Defining the Mother Lode: Yellowstone National Park v. the New World Mine

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Such places are the last of our primeval landscapes, the few surviving samples of a natural world, to walk and rest in, to see, to listen to, to feel the mood of, to comprehend, to care about. There isn’t much of it left. What there is is all all people will ever have, and all their children. It is only as safe as people, knowing about it, want it to be.

—David R. Brower

INTRODUCTION

In 1872, the creation of Yellowstone National Park (hereinafter Yellowstone, or the Park) introduced the world to the idea of national parks. Today it is still one of the most recognized of all preserved areas in the world. Ironically, that same year saw the introduction of the General Mining Law of 1872, a law which has inadvertently placed the Park in grave danger. Winnebagos, nylon tents, people feeding bears, and long lines of tourists are not the only threats to the precious resources protected by Yellowstone. Under current public land management and law, the continued preservation of our national treasures remains precariously in doubt because of development on lands adjacent to the parks.

The problem of external threats to national parks has long been recognized, yet no solution has been effectively created. Yellowstone is threatened by external development, further evidence of the National Park Service’s (hereinafter NPS) inability to protect our na-

tional parks from nearby development. Less than three miles from the border of Yellowstone in Crown Butte, Montana, Noranda Minerals, Inc., a Canadian-based minerals exploration company, intends to blast the New World Mine into the slopes of Mount Henderson.\(^5\) The proposed mine presents serious threats to the natural resources that Yellowstone protects.\(^6\) Congress, and the rest of our country, now have an important decision to make about what to see as the true wealth in our natural lands. The danger Yellowstone faces is understood by the world community. Yellowstone, which had already been designated as a World Heritage Site, was placed on the World Heritage Sites in Danger List in 1995 by the World Heritage Committee.\(^7\) The world community is concerned about the possible destruction of some of its most scarce and famous resources. This global concern should offer new incentives to protect Yellowstone from the New World Mine. The time has come for Congress to realize that we have already "struck it rich" with the national parks, and an effort must be made to protect the true "mother lode."

This Comment begins by describing the controversy over the New World Mine. Part II proposes a buffer zone management scheme to help protect Yellowstone. Part III examines how buffer zones might be implemented near Yellowstone under existing law. Part IV discusses the World Heritage Convention and Yellowstone's status as a World Heritage Site in Danger as an incentive for buffer zone protection. The Comment concludes by recognizing that buffer zone management is a movement away from the traditional park model, but still a movement that is necessary to protect Yellowstone from external threats.

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6. On August 12, 1996, President Bill Clinton unveiled a deal with the owner of the New World Mine that purports to halt the project that gives rise to this proposed mine. *Spotlight Story Yellowstone: Prez Announces Deal to Block New World Mine*, Greenwire (APN, Alexandria, VA), Aug. 13, 1996, at 1. However, the proposal does not yet stop the New World Mine. The deal, as set out, is a non-binding agreement under which Noranda will trade the rights to more than $600 million worth of gold for $65 million of as yet unspecified land. *Id.* If not satisfied, Noranda can still walk away from the agreement, and it probably will if it cannot obtain property that will provide significant financial gain, probably somewhere near $500 million in possible gold reserves. In addition, Clinton's deal does not protect Yellowstone from other mining projects adjacent to the Park. Therefore, this Comment's proposal for protecting Yellowstone from the New World Mine and other external threats remains valid and necessary.

MINING V. PRESERVATION: NEW WORLD MINE TAKES ON YELLOWSTONE NATIONAL PARK

“If you were going to throw a dart at a map of the United States and place a gold mine there, those mountains would probably be the worst place a dart could land. That’s exactly what Noranda is doing, and we are very concerned about it.”

This statement by Park Ranger Stuart Coleman puts the dispute over the New World Mine in a different perspective. Noranda, Inc. (hereinafter Noranda), through its subsidiary Crown Butte Mines, Inc. (hereinafter Crown Butte Mines), plans to begin mining at the New World Mine. The mine is located approximately two and a half miles away from the border of Yellowstone and is snuggled between Yellowstone and the Absaroka-Beartooth Wilderness—the most heavily used backcountry area in Montana. The object of Noranda’s desire is hundreds of millions of dollars in gold and silver buried underneath the 8,900 foot peak of Henderson Mountain. The problem is that Noranda’s plans have potentially horrendous repercussions for Yellowstone and the delicate ecosystem that surrounds the mine.

Noranda maintains that the New World Mine will be one of the most modern mining operations in the United States and that it will not pose any dangers to Yellowstone. Noranda’s operations will involve the removal of four tons of sulfide rock for every ounce of gold mined. This rock, which transforms into sulfuric acid when exposed to air and water, will be stored in a tailings impoundment “approximately 70 football fields in area and measuring 10 stories deep.” The impoundment will be created by bulldozing a wetland and damming 5.5 million tons of mine tailings behind a ninety-foot-long earth fill dam in the Fisher Creek drainage area. At the end of the mine’s life, which is estimated to be between fifteen to twenty years, the water level in the impoundment area will be lowered. The mass will then be capped with dirt and rock in an attempt to seal off exposure to oxygen and thereby prevent the creation of sulfuric acid.

Noranda and Crown Butte Mines insist that this design will be able to withstand

8. Wilkinson, supra note 5, at 31 (quoting Yellowstone Park Ranger Stuart Coleman).
9. Id.
11. See Wilkinson, supra note 5, at 32 (“Mining officials insist that New World will be a model of innovation that will quell fears about old-world mining disasters.”).
12. Id.
13. Id.
15. Id.
16. Id.
the potential earthquakes and harsh winter weather in the area. They also claim that it will not cause harm to downstream resources, including Yellowstone.17

These precautions have not eased the minds of many who object to the proposed mine. The opponents of the mine are concerned about Noranda’s dismal environmental record at other mines in Montana, Idaho, British Columbia, and elsewhere.18 It is difficult to trust an organization that has had so many problems in the past. There is already ample evidence of what the rock in Henderson Mountain can do to the environment. In nearby areas, the streams already “run red and sterile with acidic effluent from mining that ceased over 40 years ago.”19 There are serious long-term consequences resulting from leakage of mine tailings into the three streams whose headwaters begin in that area. The gold-bearing rock has the potential to put sulfuric acid and other highly toxic metals into the water, thereby killing aquatic life. This kind of problem occurred when Henderson Mountain was mined in the 1950s.20 Some contend that the mine’s operations will stir up underground wastes that will go directly into Yellowstone.21 Finally, the design of the impoundment area has raised the concern of many, including the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers, because its construction would require one of the largest destructions of wetlands ever in Montana.22

