESA critical to prevention of federal activities adversely affecting these designated species is titled: "Interagency cooperation."¹³⁶ That section directs that:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.¹³⁷

Clearly, the ESA presents a powerful command to all federal agencies to preserve designated wildlife and plants. By implication, the ESA not only protects an endangered or threatened species itself, but also any park in which listed species exist regardless of whether the park is recognized as critical habitat.

Consider, for example, a contemplated resource development project located outside of Yellowstone National Park on federal lands or requiring a federal permit. If such a project is considered to threaten the natural resources of Yellowstone, it might also be found to constitute a threat to the grizzly bear, a designated threatened species which relies for its survival upon the resources protected by the park.¹³⁸ The administering federal agency would be required by the ESA to ensure that the continuing existence of the grizzly bear species would not be jeopardized, with the accompanying result that the park resources would be protected.

Furthermore, when a park has been designated as included in the critical habitat of an endangered or threatened species, the protection of the park becomes an even greater concern. If, for instance, federally permitted development outside of Mammoth Cave National Park in Kentucky threatens caves within the park where indiana bats

¹³⁴ *Id.* at § 1532(3).

¹³⁵ *Id.* at § 1533.

¹³⁶ *Id.* at § 1536.

¹³⁷ *Id.* at § 1536(a)(2).

¹³⁸ 50 C.F.R. § 17.11(h) (1983).

hibernate (the caves being designated as critical habitat),¹³⁹ the administering agency may be precluded from granting the necessary permits. In both examples, the existence of the ESA may operate not only to protect the endangered species, but the park resource which that life depends on as well.

2. *The National Historic Preservation Act.* In the National Historic Preservation Act of 1966 (NHPA), Congress declared that "the historical and cultural foundations of the Nation should be preserved"¹⁴⁰ The Act calls for the establishment of a list of "historical properties" made up of "districts, sites, buildings, structures, and objects significant to American history, architecture, archeology, engineering, and culture."¹⁴¹ This list is titled the National Register of Historic Places. Sites listed on the National Register that meet certain minimum qualifications are given the status of National Historic Landmarks.¹⁴²

When historic properties are owned or controlled by a Federal agency such as the NPS, any agency undertaking an activity that might affect that historic property must take into account the effect of its actions.¹⁴³ Furthermore, the NHPA states that "[p]rior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark"¹⁴⁴ Both of these conditions mandate at least some consideration of the adverse affects a federal action may have upon the innumerable historic properties and National Historic Landmarks included in the National Park System.

3. *The Clean Air Act.* The Clean Air Act is another example of a resource protective statute. That Act goes one step further, however, by effectually limiting development in certain areas and thereby operating like a planning statute. The most relevant part of the Clean Air Act to this discussion is that section addressing prevention of significant deterioration of air quality, especially in park areas.¹⁴⁵ The

¹³⁹ *Id.* at § 17.11(h) and § 17.95(a).

¹⁴⁰ 16 U.S.C. § 470(a)(2).

¹⁴¹ *Id.* at § 470a(1)(A) and (B).

¹⁴² *Id.* at § 470a(1)(B).

¹⁴³ *Id.* at § 470f.

¹⁴⁴ *Id.* at § 470h-2(f).

¹⁴⁵ 42 U.S.C. §§ 7470-7642. The congressionally stated purpose of this part of the Clean Air Act is "to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value." *Id.* at § 7470(2).

Act designates all national parks in existence as of August 7, 1977, which exceed 5,000 acres in size, as Class I air areas.¹⁴⁶ Redesignation of other NPS areas as Class I or Class II areas by states is also allowed.¹⁴⁷ The Act sets limits for allowable excesses over determined baseline concentrations of certain air pollutants in Class I and Class II areas.¹⁴⁸ In effect these limits preclude development in the vicinity of an NPS area designated as Class I or Class II.

The Clean Air Act also directs the Secretary of the Interior to study all mandatory Class I areas-parks in excess of 5,000 acres established before August 7, 1977-and identify those where visibility is an important asset to the area.¹⁴⁹ That portion of the Act then instructs the Administrator of the Environmental Protection Agency (EPA) to "promulgate regulations to assure (A) reasonable progress toward meeting the national goal"¹⁵⁰ of "the remedying of any existing impairment of visibility"¹⁵¹ in the mandatory Class I parks. The statute does however, suggest, both specifically¹⁵² and impliedly,¹⁵³ that the Administrator's duty to meet reasonable progress deadlines is discretionary. Serviceably, the statute dictates that park areas designated Class I and Class II will be protected from further significant impact and provides directives to the EPA Administrator to at least work on improving visibility in mandatory Class I areas, to the benefit of those parks so situated.¹⁵⁴

Resource protection acts, such as the ESA, the NHPA, and the Clean Air Act, protect parks only when the specific resources they are set up to preserve are threatened. Such acts do not provide protection for all resources that have been chosen for preservation in NPS areas.

D. *Authority Regulating Resource Development*

Many federal statutes regulate allowable development on federal lands or require federal licensing or permits. This section will focus

¹⁴⁶ *Id.* at § 7472(a)(4).

¹⁴⁷ *Id.* at § 7474.

¹⁴⁸ *Id.* at § 7473.

¹⁴⁹ *Id.* at § 7491(a)(2).

¹⁵⁰ *Id.* at § 7491(a)(4).

¹⁵¹ *Id.* at § 7491(a)(1).

¹⁵² *Id.* at § 7491(f).

¹⁵³ *Id.* at § 7491(g)(1).

¹⁵⁴ The effectiveness of the Clean Air Act in protecting visibility in our national parks is addressed in Pritchard, *Visibility in Our National Parks Is Not Being Adequately Protected*, in *NATIONAL PARKS IN CRISIS* 107 (E. Connally ed. 1982).

on the obligations of the agencies administering such development or licensing to consider environmental impacts on the parks. In addition, the judicially developed theory of federal reserved water rights, occasionally utilized to protect environmental values, will be considered.

1. *Mineral Development.* Mineral development on federal lands essentially falls into two categories: development of mining claims under the Mining Law of 1872;¹⁵⁵ and development of mineral leases under the Mineral Leasing Act of 1920.¹⁵⁶

The Mining Law of 1872 provides American citizens with the opportunity to establish mining claims on unreserved, unappropriated public lands of the United States. Once a mining claim has been located properly, the claimant gains an exclusive right of possession to the claim and is able to freely develop his mineral interest in the claim. The unrestrained development of mining claims was regulated somewhat by the Surface Resources Act of 1955.¹⁵⁷ That Act authorized the federal government to manage the surface resources of all public lands, including those subject to unpatented mining claims.¹⁵⁸ The Surface Resources Act limited the use of mining claims to uses directly related to development of the mineral resource. FLPMA carried the BLM's obligation to govern the surface impact of mining claim development one step further. FLPMA states that "[i]n managing the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands."¹⁵⁹

In furtherance of that directive, surface management regulations for mining claims were promulgated by the BLM in 1981.¹⁶⁰ Similar USFS regulations were codified in 1974 with the stated purpose of minimizing "adverse environmental impacts."¹⁶¹ Both sets of regulations call for mining claimants to notify the managing agency of proposed operations that may result in surface disturbance. Both also call for reclamation of the mining site after exhaustion of the mineral deposit. Although the Government does not possess the authority to

¹⁵⁵ 30 U.S.C. §§ 21-77 (1976).

