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Protecting National Park Resources: Wildlife

George Cameron Coggins

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OUTLINE

PROTECTING NATIONAL PARK RESOURCES: WILDLIFE

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presented to

EXTERNAL DEVELOPMENT AFFECTING THE NATIONAL PARKS:

PRESERVING "THE BEST IDEA WE EVER HAD"

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PROTECTING NATIONAL PARK RESOURCES: WILDLIFE

I. INTRODUCTION

A. Abstract.

In the popular view, wildlife may be the single most important component of national parks. The threats to park wildlife resources are the same as threats to indigenous wildlife populations generally: overhunting usually is a lesser threat than loss of habitat caused by pollution, development, grazing, recreation, and like causes. This paper is limited to threats created on private and other public lands in reasonable proximity to parks. Many federal statutes protect wildlife populations to an extent, but these have proven inadequate to safeguard park wildlife resources in the face of increasing habitat disruption.

While the National Park Service (NPS) can regulate as it wishes within parks, its statutory authority and extraterritorial power to combat external threats under existing law is uncertain. For developments on other federal lands, the NPS has only the power of persuasion as a consultant in the planning and decisional

processes or other agencies. For developments on private and state lands, the NPS has only a narrow, undefined power to abate nuisance-like activities. Reform through new legislation is required if adequate remedies are to be fashioned. Present park protection proposals before Congress do not go very far. Other reform possibilities include expansion of the parks, giving the NPS a veto power over developmental proposals on adjacent lands, federal zoning, merger of the NPS with the Fish and Wildlife Service (FWS), and federal ownership of park wildlife resources. Some mix of the standard and radical might be the optimum solution.

B. Selected research sources.

1. M. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW (2d ed. 1983).
2. G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW ch. 9 (2d ed. 1986).
3. A. RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE (1979).
4. J. SAX, MOUNTAINS WITHOUT HANDRAILS (1980).
5. WILDLIFE AND AMERICA (H. Brokaw, ed. 1978).
6. Coggins & Ward, The Law of Wildlife Management on the Federal Public Lands, 60 OR. L. REV. 59 (1981).

7. Glicksman & Coggins, Federal Recreational Policy: The Rise and Decline of the Land and Water Conservation Act, 9 COLUM. J. ENVTL. L. 125 (1984).
8. Keiter, On Protecting the National Parks for the External Threats Dilemma, XX LAND AND WATER L. REV. 355 (1984).
9. Mastbaum, No Park is an Island: A Simple Solution for the Thorny Problem of Park Protection, 9 Resource Law Notes 7 (U. Colo., NRLC, Aug. 1986).
10. Sax, Buying Scenery: Land Acquisitions for the National Park Service, 1980 DUKE L.J. 709.
11. Sax, Helpless Giants: The National Parks and the Regulation of Private Lands, 75 MICH. L. REV. 239 (1976).
12. Wilkinson, The Public Trust Doctrine in Public Land Law, 14 U.C.D. L. REV. 269 (1980).
13. Comment, Protecting National Parks from Developments Beyond Their Borders, 132 U. PA. L. REV. 1189 (1984).

II. EXTERNAL THREATS TO PARK WILDLIFE RESOURCES

A. The threats to fish and wildlife resources associated with national parks stem from the full range of human activities carried on outside parks.

1. Wildlife-related activities near parks, such

as hunting in adjacent national forests, can cause local problems of considerable severity.

The recent Bison Brouhaha in Montana symbolizes the problems caused by NPS wildlife management successes: the herds nurtured while protected within park boundaries can be fair game when they migrate outside if state game agencies are insensitive to park wildlife values.

2. In addition, causes far removed from parks, such as power plants emitting pollutants that precipitate acids into park lakes, also harm park wildlife resources.

3. The most serious threat is the aggregate impact of developmental activities that destroy or alter wildlife habitat such as logging, mining, water resource development, oil and gas drilling, motorized recreation, and livestock overgrazing.

4. The nature, type, and details of threats to park wildlife vary greatly, depending on the species, the park, and many other factors. See generally NATIONAL PARK SERVICE, STATE OF THE PARKS 1980: A REPORT TO THE CONGRESS (1980); Keiter, *supra*, at 357-69.