These government agencies are not the only groups concerned. Nine environmental organizations filed suit against the New World Mine for failure to acquire necessary Clean Water Act permits.23 On October 13, 1995, a United States District Court upheld the plaintiffs’ motion for summary judgment and held that Noranda and Crown Butte Mines had violated the Clean Water Act.24 On August 25, 1995, President Clinton, expressing his concern for the area, ordered a two year ban on new mining claims in 4,500 acres of national forest land surrounding the Henderson Mountain area.25 However, President Clinton’s ban did not affect Noranda’s previously established claims. Crown Butte Mines also used the six day period between the Presi-
dent’s order and its appearance in the Federal Register to file thirty-eight more claims on federal lands around the New World site.26

President Clinton recently announced a deal with Noranda in an attempt to halt development of the mine.27 Noranda’s board of directors must still ratify the proposed agreement and the location of alternative lands must be acceptable to the mining conglomerate.28 It is not known just where land can be found that has development potential equivalent to the value of the gold and silver in Henderson Mountain. Along with the President, members of both Houses of Congress have also spoken out against the New World Mine. Montana Senator Max Baucus wrote a letter to the management of Crown Butte Mines stating that he was unwilling to allow the destruction of such a national treasure in the name of economic gain.29 New Mexico Congressman Bill Richardson has proposed a bill in the House of Representatives to establish a National Recreation Area around the New World project in order to protect Yellowstone from the mine.30

The concern over Yellowstone and the New World Mine has gained the attention of the international community. Yellowstone has been a World Heritage Site since 1978; the World Heritage Committee, an international committee which oversees the designation and protection of all World Heritage sites,31 added the Park in December of 1995 to the list of World Heritage Sites in Danger.32 Yellowstone’s addition to the endangered list was primarily a result of the concern over the New World Mine.33 This designation represents the world community’s concern over the future of Yellowstone as well as the international esteem in which the “grandfather of all national parks” is held.

The NPS has been unable to ensure protection of the Park from the New World Mine’s operations. Noranda has staked its claim to a mine that is primarily on private property. Only twenty-seven acres of the mine would be on public land.34 The authority of the Federal

27. See supra note 6.
29. Skow, supra note 14, at 60.
30. See H.R. 1846, 104th Cong. (1995); see also discussion infra Part V.
31. See discussion infra Part IV.
32. Brooke, supra note 10, at A22.
33. Id.
Government to regulate such lands in order to protect the Park from external threats is questionable because none of the mined land will be located inside the boundaries of Yellowstone. The following section proposes one management scheme, buffer zones, that would aid the NPS in protecting Yellowstone.

II. BUFFER ZONES: A METHOD TO DEFEND YELLOWSTONE FROM THE NEW WORLD MINE

The concept of buffer zones offers a different approach to protect Yellowstone, and parks like it, from external threats coming from both non-park public lands and private lands. This Part begins with a brief synopsis of the idea of buffer zone management and then moves to an example of buffer zone protection in Nepal's national parks. Finally, it concludes with an analysis of the effectiveness of buffer zones in Yellowstone.

A. What Are Buffer Zones Designed To Do?

"Buffer zone" is not a well defined term, but it is generally recognized that a buffer zone consists of "lands bordering a protected area that are subject to special land use controls." Buffer zones are strips of land on park boundaries within which uses of natural resources will be allowed, but those uses must be compatible with the protected area. Several definitions for buffer zones have been proposed since the 1982 World Parks Congress emerged with the following one: "[a]reas adjacent to protected areas, on which land use is partially restricted to give an added layer of protection to the protected area itself while providing valued benefits to the neighboring rural communities."

The authors of this definition emphasized that the first priority was the protected area, and the interests of the local citizens should be secondary. A more modern definition states that buffer zones are "zone[s], peripheral to a national park or equivalent reserve, where restrictions placed upon resource use or special development measures are undertaken to enhance the conservation value of the area." Each of these definitions provides sound criteria for implementing buffer zones in Yellowstone.

37. Id.
38. Id.
39. Id.
Buffer zones can be extremely effective in helping to ensure that protected areas remain uninjured by external threats. Although uses, such as mining, that are not allowed in the protected parks can be performed in buffer zone areas, they must not damage the park. Therefore, the idea of buffer zones does not require an extension of the boundaries of the protected area. Rather, it is only necessary that the activities in the buffer zone be restricted to those that do not damage the protected area. Activities that will damage the protected area must be limited to outside the buffer zone, allowing the buffer zone to absorb the external effects of these activities and thereby protecting the park's resources. An effectively managed buffer zone will allow a preserved area a better chance of maintaining its native biodiversity and viable populations than will a protected area that is surrounded by intensive land use.

The theoretical basis behind buffer zones extends from recognition of the fact that human beings are a part of natural systems. Buffer zones are seen as one part of a larger concentric zoning system in which human development needs remain an important consideration. The core of the system consists of the protected area, which is surrounded by buffer areas where development activity is limited in order to protect the core. The buffer zone will also absorb some of the effects from the outer-most area where heavy development activity occurs. Buffer zones accommodate both the interest in preserving the natural processes and the need to have sustainable human development.

Despite the many theoretical advantages of buffer zones, there is some difficulty with the practical use of the idea. One of the most difficult issues involving effective buffer zone management is the ability of the managers of protected areas to gain authority to establish buffer zones. The inability to gain jurisdiction and authority over the lands surrounding the protected areas presents significant problems for the designation of buffer zones. The surrounding lands may be under the authority of another agency or may be privately

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40. See 16 U.S.C. § 21 (1994) (mining was specifically outlawed in Yellowstone National Park in 1872 when the Park was set aside as a “pleasuring ground”).
43. Reed F. Noss, Some Principles of Conservation Biology, as They Apply to Environmental Law, 69 CHI.-KENT L. REV. 893, 906 (1994).
44. Baker, supra note 41, at 84-85.
45. Id.
46. See Wells & Brandon, supra note 36, at 159 (discussing buffer zones in practice).
47. Id.
DEFINING THE MOTHER LODE

owned. Conflicts may arise if the government agency that has authority over lands appropriate for buffer zone protection also has a mandate to use them for a purpose that will damage the protected area. Additionally, in the case of private lands, particularly in the United States, it will be difficult for a park manager to raise sufficient funds to purchase the rights to the land.