¹⁵⁶ *Id.* at §§ 181-287 (1976 & Supp. 1984).

¹⁵⁷ *Id.* at § 612 (1976).

¹⁵⁸ Although a claimant to mineral rights on federal lands, even where the claim is unprotected yet properly located, has exclusive rights of possession to that claim, fee title to the land does not pass to the claimant until the claim is patented. While unpatented, the claim is subject to government regulation. *Id.*

¹⁵⁹ 43 U.S.C. § 1732(b).

¹⁶⁰ 43 C.F.R. Part 3800 (1984).

¹⁶¹ 36 C.F.R. § 252.1 (1974).

prohibit totally the development of a mining claim, these provisions enable the agencies to plan better for potential environmental disruptions and make certain that a claimant obeys applicable environmental restrictions. Furthermore, the Secretary of the Interior's affirmative duty under FLPMA to protect lands against undue or unnecessary degradation should be considered an affirmative obligation to prevent mining claimants, to the legal extent possible, from damaging surface resources to the detriment of neighboring parks.

In addition, where unpatented or even patented mining claims exist within areas of the National Park System, they are subject "to such regulations prescribed by the Secretary of the Interior as he deems necessary for the preservation and management of those areas."¹⁶² This grant of authority, in addition to the Secretary's obligation to protect the parks under the Organic Act, should prevent any damage to park resources from the development of mining claims inside park areas.

The Mineral Leasing Act provides for the leasing of such minerals as oil, gas, coal and phosphates from federal lands. The courts have stated that the Secretary of the Interior, who is authorized to issue such leases, has concurrent authority and responsibility to protect the environment of the public lands.¹⁶³ In addition, it is recognized that the Secretary has discretion to impose restrictions on mineral lease terms.¹⁶⁴ Because the Secretary also has a responsibility to protect the parks from disruption, it is arguable that he should regulate mineral leases granted near parks by including terms designed to protect those parks.

More specifically, before issuing any coal lease, the Secretary is obligated to consider the effects that coal mining would have on the environment.¹⁶⁵ The Mineral Leasing Act also states that, prior to a coal lease sale, public hearings in the impacted area should be held.¹⁶⁶ Also, after a lease is issued, the Act requires the lessee to submit an operation and reclamation plan for approval prior to taking action that "might cause a significant disturbance of the environment."¹⁶⁷ The Act does not specifically direct the Secretary to forego issuance or development of the lease if he determines adverse envi-

¹⁶² 16 U.S.C. § 1902.

¹⁶³ *Copper Valley Machine Works, Inc. v. Andrus*, 474 F. Supp. 189 (D.D.C. 1979), vacated on other grounds, 653 F.2d 595 (D.C. Cir. 1981).

¹⁶⁴ *Id.*

¹⁶⁵ 30 U.S.C. § 201(a)(3)(c) (Supp. 1984).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at § 207(c) (Supp. 1984).

ronmental impacts will result. However, his other obligations under FLPMA and the NPS Organic Act should preclude the issuance of a lease that is shown to present a potential adverse effect to a park.

The surface Mining Control and Reclamation Act of 1977 goes one step further.¹⁶⁸ That Act allows any interested party to petition for the designation of a given area, as unsuitable for surface coal mining.¹⁶⁹ Those provisions have specific applicability to park lands. The Act states that an area may be designated unsuitable if mining operations will "affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific, and aesthetic values and natural systems"¹⁷⁰ After the regulatory authority receives the petition, the Act calls for a public hearing to be held.¹⁷¹ It was this exact process that resulted in the designation of the Alton Coal Field, adjacent to Bryce Canyon National Park, as unsuitable for surface coal mining due to the potential adverse effects on the park.¹⁷²

Finally, if, after issuance of any mineral lease, the Secretary finds that "in the interest of conservation of natural resources" it is necessary to suspend a lease, he may do so.¹⁷³ For example, in *Copper Valley Machine Works, Inc. v. Andrus*, the United States Court of Appeals for the District of Columbia Circuit held that the Secretary could suspend a lease to protect the Alaskan tundra permafrost environment during the summer thaw.¹⁷⁴ Consequently, the Secretary, in view of his protective duties under the NPS Organic Act, should also suspend any mineral lease threatening the environment of a park until the threat has ended.

2. *Hydropower and Reclamation Development.* The Federal Energy Regulatory Commission, under the Federal Power Act, currently has the authority to issue licenses for the construction of hydropower development projects on navigable waterways and within public lands and reservations of the United States.¹⁷⁵ Where a dam or reservoir is contemplated within a federal reservation, such as a national forest, the Federal Power Act requires that a license for such project

¹⁶⁸ *Id.* at §§ 1201-1328 (Supp. 1984).

¹⁶⁹ *Id.* at § 1272(c) (Supp. 1984).

¹⁷⁰ *Id.* at § 1272(a)(3)(B) (Supp. 1984).

¹⁷¹ *Id.* at § 1272(c) (Supp. 1984).

¹⁷² See *Utah International, Inc. v. Department of the Interior*, 553 F. Supp. 872 (D. Utah 1982).

¹⁷³ 30 U.S.C. § 209.

¹⁷⁴ 653 F.2d 595 (D.C. Cir. 1981).

¹⁷⁵ 16 U.S.C. § 797(e) (1976 & Supp. 1984). These powers were originally vested in the Federal Power Commission prior to the creation of the Department of Energy in 1977. *Id.*

only be granted by the Commission if a finding is made "that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired."¹⁷⁶ Furthermore, any license granted for a project within such a reservation is "subject to . . . such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations."¹⁷⁷

Since March 3, 1921, the national parks and monuments have been protected from hydropower development unless Congress has specifically authorized such projects.¹⁷⁸ The Federal Power Act licensing provisions also work to protect the parks from alterations to water-courses adjacent to parks. The aforementioned provisions prevent the development of hydropower facilities within reservations such as national forests when adverse impacts to the reservation are possible. There is no doubt that the Commission has an affirmative duty to evaluate the effect upon wildlife the construction of a dam might have.¹⁷⁹ Furthermore, the courts have held that the Commission must also consider scenic¹⁸⁰ and recreational¹⁸¹ values before granting a license. In effect, the courts have broadened the obligation of the Commission to evaluate all impacts a project licensed by them might have. No licenses should be granted if such a project will adversely affect the stated resources of federal reservations or public lands adjacent to a park.

The Bureau of Reclamation is the principal agency controlling the construction of dams and reservoirs for irrigation purposes. The Bureau is not subject to any particularized planning process that must take environmental values into consideration, other than NEPA. However, some safeguards against the detrimental effects of reclamation development may be found in authorizing statutes for individual projects.

One of the major projects authorized to be constructed by the Bureau is the Colorado River Storage Project. The existing legislation for that project, the Colorado River Storage Project Act of 1956,¹⁸²

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ 16 U.S.C. § 797(a).

¹⁷⁹ See *Udall v. Federal Power Comm'n*, 387 U.S. 428 (1967); *Hudson River Fisherman's Ass'n v. Fed. Power Commission*, 498 F.2d 827 (2d Cir. 1974).

¹⁸⁰ See *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965).

¹⁸¹ See 387 U.S. 428; *State of Cal. v. Federal Power Commission*, 345 F.2d 917 (9th Cir. 1965).