5. Swanson, in WILDLIFE AND AMERICA, *supra*, at 428, 431:

"Park Service policies . . . which relate

directly to wildlife include: Hunting is prohibited; fishing is permitted but may be closed in some areas for cause; only native species of wildlife are to be encouraged and exotic forms are to be eliminated if possible; native species of wildlife which have been extirpated are to be reintroduced if feasible; stocking of waters for fishing, including nonnative species, has long been permitted, but stocking is now prohibited except to reestablish native species; under the ecosystems management recently adopted, overpopulation of ungulates such as deer, Bison, and Elk are regulated 'by natural means to the greatest extent possible' rather than by live trapping and removal or shooting by Park personnel as in the past; artificial feeding of wildlife is prohibited; habitat improvements are not usually made except for endangered species; and natural lightning-caused forest fires are permitted to burn under prescribed conditions in some selected areas to induce the early stages in plant succession and seral conditions which were found in parts of primitive America."

- a. For a discussion of the law governing in-park wildlife management, see Coggins & Ward, *supra*, at 116-27.

b. Park Service wildlife management is severely criticised in A. CHASE, PLAYING GOD IN YELLOWSTONE (1986).

B. The scope of the problem must be reduced to manageable dimensions. This presentation therefore largely ignores internal park management of wildlife and external threats that are not in reasonable proximity to parks.

C. Relevant threats thus arise on two categories of lands adjacent or in close proximity to parks: other federal lands; and private or state lands.

1. In the West and Alaska, most land bordering on national parks is managed by the Forest Service or the Bureau of Land Management (BLM).

2. In the East, most bordering lands are privately owned.

III. EXISTING WILDLIFE PROTECTION LAW WITH SITUATIONAL APPLICABILITY TO EXTERNAL THREATS

A. There is no single, general law aimed at protecting park wildlife resources from external threats. But various federal statutes can help protect park wildlife in certain situations. These may be grouped as wildlife laws, general environmental laws, and public land management laws.

B. Wildlife Laws.

1. The Endangered Species Act of 1973 (ESA), 16 U.S.C §§ 1531 et seq., prohibits taking of endangered (and most threatened) species by anyone and requires all federal agencies to insure that their projects or licences do not jeopardize such species or their critical habitats.

a. The Act protects many park species (eagles, peregrine falcons, grizzly bears, wolves, etc.) wherever they are found. Cf. Sierra Club v. Clark, 755 F.2d 608 (8th Cir. 1985).

b. "Any person," including the NPS, can seek listing or sue for enforcement.

c. The FWS is primarily responsible for enforcing the ESA, the standards of which are near-absolute. See TVA v. Hill, 437 U.S. 153 (1978); Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985).

d. But some courts have ruled in effect that mitigation measures are "substantial compliance" under relaxed standards of review. See Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982).

e. The ESA is no cure-all for park wildlife

problems because only listed species are protected, and relatively few species are listed. See generally M. BEAN, *supra*, at ch. 12; Coggins & Russell, Beyond Shooting Snail Darters in Pork Barrels: Endangered Species and Land Use in America, 70 GEO. L.J. 1433 (1982); Smith, Endangered Species Act and Biological Conservation, 57 S. CAL. L. REV. 361 (1983).

2. The Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361 et seq., serves a similar function for seals, polar bears, sea lions, walrus, etc., near seafont parks such as Olympic and Arcadia.

3. The Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-15, sets up national controls on hunting and trade in migratory birds.

a. Again, the FWS is the prime enforcer.

b. Effective implementation prevents scarcity of migratory bird species. See generally Coggins & Patti, The Resurrection and Expansion of the Migratory Bird Treaty Act, 50 U. COLO. L. REV. 165 (1979).

4. Other federal wildlife laws, such as the Bald Eagle Act, the Sikes Act, and the Wild Horses and Burros Act can have beneficial, if peripheral, effects. So too can certain state laws. See M. BEAN, *supra*. See generally D. ALLEN, OUR

C. General Environmental Laws.

1. Pollution laws such as the Clean Air Act, the Clean Water Act, FIFRA, and RCRA prevent threats to wildlife and its habitat as well as to human health; ultimate success in this effort is problematic, but lowered pollution levels help many species. See generally W. RODGERS, ENVIRONMENTAL LAW (1977).

a. Several laws, including the CAA, the CWA, and the SMCRA, contain provisions specifically directed at national park protection. See Utah International, Inc. v. Department of the Interior, 553 F. Supp. 872 (D. Utah, 1982).

b. Pollution laws deal only with one aspect of the threats facing park wildlife, and then only indirectly.

c. But indirect benefits to wildlife can be substantial; e.g., some avian species, including the bald eagle, have made impressive comebacks after DDT was banned.