The buffer zone approach would attempt to mitigate these problems by placing the buffer zone mandate only on lands surrounding the protected area where activities would damage the park's resources. The public lands that are included would be managed under one buffer zone mandate, hopefully eliminating any conflict with other mandates that are placed on the lands through other authority. Buffer zones may or may not be placed on private lands. Optimal protection may be achieved by directly regulating private lands through buffer zone management, although such regulation will encounter, at least in the United States, challenges under the Fifth Amendment's takings clause.\textsuperscript{48} In the case of the New World Mine, there is mostly public land surrounding Noranda's private property. Buffer zones could be implemented in such a way that even if direct appropriation of their private land is infeasible, surrounding development and road building could be halted through regulation, thereby effectively isolating the mine and halting the mine's operations.

Where to locate the buffer zones and what size to make the buffer zones are other concerns. As one U.S. official has asked concerning the buffer zone issue, "[w]here does the buffer end? Does it stretch from the Atlantic to the Pacific?"\textsuperscript{49} One way to address this question is to designate buffer zones according to the particular concerns of the protected area. Designation of the size and area of buffer zones must take into account the sensitivity of the protected area and account for the fact that the protected area is part of a larger ecosystem.\textsuperscript{50} Current land use patterns and future development potential should be included in the process of determining the placement and size of the buffer zones. However, it must be emphasized throughout the process


\textsuperscript{49} Beyond Their Borders, supra note 4, at 1191 (quoting former Assistant Secretary of the Interior Ray Arnett).

\textsuperscript{50} Keiter, supra note 35, at 643.
that the first priority of buffer zones is to protect the park’s resources.51

B. One Attempt To Use Buffer Zones Around a National Park

One commentator, Professor Keiter, has studied and written about a buffer zone management scheme for protecting national parks that avoids many of the above-mentioned problems.52 Professor Keiter examined the Fourth Amendment to the National Parks and Wildlife Conservation Act of 1993 in Nepal (hereinafter Nepal Parks Act), which authorized the adoption of buffer zones adjacent to existing national parks.53 This amendment defined a buffer zone as an “area surrounding a national park or reserve...to provide for the use of forest resources on a regular and beneficial basis for the local people.”54 The amendment to the Nepal Parks Act is designed to incorporate sustainable development and cooperative management in buffer zones.55 The Nepal Parks Act also restricts the buffer zone designation to public lands; no privately owned lands can be included in the buffer zones created under this Act.56

Although the Nepal Parks Act does not explicitly delineate the criteria for determining the size or location of the buffer zones, Professor Keiter has offered some suggestions. The determinations should be made by considering the sensitivity of the local resources as well as the financial and technical resources of the department responsible for the buffer zones.57 It is important to note here that the Nepal Parks Act does not require that the buffer zones be located adjacent to the park. Also, the proposed designations are subject to public comment.58 The primary criterion for the buffer zones is that the activities allowed in the buffer areas must be consistent with the management objectives of the preserved area.59

Professor Keiter describes a proposed management standard that would help secure the buffer zones’ ability to assist in the protection of the preserved area. He proposes a “nonimpairment” standard.60 This proposed management standard would prohibit any activities on the adjacent public lands that harm the park’s “resources or ecological

51. Id. at 644.
52. Id. at 639-40.
53. Id. at 639.
54. Id. (citing National Parks and Wildlife Conservation (Fourth Amendment) Act 2049 § 2 (1993), 43 Nepal Gazette, No. 15 (Extraordinary)).
55. Id. at 639-40.
56. Id. at 639.
57. Id. at 642.
58. Id. at 641.
59. Id.
60. Id. at 644.
In addition, this standard would help protect the park from activities on private lands. Even if private lands could not be incorporated into the buffer zones or directly regulated by the department in control of the buffer zones, the buffer zone management authority could restrict the private landowners’ access to the public land resources in such a way that it could effectively control the private landowners’ decisionmaking. For example, roads essential for mining or logging activities on private land surrounded by the buffer zones may be restricted by buffer zone management in order to preserve the protected area. The destructive activity on the private land would be indirectly halted without direct regulation of the activity on the privately owned lands. This is a possibility in the context of the New World Mine.

There are, however, some inconsistencies in implementing buffer zones based on a nonimpairment standard and trying to determine uses in buffer zones that are “compatible” with the particular mandate of the preserved area. For instance, in the case of Yellowstone, if a buffer zone was implemented and a nonimpairment standard was used to determine allowable buffer zone activities, then it is possible that an activity that is allowed in the park would be prohibited in the buffer zones around the park. For example, fishing is a compatible use because it is compatible with Yellowstone’s preservation mandate. However, if fishing in a buffer zone was depleting the stock of a particular species of fish (one not listed as an endangered species) that is a Yellowstone resource, fishing would not be allowed in the buffer zone based on a nonimpairment standard. In that example, there is a conflict between the compatibility of fishing within the protected area and the nonimpairment standard used in the buffer zone. Although compatible with the park purposes, the per se compatible activity—fishing—is impairing the protected area and would be prohibited in the buffer zones using a nonimpairment standard. Yet, even with these possible inconsistencies, to fully protect the park’s resources a nonimpairment standard should be used, not a standard that would only identify per se compatible uses.

A final important aspect of the buffer zone scheme in the Nepal Parks Act is that of “thirty/fifty funds.” Under the buffer zone legislation, thirty to fifty percent of the park revenues and entry fees are returned to the local communities for development. Therefore, any of the local communities affected by the parks’ management schemes are entitled to a portion of the thirty/fifty funds, even if that commu-

61. Id.
62. Id.
64. Keiter, supra note 35, at 647.
This scheme provides an economic incentive for the establishment of the buffer zone legislation. It is also a vehicle to ease the concerns of local communities that fear losing the economic benefits of development, which could no longer occur if the proposed development threatened the park's protected resources.