¹⁸² 43 U.S.C. §§ 620-620(a) (1976 & Supp. 1984).

precluded the construction of dams within national parks.¹⁸³ Furthermore, the Act specifically provided protection for Rainbow Bridge National Monument from the waters that would approach it as a result of construction of the Glen Canyon unit of the project.¹⁸⁴

One would expect that such literal protective legislation would ensure the preservation of park resources. The aforementioned sections of the Colorado River Storage Project Act, however, are an excellent example of the unreliability of measures seemingly enacted to preserve the parks. As the Glen Canyon Dam was built and the waters of Lake Powell began to rise behind it, environmentalists became painfully aware of the fact that portions of Rainbow Bridge National Monument would be inundated. An environmentalist group, Friends of the Earth, brought suit against the Secretary of the Interior to prevent the flooding, based on the protective provisions of the Act.¹⁸⁵ The court, however, reasoned that those particular sections of the Act were repealed by implication through later congressional action. The court based its decision on congressional appropriations acts, which specifically deleted, and later failed to reinstate, funds for the protection of Rainbow Bridge National Monument. Based on this rationalization, the court held the protective sections of the Act to be repealed.¹⁸⁶ The *Friends of the Earth* case is an excellent example of how even specific protective mandates, in total control of the Department of the Interior, can be cast aside injudiciously where strong economic and development interests are concerned.

3. *Federal Reserved Water Rights Doctrine.* The doctrine of federal reserved water rights was first recognized in *Winters v. United States*.¹⁸⁷ In essence, that doctrine asserts that when the federal government withdraws land from the public domain and reserves it for a public purpose, any unappropriated water necessary to fulfill the purposes of that reservation is vested or appropriated in the United States as of the date of the reservation. This doctrine can be utilized

¹⁸³ 43 U.S.C. § 620b states "[i]t is the intention of Congress that no dam or reservoir constructed under the authorization of this chapter shall be within any national park or monument." See generally FRADKIN, *A RIVER NO MORE* (1982).

¹⁸⁴ 43 U.S.C. § 620 states "[t]hat as part of the Glen Canyon Unit the Secretary of the Interior shall take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument."

¹⁸⁵ *Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1973), cert. denied, 94 S.Ct. 933 (1974).

¹⁸⁶ *Id.* at 9. The view that congressional appropriations actions can impliedly repeal already existing legislation has been tempered somewhat by the subsequent case of *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

¹⁸⁷ 207 U.S. 564 (1908).

to protect parklands faced with adverse affects from external water development.

In *Cappaert v. United States*,¹⁸⁸ the doctrine of federal reserved water rights was acknowledged by the Supreme Court as a means of protecting a national monument. In that case, the pumping of groundwater from wells adjacent to Devil's Hole National Monument was lowering the water level in the limestone cavern known as Devil's Hole to a level where an indigenous, wholly unique species of pupfish was endangered. In a footnote to the opinion, the court cited the presidential proclamation establishing the monument as forbidding the removal of "any feature" from the monument.¹⁸⁹ In light of that provision the court stated that "[s]ince water is a feature of the reservation, the Cappaerts, by their pumping, are 'appropriating' or 'removing' this feature in violation of the Proclamation."¹⁹⁰

If the adjacent pumping were the result of a federal program, this provision in the proclamation might have been enough to bring it to a halt. However, since the pumping was conducted by a private party and involved questions of private water rights, the court found it necessary to use the doctrine of federal reserved water rights to protect Devil's Hole. The court thereby held that "as of 1952 when the United States reserved Devil's Hole, it acquired water rights by reservation in unappropriated appurtenant water sufficient to maintain the level of the pool to preserve its scientific value and thereby implement Proclamation No. 2961" which created the monument.¹⁹¹

In this instance the court relied upon the language and purpose of the presidential proclamation to establish the grounds for utilizing the reserved water rights doctrine. However, it seems clear that the preservationist purpose of the National Park Service Organic Act would also activate the doctrine. Such a proposition would comply with the holding in *United States v. New Mexico*.¹⁹² In that case, water rights were held to be impliedly reserved in the federal government to fulfill the purposes for which a national forest was withdrawn, as of the date of the withdrawal.¹⁹³ On that basis it can be

¹⁸⁸ 426 U.S. 128 (1976).

¹⁸⁹ *Id.* at 140 n.6 (citing Proclamation No. 2961, 3 C.F.R. 147 (1949-1953 Comp.)).

¹⁹⁰ 426 U.S. at 140 n.6.

¹⁹¹ *Id.* at 147.

¹⁹² 438 U.S. 696 (1978).

¹⁹³ *Id.* at 699-707. In the majority opinion, Justice Rehnquist held that reserved rights only existed in quantities necessary to fulfill the primary purposes for which the reservation was withdrawn. *Id.* Rehnquist stated: "Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any

concluded that where park resources are threatened by adverse use of water upstream, or over-extraction of groundwater, the reserved water rights doctrine can be applied to preclude further disruptive effects.¹⁹⁴

It is readily apparent that the four categories of protective legislation and common law reviewed herein: (1) legislation and common law doctrine mandating proper administration of NPS areas; (2) federal planning statutes; (3) statutes mandating protection of specific resources; and (4) statutes and common law regulating specific aspects of development, do not afford adequate protective mandates for the preservation of park resources. In most instances these laws do not specifically address the problem of external threats to park resources. Even the more literally protective statutes, such as the ESA, are only applicable in very limited circumstances.

IV. THE PROPOSED NATIONAL PARK SYSTEM PROTECTION AND RESOURCES MANAGEMENT ACT OF 1983: A COMPREHENSIVE STRATEGY FOR PARK PROTECTION

The increase in the number and magnitude of threats to our national park system, as illustrated by the 1980 *State of the Parks Report*, and the lack of more than piecemeal legislation and theoretical doctrines for protecting park resources from these threats, resulted in the introduction of protective park legislation in Congress in 1982. That year, two bills were introduced in Congress advocating both greater protective measures against internal and external threats to the parks, and a more detailed resource management program for the national park system.¹⁹⁵ Those bills died in the 97th Congress, succumbing to congressional inaction. A new bill, however, incorporating the attributes of the earlier two, was introduced in the 98th Congress

other public or private appropriator." *Id.* at 702. Therefore, Rehnquist held that only those quantities of water necessary for preserving timber and maintaining favorable water flows, two of the stated purposes of the National Forest Organic Act, 16 U.S.C. § 475, were reserved. *Id.* at 707-18. Four dissenting justices argued that water should have been impliedly reserved for the purpose of "improving and protecting the forest" as well. *Id.* at 720. The dissenters concluded that this third purpose of 16 U.S.C. § 475 contemplated preserving wildlife as an aspect of "improving and protecting the forest." *Id.* at 718-25.

¹⁹⁴ Amounts of water reserved to parks might be difficult to ascertain in many instances. It might even be argued that certain natural environments require periodic flooding to remain viable and, therefore, that the reserved water right is, in effect, indeterminable. It must also be remembered that the reserved water rights in a federally withdrawn area are subject to appropriations from the watercourse or body of water in question, prior to the withdrawal date.