2. The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4231 et seq., requires federal projects to be justified in writing. It is the procedural catalyst for public participation in

and litigation over the decision. Thus, agencies proposing projects on federal land adjacent to parks must at least consider the effect of the project on wildlife and on park resources generally.

a. NEPA applies to oil and gas leasing.

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

b. NEPA applies to national forest planning and logging operations. Thomas, supra; National Wildlife Fed'n v. United States Forest Service, 592 F. Supp. 931 (D. Or. 1984), appeal pending.

c. NEPA applies to road building.

Foundation for North Am. Wild Sheep v. United States, 681 F.2d 1172 (9th Cir. 1982).

d. NEPA applies to livestock grazing. NRDC v. Morton, 388 F. Supp. 829 (D.D.C. 1974).

e. Park partisans can participate in NEPA processes to avoid or mitigate threats to park wildlife resources. See infra § VI, B.

D. Federal Land Management Laws.

1. The Wilderness Act of 1964, 16 U.S.C. §§ 1131 et seq., and the Wild and Scenic Rivers Act of 1968, 16 U.S.C. §§ 1271 et seq., create land

categories on which most destructive development is prohibited; a wilderness area adjacent to a national park automatically provides a buffer against many external threats. See Keiter, *supra*. Even Wilderness Study Areas provide at least interim buffers. See Parker v. United States, 448 F.2d 793 (10th Cir. 1971), cert. denied, 405 U.S. 989 (1972); California v. Block, 690 F.2d 753 (9th Cir. 1982). The National Preserves in Alaska created by ANILCA are areas under NPS jurisdiction in which hunting and fishing are allowed.

2. The National Forest Management Act of 1976, 16 U.S.C. §§ 1600 et seq., requires the Forest Service (FS) to promulgate detailed plans for all national forest units and limits FS discretion in timber harvesting. See Wilkinson & Anderson, Land and Resource Planning in the National Forests, 64 OR. L. REV. 1 (1985).

a. The relationship between the NPS and the FS over park resource protection questions is a critical variable for many western parks. See *infra* § VI, A.

b. A relevant factor in promulgation of forest plans is the effect of activities on resources of adjacent national parks; the extent of such Forest Service consideration

in current planning is unknown.

c. Certain NFMA provisions (marginal lands, clearcutting, etc.) should prohibit timber cutting in some national forest areas near national parks. See G. COGGINS & C.

WILKINSON, *supra*, at ch. 7.

d. Forest Service and BLM authority to control hunting which may adversely affect park wildlife remains an open question.

Compare Defenders of Wildlife v. Andrus, 627 F.2d 1238 (D.C. Cir. 1980), with FLPMA, 43 U.S.C. § 1732(a) and Coggins & Ward, *supra*.

3. The Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701 et seq., gives the BLM somewhat similar duties and powers. See G. COGGINS & C. WILKINSON, *supra*, at ch. 8.

4. Executive Order 11644 has generated a variety of controls on off-road vehicle use. See American Motorcyclist Ass'n v. Watt, 543 F. Supp. 789 (C.D. Cal. 1982).

5. Federal implied reserved water rights are uncertain tools for protection of park wildlife. Compare Cappaert v. United States, 426 U.S. 128 (1976), with United States v. New Mexico, 438 U.S. 696 (1978) and United States v. City and County of Denver, 656 P.2d 1 (Colo. 1982).

6. New administrative controls on hardrock mining operations should benefit wildlife values. See generally J. LESHY, THE PERPETUAL MOTION MACHINE (1986).

7. These positive aspects -- in terms of wildlife protection -- must be understood in the context of the philosophies and mandates of the multiple use agencies.

E. Implementation and enforcement of federal wildlife, environmental, and land management laws can assist in the preservation of park wildlife resources to an extent, but effective abatement of external threats requires a more focused effort that only the Park Service itself can provide.

IV. NATIONAL PARK SERVICE POWER TO PREVENT, ABATE, OR CONTROL THREATS TO PARK WILDLIFE RESOURCES

A. The National Park System Act is not overly specific concerning wildlife management.

1. 16 U.S.C. § 1: "The [NPS] shall promote and regulate the use of . . . national parks . . . by such means and measures as conform to the fundamental purpose of the said parks . . . to conserve the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the

enjoyment of future generations."