Although the thirty/fifty funds approach used in Nepal has excellent incentives for the creation of buffer zones around parks, one change must be made before such a scheme is used in Yellowstone. The funds must be allocated only for those communities directly affected by the new buffer zone management scheme. Otherwise, the incentive for buffer zone creation might be limited by a "not in my backyard" attitude. If any community around Yellowstone could receive the funds, then it is not hard to envision communities calling for buffer zones and the financial bonus, so long as the buffer zones are not in their area. Only the communities that are adversely affected by the buffer zones should receive compensation from the thirty/fifty funds. Such a limitation is appropriate in the Yellowstone case because, unlike in Nepal, the Yellowstone management scheme was created before the communities established themselves on the borders of the Park.

The idea of buffer zones and the scheme of establishing those areas created by the Nepal Parks Act offer an innovative solution to the problem surrounding the New World Mine and its potential impacts on Yellowstone National Park. The New World Mine is located partially on federal forest lands adjacent to Yellowstone and partially on private land surrounded by public lands. Buffer zone management is a tool that would protect the resources of Yellowstone while not making the New World Mine property or its surrounding forest lands part and parcel of the Park itself.

65. Id.
66. Whether these funds will be large enough to adequately subsidize the local economies or can be used to purchase private lands will be determined by how the provisions of the buffer zone mandates are interpreted and implemented by the supervising government agency. Regardless, they suggest a feasible option for resolving some of the difficulties faced by protecting natural resources by limiting certain uses on the lands that contain those resources.
67. Yellowstone was established at a time when no people had settled in the areas along its borders. The people who have since established property rights in the areas surrounding the Park have done so with the knowledge of Yellowstone's protected status. In the Nepal example, however, protected status was given to the parks after certain people had established their communities there. All of the Nepalese communities were affected by the change in land designation and, therefore, have a legitimate claim to assistance from the thirty/fifty Funds. See Keiter, supra note 35, at 247. Implementing buffer zones around Yellowstone would only affect the expectations of certain communities, and only those communities should benefit from the creation of thirty/fifty Funds.
C. Buffer Zones Provide for Protection and Development

A buffer zone would require that any mining activity in the buffer areas not damage the protected resources of Yellowstone, using a nonimpairment rather than a per se compatible standard. If the development of the mine was guaranteed not to damage those resources, then the mining would be permitted. Even if mining could not occur in the buffer zones that are designed to protect Yellowstone, the buffer zone scheme does not prevent other types of development per se. Any activity that could be done in alliance with protecting Yellowstone would be permitted in the buffer zone areas.68

Buffer zones have been proposed before as possible protection for national parks. The idea had the support of former Yellowstone superintendent Robert Barbee and the Reagan administration's Director of the National Park Service, William Penn Mott, Jr.69 However, their proposals faced many of the concerns that are often associated with buffer zones, such as fear of increased government control, concern for the effect of buffer zones on private lands, and the difficulty of establishing criteria for limiting activities.70 One critic, Donald Leal, has rejected the idea of buffer zones in favor of limiting government agency intervention and reforming existing economic institutions.71 Although a legitimate attempt to preserve our natural lands may be made utilizing these ideals, many of Mr. Leal's criticisms of buffer zones can be addressed by proper implementation of buffer zone management.

A major impetus for the rejection of the buffer zone management scheme has been concern for the local economies around the Park. Leal's major concern is that eighty-nine percent of the buffer zones around Yellowstone would be located on forest service lands, which permit many activities such as logging, mining, geothermal development, and ski resort development.72 He argues that these activities will be limited by buffer zone designation, and the citizens that live in the communities surrounding Yellowstone are concerned that the ex-

68. The National Park Service Organic Act of 1916, ch. 408, § 1, 39 Stat. 535 (1916) (codified as amended at 16 U.S.C. §§ 1-18f (1994)), established the national parks for the protection of their abundant and valuable natural resources as well as the enjoyment of the areas by the people. Any activity that is consistent with both provisions of this mandate would certainly be allowed in buffer zones.


70. Id.
71. Id. at 44-45.
72. Id. at 26-27.
tension of protection of the Park outside of its boundaries may significantly impair their economic livelihood.

In theory, however, a buffer zones solution to protect park areas from external threats can incorporate a commitment to local economic sustainability. Rather than expand the boundaries of the protected areas under the same preservation mandate that controls the protected areas, buffer zones could effectively incorporate the concerns of the communities affected by those buffer zones. For example, the Nepal Parks Act led to the establishment of the Makalu-Barun National Park and Conservation Area. The management plan for this area has as one of its goals the improvement of local economic opportunities. The Nepal Parks Act amendment itself calls for local community involvement in the designation of buffer zones through "User Group Committees" (UGCs). The UGC concept will improve relations between communities on the outskirts of protected areas that may be affected by buffer zone creation and the managers of those areas.

The Nepal Parks Act provides a good example of buffer zone management as it might be used in the areas surrounding Yellowstone National Park. The preservation of precious geothermal resources, wondrous natural sites, and important animal and plant species can be secured from external threats while ensuring a livelihood for those people who live on the outside of the Park. Following such an example, buffer zones should be created around Yellowstone National Park to prevent activities such as the New World Mine from destroying the precious resources contained in the Park.

In addition, towns in Montana, like Gardiner, Crown Butte, and West Yellowstone, could play a role in buffer zone designation and help maintain their economic livelihood. Proper buffer zone management means maintaining communication between local communities and the managing agencies. With this management scheme, citizens in the communities surrounding the Park will have a voice in the buffer zone creation process. Rather than having the decision made only by a large, centralized government, as is the case in park designations, buffer zone management strives to place the designation process at a more local level. The citizens of the local communities will have an integral role in the decisionmaking process.