¹⁹⁵ *Supra* note 19.

and succeeded in passing the House in the first session in October of 1983.¹⁹⁶ The legislation was titled the *National Park System Protection and Resources Management Act of 1983*, H.R. 2379.¹⁹⁷ The stated purpose of the Bill was "to provide for a high degree of protection and preservation of the natural and cultural resources within the national park system"¹⁹⁸

Under the Bill's provisions, the Secretary of the Interior was ordered to prepare a biennial "State of the Parks" report. The report was to set out the current condition of, and perceived threats to, each NPS area as well as discuss present management techniques and future needs.¹⁹⁹ He was also directed to prioritize the fifty most critical cultural resource problems facing the system and to provide for a detailed analysis of each problem.²⁰⁰ In addition, the Bill called for the preparation of resource management plans for each unit of the national park system, and the revision of such plans at least every two years.²⁰¹ These measures won the support of most legislative representatives, Republican and Democrat, environmentalist and nonenvironmentalist.²⁰²

The controversial sections of the Bill were sections ten and eleven, which dealt with nondiscretionary secretarial review of all federal actions that may have a damaging effect upon national park system areas. Subsection (a) of § 10 stated that "[i]n any case of areas which are within any unit of the National Park System" where the Secretary of the Interior has authority to issue leases, permit use, occupancy or development, or sell or dispose of lands, he may not do so until "after he has determined that the exercise of such authority is not likely to have a significant adverse effect on the values for which such national park system unit was established."²⁰³ Subsection (b) of § 10 precluded action concerning development by the Secretary of the Interior in areas "adjacent to any unit of the national park system" until the same determination was made.²⁰⁴ Section 10(b) also stated, however, that unless "the public interest in preventing such adverse effect on such values significantly outweighs the public interest value of the proposed action, taking into consideration the Act of

¹⁹⁶ 129 Cong. Rec. H7910-34 (daily ed. Oct. 4, 1983).

¹⁹⁷ H.R. 2379, 98th Cong., 1st Sess. (1983) [hereinafter cited as H.R. 2379].

¹⁹⁸ H.R. 2379 at § 3.

¹⁹⁹ *Id.* at § 4.

²⁰⁰ *Id.* at § 5.

²⁰¹ *Id.* at § 7.

²⁰² See 129 Cong. Rec. H7919-31 (daily ed. Oct. 4, 1983).

²⁰³ *Id.* at § 10(a)(3) (emphasis in original) (Seiberling Amendment at 7917).

²⁰⁴ *Id.* at § 10(b).

August 25, 1916 (39 Stat. 535; 16 U.S.C. 1-4), and the Act of August 18, 1970 (84 Stat. 825; 16 U.S.C. 1a-1 through 1a-7)," the Secretary may proceed with the action.²⁰⁵

Section 11 of the Bill created less debate, but was objected to by some opponents. That section required any federal agency which "undertakes or proposes to approve a federal action within or adjacent to a unit of the National Park System which it determines may have a significant adverse effect on the natural or cultural resources of such unit . . ." to promptly notify the Secretary of the Interior of such action.²⁰⁶ The provision also ordered the Secretary to submit comments and recommendations to the agency administering the action, or if no comments were prepared, to notify Congress.²⁰⁷ Even where the acting agency had not notified the Secretary of impending action, the Secretary could, under the Bill, on his own determination, find that the action would have adverse consequences and submit comments and recommendations to the agency.²⁰⁸ If the action contemplated was inside an NPS area and on federally owned land, the administering agency "could not approve such action until such time as the Secretary of the Interior has concurred in such action."²⁰⁹ If, however, the action contemplated was outside an NPS area, nothing in the proposed bill would have precluded the agency's approval of the federal action, regardless of the Secretary's comments.²¹⁰

Opponents of the Bill argued that sections 10 and 11 would preclude a significant amount of oil, gas, and coal extraction on federal lands, and stall if not foreclose, federally permitted energy generation from coal fired power plants and hydroelectric projects.²¹¹ Critics also questioned the vagueness of the language "adjacent to a park," fearing the creation of unlimited protective buffer zones around the parks.²¹² Proponents of the Bill responded that the legislation did not impose any new duties on the Secretary, nor restrict his development authority.²¹³ Rather, proponents of the Bill argue that it only assured

²⁰⁵ *Id.*

²⁰⁶ *Id.* at § 11(a) and (a)(1).

²⁰⁷ *Id.* at § 11(b).

²⁰⁸ *Id.* at § 11(d).

²⁰⁹ *Id.* at § 11(e). If not federally owned, nothing precludes the agency's ultimate action.

²¹⁰ The Secretary of the Interior is merely directed to submit the agency's ultimate decisions along with his comments and recommendations to appropriate committees of Congress. *See id.* at § 11(c).

²¹¹ *See* 129 Cong. Rec. H7919-31 (daily ed. Oct. 4, 1983) (statements of Representatives Hansen, Marriott, and Nielson of Utah).

²¹² *See id.* at H7922-23, 7928, 7929 (statements of Representative Craig of Colo., Representative Brown of Colo., and Representative Nielson of Utah).

²¹³ *Id.* at 7919-31.

that land management decisions will be made wisely and ensure protection of park resources.

V. CONCLUSION

If we truly desire to protect our nation's parks, then we need to clarify the protection that they are to be afforded. The current, piecemeal protective measures that have been used to force the Secretary of the Interior to prevent damage to the parks are inadequate to preserve the parks' unimpaired ecosystems.

Much of the existing protective legislation that has been reviewed in this article is applicable only in limited situations. FLPMA and the National Forest Management Act provide directives that can be interpreted to mandate protection for the parks from activities on BLM or USFS lands. But such interpretations are untested and insecure in relation to the multiple use doctrine. Even legislation literally ordering protection of the parks has failed, as in the case of *Friends of the Earth v. Armstrong*.²¹⁴ The strongest mandates in favor of preservation of our parks remain the Organic Act of 1916 and the duties it has been interpreted to place on the Secretary of the Interior, as discussed in *Sierra Club v. Andrus*.²¹⁵ The extent of those duties, however, has yet to be adequately tested in the courts. Furthermore, even if the Secretary does have a duty to do all in his power to protect the parks, the action of departments other than the Department of the Interior are not similarly restricted.

As discussed, the provisions of the proposed National Park System Protection and Resources Management Act calling for recognition and further study of threats to the National Park System are unopposed, and indeed, highly commendable. Congress has demonstrated its support for such studies through recent appropriations for more analytical research of existing threats to the system.²¹⁶

The portion of the proposed legislation calling for a secretarial determination of no significant adverse impact on park values before proceeding with projects within parks is also essentially harmless. Indeed, it would seem the Organic Act impliedly mandates the Secretary to proceed in such fashion.

Section 10(b) and Section 11 of the proposed act are the provisions that would ensure greater protection of the parks than is currently

²¹⁴ 485 F.2d 1 (10th Cir. 1973). See *supra* notes 175-76 and accompanying text.

²¹⁵ 487 F. Supp. 443 (D. D.C. 1980), *aff'd*, 659 F.2d 203 (D.C. Cir. 1981). See *supra* notes 53-58.

²¹⁶ Department of Interior and Related Agencies Appropriation Act of Nov. 4, 1983, Pub. L. No. 987-146; and House Report 98-253, Senate Report 98-184, and Conf. Report 98-399.

guaranteed. These sections call for review and analysis of both Interior and other departmental actions taken outside of, and adjacent to, park system areas. Generally, those sections could be strengthened by the addition of a provision affirmatively requiring the NPS to take part in any land management and environmental planning undertaken by other federal agencies that may affect park resources.²¹⁷

As pointed out, one major problem with the review and analysis sections of the Bill is the precise meaning of the phrase "adjacent to a park." The opponents of the Bill claim that such terminology is objectionably vague. Furthermore, the diversity of the park system as it presently exists could make such review provisions burdensome if not unmanageable. Once again, we need to ask ourselves whether we want, or need, to provide the same protection and precautionary planning for a park such as Golden Gate National Recreation Area, as compared to Yellowstone National Park. The paperwork and litigation that would result from reviewing every proposed action adjacent to an urban park could be overwhelming. On the other hand, even a minor external action taken near a delicate ecosystem such as that preserved by Yellowstone National Park deserves scrutiny.