2. 16 U.S.C. § 1a-1: "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 derogation of the values and purposes for which these various areas have been established"

3. 16 U.S.C. § 3: "[The Secretary] may also provide in his discretion for the destruction of such animals and such plant life as may be detrimental to the use of any of said parks"

4. Many individual Park System units are governed by specific legislation with specific wildlife provisions. E.g., 16 U.S.C. § 26 (Yellowstone).

5. Although none of these or other provisions refers directly to off-park activities, Professor Keiter argues that the statutory Park Service mission includes the duty to combat external threats to park resources. Keiter, *supra*, at 369-75. Cf. Sierra Club v. Department of the Interior, 376 F. Supp. 284 (N.D. Cal. 1974), 398 F. Supp. 284 (N.D. Cal. 1975), 424 F. Supp. 172 (N.D. Cal. 1976). But cf. Sierra Club v. Andrus,

487 F. Supp. 443 (D.D.C. 1980), aff'd, 659 F.2d 203 (D.C. Cir.1981). The relatively few NPS efforts in this regard have met with but limited success in court. See Sax, 1976, supra.

B. Within parks, NPS authority over all activities affecting wildlife is plenary, full, and preemptive. Kleppe v. New Mexico, 426 U.S. 529 (1976); Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250 (9th Cir. 1979); United States v. Brown, 552 F.2d 817 (8th Cir 1977); New Mexico State Game Comm'n v. Udall, 410 F.2d 1197 (10th Cir. 1969), cert. denied, 396 U.S. 961 (1970). NPS actions that denied trapping or fishing rights in Park System units have been upheld in a series of recent cases. Organized Fishermen of Florida v. Hodel, 775 F.2d 1544 (11th Cir. 1985), cert. denied, ___ U.S. ___ (1986); National Rifle Ass'n v. Potter, 628 F. Supp. 983 (D.D.C. 1986); Voyageurs Nat'l Park Ass'n v. Arnett, 609 F. Supp.532 (D. Minn. 1985).

C. On inholdings within parks, NPS authority is also complete in a different way, except to the extent circumscribed by statute. Inholders are subject to NPS regulations. Should an inholder threaten incompatible activities, and existing regulations are futile or would constitute a "taking," the Park

Service can condemn the offending inholding. Funds for this purpose are available through the Land and Water Conservation Fund Act, 16 U.S.C. §§ 4601-4 et seq. See Glicksman & Coggins, supra.

D. The primary question is NPS authority to prevent, abate, or control threatening activities on adjacent land.

1. The NPS clearly has at least a limited power of this nature in two situations:

a. when the activity creates a "nuisance," broadly construed, that directly threatens park resources, Camfield v. United States, 167 U.S. 518 (1897); United State v. Brown, 552 F.2d 817 (8th Cir. 1977); or

b. when Congress has directed such regulation and it is "needful" and rationally related to the end of protecting park purposes. Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982)).

2. Even within those limited categories, considerable uncertainty and confusion remain.

a. What is a nuisance?

b. How direct must its effects be?

c. How far does the power extend?

d. See Sax, 1976, supra; Keiter, supra;

Gaetke, The Boundary Waters Canoe Area
Wilderness Act of 1978: Regulating Non-
Federal Property Under the Property Clause,
60 OR. L. REV. 157 (1981).

3. The picture is further clouded by Justice Department discretion, administrative timidity, and local politics.

4. Without additional legislative authorization, this legal power is inadequate to combat the known range of threats to park wildlife resources.

V. PARK SERVICE OPTIONS UNDER EXISTING LAW FOR PRESERVING
WILDLIFE RESOURCES FROM THREATS ARISING ON ADJACENT
PRIVATE LANDS

A. The NPS can use its limited condemnation funds selectively to abate the most serious threats and to serve as an example. The shortcomings of this action as a general remedy are obvious.

B. The NPS could by regulation define "nuisance" in terms of park wildlife protection and seek Justice Department cooperation in proceeding aggressively against offenders. The Redwood Park litigation illustrates that cooperation with the NPS is not automatically forthcoming in any Administration.

C. The NPS can cooperate with (or possibly coerce) local zoning authorities to the end of controlling developments posing threats to park wildlife resources. It is ordinarily in the local community's self-interest to keep parks attractive to visitors, but history does not generate much optimism on this score.