More importantly, the buffer zone designation will help ensure the continued growth of the most important industry to the communities that surround Yellowstone, recreation. Recreation and tourism

73. See Keiter, supra note 35, at 630-33.
74. See id. at 633 (the region "is managed under a comprehensive Management Plan that links protection of park resources with sustainable development").
75. Id. at 645.
revenues surpassed Montana’s combined income from both mining and logging in the early 1990s. Recreation in the buffer zone is consistent with the purpose of the Park and would be allowed if it did not damage the Park’s resources. After all, Yellowstone was established “for the enjoyment” of people, and recreation is a vital component of all national parks. Buffer zones could increase the land that is available for recreation by halting those activities that violate the purpose of Yellowstone and injure its resources. Buffer zones will also prevent some of the activities that disturb the habitats of important wildlife species—species that are also an important source of recreation income. Although the hunting of many of these species is not an activity that is allowed in the Park itself, as long as an activity does not destroy the valuable wildlife resource base that Yellowstone now protects, hunting could be an activity allowed in the buffer zones.

D. Defining Activities Allowed in Buffer Zones

There are many complex problems related to the buffer zone issue. One problem is determining which activities should be allowed within the buffer zones. The protection of the park’s resources should be the first priority in this determination. A major aspect of this process is calculating the extent of damage to a park’s resources that an activity can have before it is no longer allowed in the buffer zone.

It is conceivable, although somewhat unlikely, that there may be a use (such as mining) in buffer zones that is incompatible with preserving the park’s resources and would undoubtedly impair some of the park’s resources, yet still provide for better protection of most of the park’s resources than other activities. For instance, suppose there were a provision in the 1872 Mining Law where a substantial portion of the royalties from the New World Mine were allocated to expand Yellowstone in order to protect a greater amount of its resources. In that case, it may be reasonable to allow the mine to develop in the buffer zones. However, this could only happen if the benefits to the park’s resources far outweigh the environmental costs of the project. Having buffer zones would be a more flexible approach that would allow such a comparison of costs and benefits, while an extension of the park’s boundaries would not allow such a consideration. This

76. Brooke, supra note 10, at A22.
77. 16 U.S.C. § 1 (1994); see also id. § 1a-1 (Congress declared that the national parks are to be “preserved and managed for the benefit and inspiration of all the people of the United States . . . ”).
78. Id. § 26 (1992).
80. See Leshy, supra note 3, at 327-70, for a discussion of mineral leasing and royalty payments as well as other suggestions for reform of the General Mining Law.
cost-benefit approach is consistent with a nonimpairment standard. There would be no overall impairment of resources in Yellowstone as long as the overall result is that the acquisition of park resources is equal to or greater than those resources already protected by Yellowstone National Park.

The determination of what activities are permitted in buffer zones entails an analysis of their effects on the park’s resources. If the above-mentioned possibility were to be actually considered, this would require a complex analysis of the costs and benefits to the park’s resources. Making sure that sufficient funds are available to acquire important additional resources would be a paramount factor. The areas to be acquired must fit within the purposes of the National Park Service Organic Act of 191681 (hereinafter the Organic Act) and the establishment laws of the individual park. The resources obtained must be substantially comparable to those resources which would be damaged by the activity in the buffer zones. This balancing test must be performed in such a way that over time the resources of the park remain fundamentally equivalent to those which have been preserved by the park in the past.

The decision process would be monitored and controlled by the manager of the buffer zones. Protecting the park’s resources would be the controlling criterion in this process. The buffer zone manager would be open to lawsuits in order to ensure he or she carries out his or her duties in meeting this criterion. As in all cooperative decision-making processes, ample time must be allowed for public notice and comment. This is imperative for buffer zones because they are designed to ensure community input. The designation process should also require that a buffer zone manager communicate with a panel of representatives from all of the affected constituents. As long as the panel remains aware of the manager’s focus on the preservation of the park’s resources, open lines of communication will increase the likelihood of an optimal buffer zone management plan.

E. Implementing Buffer Zones in the Yellowstone Area

Buffer zones could prevent the development of the public land that is currently a part of the New World Mine property while the rest of the New World Mine land, which is private, could be barred from development by regulation. The public land that surrounds the New World Mine could also be regulated in order to prevent the construction of roads or other development that is essential to the mine’s operations. The roads would be prevented in the buffer zones because their development would cause damage to the park’s resources. The

loss of this mining project would have some impact on the economy of Crown Butte. However, the future of this town is more closely linked to the preservation of the Yellowstone area than it is to the extraction of gold; recreation will bring more money to the place than Noranda ever will. Those recreational activities with significant revenue-raising potential include fly fishing, elk hunting, snowmobiling, hiking, camping and river rafting. Anglers alone bring in more than $400 million a year in Montana. Buffer zone management would work to preserve the Park as well as create possibilities for economic and community development.

Members of the local communities may be skeptical of the buffer zone management idea. One important aspect to implementation of buffer zones in the Yellowstone area is ensuring that the local citizens are aware of the emphasis that buffer zones place on assisting community development. The buffer zone approach does not forsake human interests completely, rather it provides for a balancing of preservation needs and economic concerns. In addition, the option of a thirty/fifty funds program could provide additional incentive for communities to participate in the buffer zone designation process. It would be appropriate to place a portion of those funds aside to acquire private lands that would be suitable for further buffer zone designation. Such a policy would also create alternatives for private property owners that have land where development activities would probably damage the park’s resources.

Implementing buffer zones as a means of protecting parks from external threats is a different approach to park management. Yellowstone’s battle with the New World Mine is a result of the inability of the national parks to be effectively protected from external threats. However, the current structure of public lands management and present law may make it difficult for buffer zones to be created. The authority under which such a management scheme might be created to protect Yellowstone, and other parks, is explored in the next two sections.

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83. Brooke, supra note 10, at A22.
84. Id.
III.
CURRENT POSITIONS: THE POWER TO IMPLEMENT BUFFER ZONES AROUND YELLOWSTONE UNDER EXISTING LAW

In 1916, the Organic Act was passed in order to coordinate and rationalize the developing strategies for protecting our resources. The Organic Act granted authority to the Secretary of the Interior to "make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks . . . ." In a 1978 Amendment to the Organic Act, Congress affirmed the interpretation that preservation was the primary concern of the National Park Service. However, the Park Service has not been willing or able to regulate effectively activities adjacent to the lands under its control in order to uphold these congressional mandates. External threats to the national parks have been a major concern for more than fifteen years. In 1980 the NPS reported to Congress that over fifty percent of the "threats" to the cultural and natural resources of the parks were from sources located outside of the park boundaries. In that same study, Yellowstone reported forty-six threats, the eighth highest in the National Park System.