A simple answer to the problem of diversity of the system has been administratively formulated by the NPS itself. The NPS divides the system into natural, historic, and recreational areas for purposes of management.²¹⁸ Functionally, a similar divisional classification of the system for the protective Bill would greatly simplify matters. The resources which historic and recreational areas were created to protect are less susceptible, in most cases, to outside influences than the pristine ecosystem of a natural park. Historic and recreational areas should be afforded the protective measures the Bill has suggested; however, they do not require the in-depth review which actions taken near a natural area call for. "Adjacent," in relation to historic and recreational areas, might be more specifically defined as in close contact with the area's boundaries.²¹⁹

On the other hand, the term "adjacent," in respect to actions taken outside of natural preserves such as Yellowstone or Capitol Reef National Parks, should be interpreted more broadly. A viable solution to determining the bounds of "adjacent" territory with regard to natural preserves would be to identify the surrounding ecosystem intimately

²¹⁷ See *infra* app. A, at § 12(c).

²¹⁸ NATIONAL PARK SERVICE, U.S. DEP'T OF THE INTERIOR, MANAGEMENT POLICIES (1975).

²¹⁹ See *infra* app. A, at § 10(e)(2) and § 11(i)(2).

related to the smaller ecosystem preserved by the park.²²⁰ An environmentalist group called the Greater Yellowstone Coalition has already made such an identification for the Yellowstone National Park area.²²¹ Once such adjacent areas were geographically recognized for each park, developers would have a better sense of what hurdles they would face in pursuing their ventures.

Although the Bill's plan for secretarial and agency review of proposed actions is well presented and commendable, even greater legal guarantees of protection should be provided. In the event the Secretary or an independent agency decide to proceed with an action adjacent to a park, after an evaluation and a determination that the project's benefits outweigh its adverse impacts, judicial review would be based on the deferential arbitrary and capricious standard.²²² Considering the highly valued and irreplaceable nature of our park resources, the standard of review should be heightened. To achieve greater scrutiny, and also to afford the opportunity for the public to comment on potentially damaging actions, there should be some provision for a public hearing on the record. To foreclose the possible time and expense consequential to innumerable hearings, the Bill could provide that hearings would only be granted upon petition, and only after the administrative procedures outlined in the currently proposed Bill were completed.²²³ The standard of judicial review of any agency action would thereby be made stricter. For a court of law to uphold the agency's action it would have to be based upon substantial evidence in the record compiled at the formal hearing.²²⁴

To guarantee the preservation of our national parks—our national heritage—a revised and stronger version of H.R. 2379 should be passed. A revised and strengthened version of H.R. 2379 appears in Appendix A to this article. It is hoped that this proposed legislation will help to refocus congressional debate on protection of our national parks.

Such legislation would merely act to clarify what some courts have declared the protective scope of the National Park Service Organic Act and its amendments to be. Ultimately, no greater amount of energy development and resource exploitation would be precluded than would be precluded through litigation in pursuit of the uncertain answers the current legislation and case law provide. The suggested leg-

²²⁰ See *infra* app. A, at § 7a, § 10(e)(1) and § 11(i)(1).

²²¹ Robbins, *supra* note 24.

²²² See 5 U.S.C. § 706.

²²³ See *infra* app. A, at § 10(c) and § 11(h).

²²⁴ See 5 U.S.C. § 706.

isolation hopefully would provide better guidance for developers and environmentalists alike and benefit all through the guaranteed protection of our nation's treasures.

Appendix A: The National Park System Protection and Resources Management Act of 1983, H.R. 2379, with Suggested Amendments.

The text of H.R. 2379 is taken from 129 Cong. Rec. H7914-7933 (daily ed. Oct. 4, 1983). Suggested additions to that text are underlined. Suggested deletions to that text are indicated by bracketing ([]).

SHORT TITLE

SECTION 1. This Act may be cited as the "National Park System Protection and Resources Management Act of 1983."

FINDINGS

SEC. 2. The Congress finds that—

(1) the natural and cultural resources of the national park system embrace unique, superlative and nationally significant resources, constitute a major source of pride, inspiration, and enjoyment for the people of the United States, and have gained international recognition and acclaim;

(2) the Congress has repeatedly expressed its intentions, in both generic and specific statute and by other means, that the natural and cultural resources of the national park system be accorded the highest degree of protection;

(3) many of the natural and cultural resources of the national park system are being degraded or threatened with degradation; and

(4) no comprehensive process exists for the gathering of data, the identification, analysis, and documentation of trends, and the identification of problems regarding the condition of the national park system's natural and cultural resources, and for the development of a program to prevent and reverse the degradation of the natural and cultural resources of the national park system.

PURPOSE AND POLICY

SEC. 3. In furtherance of the provisions of the Act of August 25, 1916 (39 Stat. 535; 16 U.S.C. 1-4), it is the purpose of this Act and shall continue to be national policy to provide for a high degree of protection and preservation of the natural and

cultural resources within the national park system for the benefit of the public, and to provide for the interplay of the forces and processes of natural geological change and ecological succession in perpetuity (except for locations of development or where the historic scene is to be stabilized and depicted at a particular static point in time). In furtherance of that purpose and policy, it is the specific purpose of this Act to provide for the development of comprehensive management programs, and planning and decision making processes which will—

(1) identify damage, threats, and problems affecting the natural and cultural resources of the national park system, and

(2) provide for the implementation of actions which will prevent and reverse such adverse forces so as to maximize the protection and preservation of the natural and cultural resources of the national park system.

Nothing in this section shall be deemed to constitute a change in the more specific purposes or provisions of the various Acts establishing the individual units of the national park system.

STATE OF THE PARKS REPORT

SEC. 4. (a) In furtherance of the provisions of section 3 of this Act, the Secretary shall undertake a continuing program of data collection, research, monitoring, analysis and documentation as to conditions, factors and forces which are degrading, or threatening to degrade, the natural and cultural resources of the national park system and shall prepare a biennial "State of the Parks" report. Such report shall constitute documentation of the condition of park resources, including problems related to their degradation and solutions to such problems. The report shall correlate to a fiscal year base and shall be transmitted by January 1, [1985; (to be changed to make current)] (and by January 1 of each odd numbered year thereafter), by the Secretary to the Speaker of the United States House of Representatives and to the President of the United States Senate for deferral to and consideration by the appropriate legislative committees of the Congress. Successive reports shall update previous submissions. Each report shall be printed as a House document. The report shall include, but need not be limited to, the following major components:

(1) a brief description, for each individual unit of the national park [sic] system, of—

(A) the past, current, and projected condition of the unit's natural and cultural resources;

(B) the impact from identified factors and forces, ranked in order of priority, emanating from both inside and outside the unit, which damage or threaten to damage the welfare and integrity of the unit's natural and cultural resources, with identification of the trends and the severity of impact of such factors and forces;