D. Each of these options can be helpful but is insufficient as a general solution.

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

A. NPS cooperation with the other federal land management agencies is hampered by a variety of considerations, e.g.,

1. The Forest Service is not only in a different department, and devoted to timber production, it also has had an historic antipathy toward the NPS and its preservation philosophy.

2. The BLM is not only oriented toward production of minerals and meat, it also has little experience in managing for preservation of any resource. See, e.g., NRDC v. Hodel, 624 F. Supp. 1045 (D. Nev. 1986), appeal pending.

3. The devotion of the FWS to hunting and

fishing may also pose compatibility problems; similarly, Park Service relations with state fish and game agencies historically have been strained. See Gottschalk, The State-Federal Partnership in Wildlife Conservation, in WILDLIFE AND AMERICA, supra, at 290.

B. Nevertheless, the most promising option under existing law for the NPS and its champions is to seek cooperative agreements with the other agencies and participate aggressively in their land use planning and other decisions.

1. Legally-mandated planning on national forests and BLM lands is now the critical point in the land management process. See Wilkinson & Anderson, supra; Coggins, The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate, 14 ENVTL. L. 1 (1983). The NPS can and should comment, suggest, and object as its interests appear.

2. A proposed project that threatens park wildlife resources is almost certainly a major federal action having a significant environmental impact. Cf. Foundation for North American Sheep, supra. NEPA offers the NPS the opportunity to affect such decisions by consulting and commenting; even if the decision is adverse, the

NPS analyses may lay a basis for judicial review of the EIS.

C. Failing that, the NPS or its stalking horses can mount publicity campaigns against proposed activities that will pose threats to park wildlife resources.

D. In this context, the power of persuasion is a real power because of the general reverence in which many hold parks; few agencies want to face popular responsibility for "ruining the parks."

VI. PROPOSALS FOR LEGISLATIVE REFORM

A. If one accepts that protection of park resources from external threats is a high national priority, and that protection of park wildlife resources is a central element of that priority, then the foregoing makes inescapable the conclusions that existing law is inadequate for those purposes and that legislative revision is in order.

B. Two different but complementary notions are embodied in bills recently submitted to but not yet enacted by Congress.

1. The Park Protection Act, H.R. 2379, 98th Cong., 1st Sess. (1983), passed twice by the House, contains two pertinent provisions:

a. In issuing leases and taking similar actions on other Interior Department property, the Secretary would have to balance the effect on park resources against the value of the proposed action. *Id.* § 10. See H.R. REP. NO. 170, 98th Cong., 1st Sess. (1983); Keiter, *supra*, at 396-403.

b. The Park Service would be given an official consultative role whenever development on adjacent federal lands might threaten park resources. *Id.* § 11.

c. Neither provision adds much to existing law. The Department has the power and arguably the duty to perform that balancing whenever one of its actions threatens park resources. The NPS is not barred from making its position known to any other agency proposing actions with harmful potentials.

d. This relatively innocuous measure was opposed -- successfully, so far -- by the NPS and the Department.

e. Other provisions in the proposed Act might contribute marginally to park resource protection. See Keiter, *supra*; Comment, *supra*.

2. Senator Chaffee's bill, entitled "Wildlife

and the Parks Act of 1984," S. 978, 98th Cong., 1st Sess. §§ 601-07, 130 Cong. Rec. S2919-21 (daily ed. Mar. 20, 1984) (Chaffee Amendment No. 2807), was more to the wildlife protection point.

a. It would prohibit federal expenditures for activities within "wildlife resource habitat areas" in and contiguous to parks, unless the Secretary determined that the activity would not detrimentally affect park wildlife resources. *Id.* § 604(a)(1). See Keiter, *supra*, at 403-08.

b. The Secretary would designate and update the wildlife resource habitat areas. S. 978 at § 604(b).

c. Unless within one of the limited exceptions, expenditures by other federal agencies could be vetoed by the Interior Secretary.

d. If private land was within the area, the landowner would be entitled to pre-designation value in eminent domain proceedings. *Id.* § 604(a)(2).