The dispute over the New World Mine is direct evidence that these concerns have not been dealt with satisfactorily. This Part examines the authority that would allow for the protection of the parks from external threats and the implementation of buffer zones around Yellowstone.

A. Statutory Authority for the National Park Service To Regulate External Lands

1. The 1916 Organic Act

The Organic Act was written with two independent purposes: to conserve scenery, natural and historic objects and wildlife; and to provide for the public use and enjoyment of the parks. The Act provided the Secretary of the Interior with substantial authority to regulate any activities occurring within park boundaries in order to

86. Id. § 3.
87. "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 areas have been established." Id. § 1a-1.
88. Keiter, supra note 4, at 356.
89. PARKS REPORT, 1980, supra note 4, at viii.
91. 16 U.S.C. §§ 1, 2, 3 (1994).
carry out his duties. In addition, there is sufficient authority for the Secretary to regulate external activities that pose a threat to park resources when they involve the use of park resources. However, the difficult issue arises when there is an external threat to park resources. It is not readily apparent that such activities are subject to NPS regulation under the authority of the Organic Act. The inability of the NPS to control the lands outside of the parks make the concept of buffer zones very difficult to implement.

Congress has only once specifically authorized the NPS to regulate lands outside a park, in a brief attempt to control activities on land adjacent to Mesa Verde National Park. Since then there have been attempts to find implicit authority within the Organic Act for the NPS to regulate external activities. In Sierra Club v. Department of the Interior I, an environmental group alleged that the Organic Act and the Redwood National Park Act imposed affirmative duties on the Secretary of the Interior to protect Redwood National Park from external threats. In that case, the plaintiffs were trying to force the protection of the park’s resources from extensive lumbering activities on forest lands adjacent to Redwood National Park. The lumbering was causing extensive damage to proper water drainage and increasing soil erosion inside the park. The court held that Congress had imposed certain duties on the Secretary of the Interior to protect the park in the Redwood National Park Enabling Act.

In a subsequent decision, which went to the merits of the case, the court found that the Secretary of the Interior had certain powers through which he could take action to protect the park from external threats. Those powers included the powers to modify the boundaries of the park and to acquire interest in land from, and to enter into contracts with, adjacent landowners. In addition, the court reiterated its finding that the Secretary had a duty under the public trust imposed by the Organic Act. However, this duty under the Organic Act was later rejected by a different federal court in Sierra Club v.
Andrus.\textsuperscript{102} In that case, the court held that the Organic Act did not impose any "trustee" duties on the Secretary of the Interior, and that the Secretary's choice not to assert federal water rights in the area was sufficiently supported by a "rational basis."\textsuperscript{103} The decision of the district court was upheld by the D.C. Circuit Court of Appeals.\textsuperscript{104}

The tenuous nature of the Secretary of the Interior's ability to regulate external lands under the authority of the Organic Act is evidenced by the conflict between the two Redwood National Park decisions and the Andrus decision. Although the Redwood National Park decisions led to the 1978 Amendment of the Organic Act mentioned above\textsuperscript{105} (as well as to an expansion of the Park), the NPS has never tried to regulate development on lands adjacent to the parks based solely on its authority under the Organic Act.\textsuperscript{106} The failure of the NPS or the Secretary of the Interior to invoke their authority to regulate external lands is evidence of both the tenuous nature of the authority and of the fact that even the 1978 Amendment does not offer any mechanism by which park officials can adequately respond to external threats.\textsuperscript{107}

2. Establishing Legislation

The Yellowstone National Park Establishing Act (hereinafter Establishing Act) does not provide any additional authority by which Yellowstone officials might regulate external lands in order to protect the Park.\textsuperscript{108} As in the case of the enabling legislation for most of the national parks, Congress did not consider the characteristics and connections of the entire ecosystem surrounding the Park in its establishing legislation.\textsuperscript{109} The establishing legislation is devoted to establishing the delineated boundaries of the Park, which reflects a concern for containing the Park within itself rather than an approach to ensuring Yellowstone's safety from external threats.\textsuperscript{110} The rest of

\begin{thebibliography}{11}
\bibitem{102} 487 F. Supp. 443 (D.D.C. 1980).
\bibitem{103} \textit{Id.} at 449-50.
\bibitem{104} Sierra Club v. Watt, 659 F.2d 203, 206 (D.C. Cir. 1981).
\bibitem{105} Beyond Their Borders, supra note 4, at 1199, 1201.
\bibitem{106} \textit{Id.} at 1202.
\bibitem{107} Keiter, \textit{supra} note 4, at 373. It is also possible that this failure is simply evidence of timid park administration. The Secretary of the Interior and the NPS may be shying away from using their authority to respond to external threats in light of political pressure in favor of development for mining and timber industries.
\bibitem{109} Keiter, \textit{supra} note 4, at 375.
\bibitem{110} See, \textit{e.g.}, 16 U.S.C. § 21 (park establishment); \textit{id.} § 21a (revision of park boundaries).
\end{thebibliography}
DEFINING THE MOTHER LODE

the establishing legislation focuses on the types of regulation that are to be implemented inside the park's boundaries.111

There have been instances in other parks where the establishing legislation has been changed to allow for more effective protection from outside threats. In 1965, Congress amended the Redwood National Park Act, allowing for expansion of that park to show the more accurate realities of the park ecosystem and authorizing the Secretary of the Interior to acquire land for a buffer zone to protect the park from logging occurring in close proximity to the park.112 Congress also amended the establishing legislation for Grand Canyon National Park, calling for expansion of that park and regulation of certain uses within that expansion.113 However, this change is not system-wide, and there has yet to be any extension of the Yellowstone National Park boundaries that would prevent it from being damaged by the New World Mine. The reliance on granting authority to protect parks on a threat-by-threat basis allows each park to tailor its solutions to the problems encountered. However, this requires congressional action every time a new problem arises from a different area around each park.