(C) ongoing and planned protection and management actions, including specific research programs, with regard to subparagraphs (A) and (B) of this paragraph; and

(D) the accomplishments and results of the actions undertaken in accordance with subparagraph (C);

(2) a description and assessment of the systemwide efforts to address the requirements of paragraph (1) of this subsection, which assessment shall include a list of all personnel positions systemwide (given according to pay grade, location, and professional expertise of the incumbent) assigned 50 per centum or more of the time to direct resource protection, resource management activities or research, and an assessment of the effectiveness and adequacy of these personnel in meeting resource management objectives;

(3) a detailed and specific discussion, developed in accordance with the requirements of paragraphs (1) and (2) of this subsection, of continuing, newly implemented and/or recommended systemwide policies, plans, programs, actions, commitments, and accomplishments for both the direct management actions and the research programs of the National Park Service relating to the prevention and reversal of factors and forces which are altering or damaging, or threatening to alter or damage, the welfare and integrity of natural and cultural park resources, which discussion shall include but not be limited to—

(A) management policies, directions, and priorities;

(B) accomplishments in and progress toward resolving specific problems described in the current and the previous State of the Parks report;

(C) continuing research projects;

(D) new administration and research proposals for park protection and resource management programs;

(E) an itemized estimate of the funding required for the following two fiscal years to carry out both the continuing and the new management actions and research programs;

(F) legal authority available for addressing damage and threats emanating from outside unit boundaries, the effectiveness of that authority in preventing damage to the natural and cultural resources, and suggestions for new authority which may promote resource protection; and

(G) the progress in meeting the objectives of this Act;

(4) a discussion of the adequacy of past and present congressional appropriations in addressing protection and resource management programs; and

(5) a determination and explanation of funding needs for fulfilling the mandates of this section.

(b) In the preparation of the State of the Parks report, the National Park Service shall take appropriate steps to solicit public involvement. A preliminary draft of the report shall be made available to the public for a period of thirty days for review and comment no less than three months before the final report is due for submission to the Congress. Notice of the availability of such draft for public review and comment shall be published in the Federal Register. A summary of public comments received shall be transmitted with the State of the Parks report.

SIGNIFICANT RESOURCE PROBLEMS

SEC. 5. The Secretary shall identify and establish priorities among at least the *fifty most critical* natural and the *fifty most critical* cultural resource problems or threats within the national park system and shall prepare a detailed analysis of such problems or threats (with an estimate of the funds necessary to reduce or eliminate the problems or threats). Such analysis shall be made annually and shall be submitted to the appropriate committees of the Congress on the same date as the submission of the President's budget to the Congress.

SCIENTIFIC ADVISORY ASSISTANCE

SEC. 6. (a) The Secretary shall take such steps as may be necessary to contract with the National Academy of Sciences for development of a plan for the National Park Service to conduct natural and cultural resources inventories and research directed to the problems of and the solutions for natu-

ral and cultural resource problems within the national park system.

(b) The plan required under subsection (a) shall be simultaneously submitted to the Secretary and to the appropriate committees of the Congress no later than eighteen months after the effective date of this Act. Three months and six months after the effective date of this Act, the Secretary shall submit to the appropriate committees of the Congress a written statement as to his progress in the consummation of arrangements with the National Academy of Sciences for the development of such a plan.

(c) Funding for such plan shall derive from funds specifically appropriated for this purpose to the National Park Service.

RESOURCE MANAGEMENT PLANS

SEC. 7. Resource management plans for each unit of the national park system, including areas within the national capital region, shall be prepared and updated no less frequently than every two years. Such plans shall address both natural and cultural resources of the park units and shall include, but not be limited to—

(1) a historical overview of the past composition, treatment, and condition of the resources;

(2) a statement of the purposes and objectives for the management and preservation of the individual and collective components of the resource base;

(3) an inventory of significant resources and their current condition, prepared in accordance with acceptable scientific baseline data collection methods;

(4) an identification of current and potential problems, emanating from sources both inside and outside park unit boundaries, associated with the protection and management of resources;

(5) a comprehensive, detailed program of proposed actions to be taken to prevent or reverse the *degradation* of the natural and cultural resources of the park, including a proposed schedule of actions to be initiated and the estimated costs to complete such actions; and

(6) a brief summary of accomplishments in resolving resource problems identified pursuant to paragraphs (4) and (5) of this subsection.

General management and other relevant plans developed for each park unit shall be brought into conformity with the park unit's resource management plan, and the resource management plan shall be used to provide data for the State of the Parks report. The Secretary shall establish guidelines for the National Park Service setting forth procedures whereby the development of general management plans and resource management plans shall be coordinated with other affected Federal agencies, States, and local governments.

SEC. 7a In the case of any national park or monument established to preserve natural resources:

(a)(1) The National Park Service in cooperation with other Federal, state, and local authorities, shall, within one year of the passage of this Act or creation of such a new park or monument, identify ecosystems surrounding and related to such parks and monuments; and,

(2) submit reports detailing the basis for the identification of, and geographical limits of, those ecosystems to the Secretary to the Speaker of the United States House of Representatives and to the President of the United States Senate for deferral to and consideration by the appropriate legislative committees of the Congress, within two years of the passage of this Act or creation of such a new park or monument.

(b) In the preparation of such ecosystem identification reports, the National Park Service shall take appropriate steps to solicit public involvement. A preliminary draft of the reports shall be made available to the public for a period of thirty days for review and comment no less than three months before the final reports are due for submission to the Congress. Notice of the availability of such drafts for public review and comment shall be published in the Federal Register. A summary of public comments received shall be transmitted to Congress with the finalized reports. After the passage of thirty legislative days, subsequent to the submission of the reports to Congress, the geographical limits of each ecosystem around such parks or monuments shall be published in the Federal Register.

LAND CLASSIFICATION REVIEW

SEC. 8. The Secretary shall conduct a review of the current land classification system for the preservation and use of lands within *national* park system units, and shall adopt such

revisions as may be appropriate to assure the protection of park resources, appropriately balanced with the use and include the development of a new classification for maximum resource protection where restricted use may be necessary to protect sensitive ecosystems and cultural resources or areas of special value for research, scientific, or related purposes. The review mandated by this section shall be completed and the results adopted by January 1, [1985; (to be changed to make current)].

INTERNATIONALLY RECOGNIZED AREAS

SEC. 9. (a) Those park units accorded the designation of "biosphere reserve" or "world heritage site" shall receive priority attention and consideration for prompt, heightened resource data collection, monitoring, and resource protection efforts. The Secretary shall develop a document, setting forth such policies and guidelines as are appropriate to achieve these objectives, to be published in draft form in the Federal Register no later than January 1, [1985; (to be changed to make current)] for public *comment*, and published in final form no later than April 30, [1985; (to be changed to make current)]. Such document shall be revised subsequently as appropriate.

(b) It is the sense of the Congress that with respect to any international park located within the United States and any adjacent nation which has been recognized and designated as a Biosphere Reserve under the auspices of the international conservation community, the responsible park management officials of the United States and such nation, in conjunction with appropriate legislative and parliamentary officials, establish means and methods of ensuring that the integrity of such Biosphere Reserve is maintained, and the collective attributes for which it was so recognized and designated are accorded the highest practicable degree of continuing protection.