e. Limitations: "First, the bill applied only to park units which exceed 5000 acres in size. Secondly, the bill was designed only to protect park wildlife and their habitat; it did not directly reach internal

or external threats problems that impact park resources other than wildlife and fish. It might have, however, indirectly reached these threats if they also impacted park wildlife. Thirdly, the bill did not regulate activities or developments occurring on private lands adjoining the parks unless the activity was subsidized by federal funds. Finally, the bill was only intended to reach federal expenditures that support activities which threaten park wildlife, thus, it did not necessarily reach all incompatible federal agency actions. But the bill defined federal financial assistance rather broadly so that it encompassed activities such as federal leasing and permitting decisions." Keiter, *supra*, at 405 (notes omitted).

f. The designation of semi-protected adjacent zones is an advance over the PPA, which was broader but less coercive, but, for the reasons above, the Chaffee bill too would pose as many problems as it resolved.

C. Professor Keiter, after surveying some alternatives, combines, refines, and expands upon these two approaches; he would have the NPS designate

"national resource areas" by ecological boundaries to be managed for preservation and recreation and in which no federal funds would be available for incompatible developments. Keiter, *supra*, at 408-19.

D. Mr. Mastbaum proposes a more political solution: he would have the Park Service actively seek out alternatives to the destructive proposal when park resources are threatened. Mastbaum, *supra*.

E. The author of the Penn student Comment, *supra*, advocates an explicit delegation to the Secretary of the authority and the duty to proceed aggressively in a nuisance-abatement fashion.

F. Those proposals embody a wide variety of useful elements, but they do not exhaust the catalogue of the possible. Some other notions (not necessarily recommended):

1. Congress could simply expand the parks by adding whatever adjoining public (and private) lands are necessary to achieve comprehensive protection for the core areas. Alternatively, Congress could designate as National Preserves any areas the control of which is thought necessary for protection from external threats.

- a. Positive aspects: simplicity,

comprehensiveness, and effectiveness. This proposal would avoid unstable interagency relations and the tensions of differing management mandates.

b. Negative aspects: rights in transitional areas; condemnation costs when much private land is involved; congressional attention to detail; interagency friction; the possible need for a newer buffer zone to buffer the new buffer zone.

2. Congress could command the merger of the NPS with the FWS.

a. Positive aspects: the new National Park and Wildlife Service would have primary authority over implementation of all federal wildlife law and thus an expansive consultation role in most major agency decisionmaking. As both agencies are under the same Assistant Secretary, the transition should be tolerable.

b. Negative aspects: history; the possibility that the mission of each agency could be diluted; the pro-hunting and anti-predator bias and "multiple use" practices of sections within the FWS.

3. The Congress could declare that all wildlife resident in national parks for part of the year

is owned by the United States in trust for the people and thus cannot be killed, harmed, or harrassed by anyone in its migrations outside of national parks.

a. The federal government likely has power under the Property and Commerce Clauses to take declare such ownership, see Kleppe v. New Mexico, supra; Palila v. Hawaii Dept. of Land and Natural Resources, 471 F. Supp. 985 (D.Ha. 1979), aff'd, 639 F.2d 495 (9th Cir. 1981), but it is doubtful whether the Park Service has authority to take such a step on its own.

b. Ownership would have the advantages of lowcost regulation of taking, but it would have little effect on habitat protection by itself.

c. Implementation of such a property declaration would pose many difficult issues. E.g.: Which specimens of which species would qualify? Would the United States be liable for damage done by its animals? Compare Mountain States Legal Found. v. Clark, 740 F.2d 792 (10th Cir. 1984), vacated, 765 F.2d 1468 (10th Cir. 1985), with American Farm Bureau v. Block, 154 ELR 20763 (D.S.D. 1984)

4. Slightly less radically, Congress could institute a system of federal zoning for the areas surrounding parks or give the NPS a veto power over incompatible adjacent developments on public and private lands.

a. Any system for protecting parks from external threats will require designation of areas on which controls will apply, either formally, through a form of official zoning, or on an ad hoc basis, through a "spot zoning" veto power.

b. Outright prohibitions through zone designations or vetos are simpler and easier to implement than indirect means such as withholding federal financing.

c. Political opposition would be fierce.

G. As Sax and Keiter have noted, the parks vary so greatly that no one solution is likely to be appropriate in every situation. Some flexible combination of the foregoing remedy possibilities incorporating adequate power in the National Park Service would appear to be the optimum solution.

VII. CONCLUSIONS.

[I hope to have thought of some by September 15.]