A more effective solution is to give the NPS the ability to develop a general buffer zone scheme on a park-by-park basis depending on the needs of individual parks. Rather than requiring congressional micromanagement for every threat to a park, buffer zones would allow the NPS to effectively protect precious resources through management of the buffer zones. Individual parks may need buffer zones for different reasons, and the buffer zones around different parks could be managed in such a way as to protect each parks' unique resources, as well as to allow for more local input into buffer zone development. The possibility of such legislation is appropriate for Yellowstone because of the urgency with which the Park must be protected. Another incentive for this approach is the reality that system-wide legislation for all parks will suffer progressively longer delays in Congress.

B. Constitutional Authority for Congress To Protect Public Lands

One of the leading legal scholars on national parks issues, Professor Joseph Sax, has explored the constitutional authority through which the Federal Government might regulate private lands adjacent

111. See, e.g., 16 U.S.C. § 22 (legislation regarding the ability to remove trespassers); id. § 26 (regulation of fishing and hunting in the park); id. § 32 (lease of lands within the park).
112. Keiter, supra note 4, at 375-76 & nn.119-21 (citing 16 U.S.C. § 79b(a) and (c) (1982)).
113. Id. at 376.
Understanding the constitutional limits here is necessary to ensure that the Organic Act or the Yellowstone Establishing Act can be expanded to effectively protect Yellowstone, and other parks, while still being consistent with our Constitution. It also addresses the property takings concerns that may underlie the failure of the NPS or the Secretary of the Interior to regulate lands outside the parks. This analysis is also an important element in determining how feasible it is to establish buffer zones outside Yellowstone.

1. The Property Clause

Professor Sax found sufficient authority for the Federal Government to regulate private lands under the Property Clause of the Constitution. A review of United States v. Alford reveals that Justice Holmes found the Property Clause to allow Congress to protect its national forests from fire even if that required extended protection onto private lands because “[t]he danger depends upon the nearness of the fire not upon the ownership of the land where it is built.” The power under the Property Clause to regulate private lands to protect public lands can also be found in Camfield v. United States, where the Supreme Court found that the Federal Government has the same rights as a proprietor of private lands in abating a nuisance to federal lands under nuisance law. These cases offer substantial evidence that, “[t]o the extent that the conduct in question can broadly be characterized as a common-law type of wrong—such as trespass or nuisance—or can be said to imperil the public lands, or to impede protection of those lands,” the Federal Government has the power under the Property Clause to regulate those private lands causing the harm.

Furthermore, in a more recent decision the Supreme Court has stated that Congress has the authority under the Property Clause to pass a statute that is designed “to achieve and maintain a thriving natural ecological balance on the public lands.” Although the Property Clause is not limitless under Kleppe, it is clear that Congress does

114. Sax, supra note 4.
115. Id. at 250-52. U.S. CONST. art. IV, § 3, cl. 2, states that “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States...”
117. Sax, supra note 4, at 251 (quoting Alford, 274 U.S. at 267).
118. 167 U.S. 518 (1897).
119. Id. at 518, 526; see also Sax, supra note 4, at 251-52.
120. Sax, supra note 4, at 251-52.
121. Kleppe v. New Mexico, 426 U.S. 529, 531 (1969) (quoting 16 U.S.C. § 1333(a) (Supp. IV 1970)); see also United States v. Lindsey, 595 F.2d 5, 6 (9th Cir. 1979) (holding that the Secretary of Agriculture can regulate against camping and campfires on state lands surrounded by National Forests: “It is well established that this [property] clause grants to
have the authority to protect public lands and interests from the activities of neighboring private property owners.\textsuperscript{122} The situation involving the New World Mine is impeding the Federal Government’s ability to protect Yellowstone, and Congress has the authority to protect those lands from Noranda’s activities.

2. The Commerce Clause

Regulation designed to protect the public lands from external threats would fall clearly within the rationale of the Commerce Clause as well.\textsuperscript{123} The Commerce Clause gives Congress the power to “regulate commerce . . . among the several states . . . .”\textsuperscript{124} Those people who visit the parks would be contributing substantially to interstate commerce, if only by virtue of their need to travel to and from the park.\textsuperscript{125} According to Professor Sax, any impairment of the land surrounding the parks, even if it was not directly affecting the park, would substantially impair the quality of interstate commerce, an area in which Congress has well established authority to act.\textsuperscript{126} This power seems to remain in the hands of Congress today even under the latest determination of Congress’ Commerce Clause authority in \textit{United States v. Lopez}.\textsuperscript{127}

In \textit{Lopez}, the Supreme Court recently defined the “outer limits” of what has been perceived as congressional authority run haywire. Declaring the Gun-Free School Zones Act of 1990 (hereinafter Gun-Free Act)\textsuperscript{128} unconstitutional, the majority said that the Commerce Clause authority is limited to the regulation of any activity that “substantially affects” interstate commerce.\textsuperscript{129} Regulation of activities that threaten the preservation of the national parks would probably still fit within this power. In \textit{Heart of Atlanta Motel, Inc. v. United States},\textsuperscript{130} the Court held that hotels and inns that cater to interstate guests fit within the “substantially affects” category.\textsuperscript{131} Yellowstone and the preservation of the resources of the Park, as well as all of the national parks, are designated to promote visitation by people all over the

\textsuperscript{122} Beyond Their Borders, supra note 4, at 1203.

\textsuperscript{123} Sax, supra note 4, at 255-58.

\textsuperscript{124} U.S. CONST. art. 1, § 8, cl. 3.

\textsuperscript{125} Sax, supra note 4, at 255-58.

\textsuperscript{126} \textit{Id.} (citing Morgan v. Virginia, 328 U.S. 373, 381 (1946) and Berman v. Parker, 348 U.S. 26 (1954)).

\textsuperscript{127} 115 S. Ct. 1624 (1995).


\textsuperscript{129} \textit{Lopez}, 115 S. Ct. at 1630.

\textsuperscript{130} 379 U.S. 241, 258 (1964).

\textsuperscript{131} \textit{Id.}
United States, resulting in a substantial effect on interstate commerce. Regulation of any activity that would damage the parks' resources is regulation of an activity that will substantially affect interstate commerce.