PUBLIC LAND MANAGEMENT

SEC. 10. (a) In any case of areas which are within any unit of the national park system, where the Secretary of the Interior is vested with any authority to—

- (1) issue any lease;
- (2) authorize or permit any use, occupancy, or development of such areas;
- (3) sell or otherwise dispose of such lands or waters or inter-

ests therein or sell or otherwise dispose of any timber or sand, gravel, and other materials located on or under such areas,

he may exercise such authority only after he has determined that the exercise of such authority is not likely to have a significant adverse effect on the values for which such national park system unit was established (including the scenery or the natural or cultural resources). Such determination shall be made only after notice and opportunity for a hearing on the record. The process for collecting needed information and evaluation thereof may be integrated with such planning and decisionmaking processes as are required by other law, except that the determination of the effect upon park resources shall be a separate document or a separate chapter within a document executed by the Secretary of the Interior.

(b) In any case of areas which are adjacent to any unit of the national park system, where the Secretary of the Interior is vested with any authority described in subsection (a), the Secretary of the Interior, before exercising such authority, shall determine whether such action is likely to have a significant adverse effect on the values for which such national park system unit was established, and if he finds such an effect would be likely and that the public interest in preventing such adverse effect on such values significantly outweighs the public interest value of the proposed action, taking into consideration the Act of August 25, 1916 (39 Stat. 535; 16 U.S.C. 1-4), and the Act of August 18, 1970 (84 Stat. 825; 16 U.S.C. 1a-1 through 1a-7), then he shall decline to exercise such authority. The Secretary of the Interior shall publish the record of such decision in the Federal Register and transmit copies of such decision documents to the Committee on Energy and Natural Resources of the United States Senate and to the Committee on Interior and Insular Affairs of the United States House of Representatives.

The Secretary shall not implement such decisions until thirty legislative days after such transmittal.

(c) In the event the Secretary determines that the exercise of his authority described in subsection (a), and related to an area adjacent to any unit of the national park system, is likely to have a significant adverse effect on the values for which such national park system unit was established, and yet the Secretary decides to proceed with the exercise of such authority; any interested citizen may petition for a hearing on the

record regarding the Secretary's decision to exercise his authority. Interested citizens shall have thirty days from time of the publication of the Secretary's decision in the Federal Register to file such a petition with the Department of the Interior, Office of the Secretary.

(d) [c] This section shall not apply to inland waters.

(e) The term "adjacent to" for purposes of subsections (b) and (c) shall be defined accordingly:

(1) in the case of any national park or monument established to preserve natural resources, the term "adjacent to" shall mean outside of park or monument boundaries, yet within the geographical limits of those ecosystems identified pursuant to section 7a, or a minimum one mile buffer zone around park or monument boundaries;

(2) in the case of all other units of the national park system the term "adjacent to" shall mean within a one mile buffer zone around the unit's boundaries.

FEDERAL PROGRAM REVIEW

SEC. 11. (a) When a Federal agency or instrumentality undertakes or proposes to approve a Federal action within or adjacent to a unit of the National Park System which it determines may have a significant adverse effect on the natural or cultural resources of such unit, such agency or instrumentality shall—

(1) promptly notify the Secretary of the Interior of the action at the time it is planning the action, preparing an environmental assessment regarding the action, or preparing an environmental impact statement under the National Environmental Policy Act of 1969 for the action;

(2) provide the Secretary of the Interior a reasonable opportunity to comment and make recommendations regarding the effect of the Federal action on the natural and cultural resources of the National Park System unit concerned; and

(3) notify the Secretary of the Interior of the specific decisions in response to the comments and recommendations of the Secretary of the Interior. The decisions and their impact upon national park system resources shall also be published in the Federal Register. No action based upon those decisions shall be taken until thirty days after publication of the decision in the Federal Register.

The requirements of this subsection shall be carried out in ac-

cordance with procedures established by the Federal agency responsible for undertaking or approving the Federal action. These procedures may utilize the procedures developed by such agency pursuant to the National Environmental Policy Act.

(b) Following receipt of notification pursuant to subsection (a)(1), the Secretary shall make such comments and recommendations as he or she deems appropriate pursuant to subsection (a)(2) as promptly as practicable in accordance with the notifying agency's procedures established pursuant to subsection (a). In any instance in which the Secretary of the Interior does not provide comments and recommendations under subsection (a)(2), the Secretary of the Interior shall notify, in writing, the appropriate committees of Congress.

(c) Following receipt of the notifying agency's decisions pursuant to subsection (a)(3), the Secretary of the Interior shall submit to the appropriate committees of Congress, including the authorizing Committees with primary jurisdiction for the program under which the proposed action is being taken, a copy of the notifying agency's specific decisions made pursuant to subsection (a)(3), along with a copy of the comments and recommendations made pursuant to subsection (a)(2).

(d) In any instance in which the Secretary of the Interior has not been notified of a Federal agency's proposed action within or adjacent to a unit of the National Park System and on his or her own determination finds that such action may have a significant adverse effect on the natural or cultural resources of such unit, the Secretary of the Interior shall notify the head of such Federal agency in writing. Upon such notification by the Secretary of the Interior, such agency shall promptly comply with the provisions of subsection (a) of this section.

(e) Each agency or instrumentality of the United States conducting Federal action upon Federally owned lands or waters which are administered by the Secretary of the Interior and which are located within the authorized boundary of a National Park System unit shall not approve such action until such time as the Secretary of the Interior has concurred in such action.

(f) Except as otherwise permitted by law, nothing in this section shall be construed to require any State or local government to carry out any study or prepare any document or re-

sponse to comments or recommendations made by the Secretary of the Interior regarding any State or local activity supported by an agency or instrumentality of the United States which is subject to this subsection.

(g) The following Federal actions which constitute a major and necessary component of an emergency action shall be exempt from the provisions of this section—

(1) those necessary for safeguarding of life and property;

(2) those necessary to respond to a declared state of disaster; and

(3) those necessary to respond to an imminent threat to national security.

Any federal action which pertains to the control of air space, or which is regulated under the Clean Air Act, [or which is required for maintenance or rehabilitation of existing structures or facilities] shall also be exempt from the provisions of this section.

(h) In the event the Secretary or the administering Federal agency or instrumentality finds that the Federal actions contemplated by subsection (a) of this section are likely to have a significant adverse affect on the natural or cultural resources of any adjacent or surrounding national park system unit, and after consultation with the Secretary, the agency or instrumentality decides to proceed with the action; any interested party may petition for a hearing on the record regarding the decision to proceed with the action. If the decision to proceed with the action, in light of its adverse effects upon national park system resources, is not supported by substantial evidence, the action shall be disallowed. Interested citizens shall have thirty days from the time of the publication of the agency's or instrumentality's decision in the Federal Register, required by subsection (a)(3), to file such a petition with the agency or instrumentality proposing action.

(i) The term "adjacent to" for purposes of subsections (b) and (c) shall be defined accordingly:

(1) in the case of any national park or monument established to preserve natural resources, the term "adjacent to" shall mean outside of park or monument boundaries, yet within the geographical limits of those ecosystems identified pursuant to section 7a, or a minimum one mile buffer zone around park or monument boundaries;

(2) in the case of all other units of the national park system

the term "adjacent to" shall mean within a one mile buffer zone around the unit's boundaries.

TECHNICAL ASSISTANCE, COOPERATION, AND PLANNING

SEC. 12. (a) The Secretary is directed to cooperate with, and is authorized to provide technical assistance to, any governmental unit within or adjacent to the units of the national park system where the results of such cooperation and assistance would likely benefit the protection of park resources. There shall be initiated, by the superintendent of each unit of the national park system, an effort to work cooperatively with all governmental agencies and other entities having influence or control over lands, resources, and activities within or adjacent to the park unit for the purpose of developing, on a voluntary basis, mutually compatible land use or management plans or policies for the general area.

(b) Those personnel assigned to provide assistance described in subsection (a) shall be employees of the National Park Service knowledgeable about the affected unit of the national park system and the resources that unit was authorized to protect.

(c) The Secretary of the Interior, and those personnel assigned to provide assistance described in subsection (a) shall take part in any land management planning process, and environmental review and planning process undertaken by a Federal agency whenever such plans or processes may result in damage, or loss of, any resource preserved in any area of the National Park System.

(d) [c] The Secretary is authorized to make grants to units of local government for the purposes described in subsection (a). Such grants shall not exceed \$25,000 in any fiscal year to any unit of local government. The Secretary shall develop criteria for the awarding of grants, with such criteria to include priority for awards which will afford the greatest increased degree of protection to critically degraded or threatened park resources.

(e) [d] There is authorized to be appropriated not more than \$750,000 in each of fiscal years [1984, 1985, and 1986; (to be changed to make current)] for the purposes of this section. Such sums shall remain available until *appropriated*, and such sums as may be appropriated shall remain available until expended.

(f) [e] Within one year after the *date of enactment of this Act*, no less than two park units in addition to all "biosphere reserves" and "world heritage sites", for each administrative region of the national park system shall have initiated the effort described in subsection (a). No more than two years after the date of enactment of this Act, each unit within the national park system shall have initiated such an effort.

(g) [f] In no more than two years following the date of enactment of this Act, the Secretary shall assure that each unit, or each regional office for the region in which a unit is located, has on its staff at least one person who is trained and knowledgeable in matters relating to the provisions of this section, and whose principal duty it shall be to coordinate the activities which are related to the provisions of this section. The Secretary shall initiate, within no more than one year of the date of enactment of this Act, a training program for park personnel in the principles and techniques necessary to carry out the requirements of this section.

PUBLIC INFORMATION PROGRAM

SEC. 13. By January 1, [1984; (to be changed to make current)], the Secretary shall initiate and shall continue to develop a public information program designed to inform park visitors and the public of the problems confronting the protection of park resources and the solutions being implemented to address those problems. Educational information of this nature shall be made available to youth groups and to educational institutions.

PERSONNEL

SEC. 14. The Secretary shall promptly and continually take actions to assure that the staffing of the National Park Service provides for an adequate number and distribution of personnel with sufficient scientific and professional knowledge and expertise to provide for the protection and management of the natural and cultural resources. Scientific research shall be directed to the resource protection and management needs of the park system units. Programs, guidelines, and standards for the following shall be under development by no later than January 1, [1984; (to be changed to make current)], and completed no later than January 1, [1985; (to be changed to make current)]:

(1) employee training programs in resource protection and resource management;

(2) performance standards for all employees as related to resource protection and resource management;

(3) qualification criteria related to resource protection and resource management for positions to be filled by new employees; and

(4) career ladders for employees specializing in resource protection and resource management, with equitable promotion opportunities for advancement into mid-level and senior general management positions.

GENERAL MANAGEMENT PLANS

SEC. 15. Section 12(b) of the Act of August 18, 1970 (84 Stat. 825; 16 U.S.C. 1a-1 through 1a-7) is amended by inserting the following at the end of the first sentence: "Each such plan shall be reviewed, revised and approved no less frequently than every ten years or it shall cease to constitute an officially approved plan. All plans not fully addressing all of the following elements on January 1, [1984; (to be changed to make current)], shall be revised and approved to so address all such elements by no later than January 1, [1988; (to be changed to make current)].".

DONATIONS

SEC. 16. (a) In the case of real property located adjacent to, or within or in the near vicinity of, any unit of the national park system if—

(1) the owner of any interest in such property desires—

(A) to make a contribution of such interest to any person, and

(B) to have such contribution qualify as a charitable contribution under section 170 of the Internal Revenue Code of 1954 (relating to deduction for charitable, etc., contributions and gifts), and

(2) the Director of the National Park Service determines that the contribution of such interest to such person will protect or enhance the unit of the national park system,

the Director of the National Park Service shall, upon such 24 owner's [sic] written request, promptly take appropriate steps to assist the owner in satisfying the requirements of such section 170 with respect to such contribution.

(b) The assistance provided by the Director of the National Park Service under subsection (a) shall include (but shall not be limited to) providing for—

(1) a professional valuation of the interest in real property being contributed, and

(2) a statement as to the importance of such contribution related to protecting and enhancing park unit values.

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT PRIORITY

SEC. 17. In all cases where the Secretary determines that the provisions of this Act are in conflict with the provisions of the Act of December 2, 1980 (16 U.S.C. 3101-3233), the provisions of the Act of December 2, 1980 (16 U.S.C. 3101-3233) shall prevail.

DEFINITIONS

SEC. 18. As used in this Act, the term—

(1) "Appropriate committees of the Congress" means those committees of both the House and the Senate which have primary jurisdiction for the authorization of national park system units and programs or for the appropriation of funds for the acquisition and operations of such units and programs.

(2) "Secretary" means the Secretary of the Interior acting through the Director of the National Park Service except where specified reference is made to the Secretary of the Interior.

(3) "Resource" and "resources" includes—

(A) in the case of natural resources, the geology, paleontological remains, and flora and fauna which are principally of indigenous origin, and

(B) in the case of cultural resources, the historic and prehistoric districts, sites, buildings, structures, objects and human traditions associated with or representative of human activities and events, including related artifacts, records and remains.

(4) "National park system" has the meaning provided by section 2 of the Act of August 8, 1953 (16 U.S.C. 1b-1c).

(5) "Federal action" means any Federal project or direct action, or any Federal grant or loan to a public body.

(6) The term "thirty legislative days" means thirty calendar days of continuous session of Congress. For purposes of this

paragraph—

(A) continuity of session of Congress is broken only by an adjournment sine die; and

(B) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the thirty-day period.

For purposes of this Act the terms “significant adverse effect on the values for which such national park system was established”, and “degrade or threaten the natural or cultural resources of any such unit” shall not include the activity of hunting in areas adjacent to any unit of the national park system where such activity is not in violation of State or Federal law or regulation.

SAVINGS PROVISION

SEC. 19. Nothing in this Act shall be construed to exempt the Secretary of the Interior, the Director of the National Park Service, or any other department, agency, or instrumentality of the United States from Compliance with any other requirement of law.

AUTHORIZATION OF APPROPRIATIONS

SEC. 20. Effective October 1, [1983; (to be changed to make current)], there is hereby authorized to be appropriated to the Department of the Interior such sums as may be necessary to carry out the provisions of this Act.

COMPLIANCE WITH BUDGET ACT

SEC. 21. Any new spending authority (within the meaning of section 401 of the Congressional Budget and Impoundment Control Act of 1974) which is provided under this Act shall be effective for any fiscal year only to the extent or in such amounts as provided in appropriations Acts. Any provision of this Act which authorizes the enactment of new budget authority shall be effective only for fiscal years beginning after September 30, [1983; (to be changed to make current)]. Nothing in this section shall be construed to affect or impair any authority to enter into contracts, incur indebtedness, or make payments under any other provision of law.