Justice Kennedy's concurring opinion in *Lopez* was concerned with the fact that the Gun-Free Act was intruding on an area of regulation traditionally left to the states. The Act was imposing on the states' ability to "exercis[e] their own judgment in an area to which States lay claim by right of history and expertise . . ." This restriction would certainly not cover the ability of Congress to protect the public lands. The states have never had the power to regulate federal lands and could not claim such an historical right in arguing that regulation for the protection of park resources is a violation of the Commerce Clause authority.

Professor Sax's evaluation of the Property and Commerce Clause authority of Congress to regulate for the protection of the public lands remains valid today. Congress has the authority to take action to protect the parks from external threats, even on private lands. But the power to regulate the lands outside of the national parks has not yet been granted to the NPS under the Organic Act or under any of the statutes establishing the individual parks, including Yellowstone. Congress' power to enact legislation in order to protect the national parks from external threats can be used to create buffer zone legislation to protect Yellowstone, and the other parks, from external threats like the New World Mine.

C. Implementing Buffer Zones Under Forest Service Management To Protect Yellowstone

There is another option that might be pursued for implementing buffer zones around Yellowstone. The New World Mine is also surrounded by federal forest and wilderness land. These federal lands are managed by the Secretary of Agriculture under the National Forest Management Act (NFMA) and the Wilderness Act of 1964. Under the Wilderness Act, the Secretary must manage those lands "for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment as wilderness . . . ." The NFMA also places several important requirements

132. *See Lopez*, 115 S. Ct. at 1634, 1641 (Kennedy, J., concurring).
133. *Id.*
136. *Id.* § 1131(a).
on the Secretary under which he or she must manage the National Forests.

The Secretary of Agriculture has managed the forests pursuant to the NFMA since 1976, when the Act substantially replaced the 1897 Organic Act.\(^{137}\) The NFMA requires the Secretary to coordinate land and resource management with local and state governments as well as other federal agencies.\(^{138}\) In addition, the Act explicitly requires public participation in the management planning process.\(^{139}\) Most importantly for the implementation of buffer zones, the NFMA demands that the Secretary use an interdisciplinary approach to management in order "to achieve integrated consideration of physical, biological, economic, and other sciences."\(^{140}\) The management of the forests must provide for multiple use and sustained yield in accordance with the Multiple-Use Sustained-Yield Act of 1960 (MUSYA),\(^{141}\) which requires administration for the following uses: range; timber; watershed; wildlife and fish; and outdoor recreation activities.\(^{142}\)

Each of these mandates give the Secretary of Agriculture sufficient authority to allocate the use of these forest lands for buffer zones. The wilderness-designated lands would have the additional caveat that they must be preserved and maintained "untrammeled by man."\(^{143}\) Activities in these areas, if included in the buffer zones, would be restricted according to their wilderness status, providing more than adequate protection to Yellowstone. The non-wilderness forest lands could be set aside to be buffer zone areas with the intent of protecting the Park's resources. The use of these forest lands can be limited to prevent those activities that might adversely affect Yellowstone. Forest lands could be used as buffer zones and could be regulated to prevent the roads and development that are essential to mining at the Crown Butte site.

One significant advantage of creating buffer zones on forest lands around the Park and maintaining their management under the Secretary of Agriculture and the Forest Service is that doing so would implement a cooperative structure, which is an important element in effective buffer zone designation and ecosystem management. Main-

137. GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 641 (3d ed. 1992). The Organic Act referred to here set the general guidelines for the administration of the national forests, 16 U.S.C. §§ 473-482 (1994), and is a different congressional act from the previously discussed National Parks Service Act, supra Part III.A.1.


139. Id. § 1604(d).

140. Id. § 1604(b).


142. Id. § 1604(e).

143. Id. § 1131(c).
taining NPS authority over the Park and establishing Forest Service authority over the buffer zones that protect the Park may help stimulate communication and cooperation between government agencies. Since the NPS and the Forest Service have different interests and skills, their cooperation may help solve difficult issues encountered in creating buffer zone areas. Also, the MUSYA and NFMA mandates require the Secretary of Agriculture and the Forest Service to deal with the effects and coordination of many different uses. The NPS, operating under the Organic Act, has little experience with this diverse style of management, which is an integral part of buffer zone management. Finally, the coordination of the two different agencies would diversify authority, which may be important if the political winds change and the NPS reinterprets its mandate in such a way that the buffer zones are no longer focused on protecting the Park's resources.

There are also significant reasons for not attempting a coordinated effort between the Forest Service and the NPS to implement buffer zones in the Yellowstone area. The two agencies attempted such an approach in the "Vision for the Future" document for the Greater Yellowstone Ecosystem in the late 1980s. This effort failed miserably in trying to create an effective ecosystem management approach to protect the Yellowstone Ecosystem. Foremost among the reasons for the "Vision" document's failure was the fact that local communities were not included in the decisionmaking process. Effective buffer zones management would require such involvement.

In addition to this bad precedent, there are other concerns that complicate such an integrated approach. The most significant of these concerns is that the Forest Service does not manage the non-wilderness forest lands under a preservation mandate like the Organic Act. Eventually, the Forest Service may be subject to political pressures to incorporate some of its buffer zones land into the more consumptive uses mandated under the MUSYA and NFMA. Without an alteration to the MUSYA and NFMA to specifically account for buffer zones management to protect adjacent parks, there is no guarantee of successful protection through buffer zones. The NPS already works under a preservation mandate. Buffer zones must be designed to ensure the preservation of the park resources; any other consideration is secondary. Management of the buffer zones for this priority is consistent with the mandate already placed on the NPS. Clearly, the NPS can benefit by consulting the Forest Service and all other agencies in

144. See id. §§ 529, 1600.
145. Keiter & Boyce, supra note 82, at 394.
146. Id.
its management of the buffer zones, but the NPS is the most appropriate agency to manage buffer zones for protection of the parks.

The most successful approach to buffer zone implementation is congressional action giving the NPS this authority. Without this extension of authority, a buffer zone management scheme is impossible to implement. Buffer zones inherently require that land outside of the park boundaries be regulated with sufficient authority to ensure that no activities that cause damage to the park resources occur. Without buffer zone protection, the New World Mine (or some future proposal) will surely cause damage to Yellowstone. The following Part discusses another impetus for congressional action to create buffer zones, the World Heritage Convention, which is particularly important in providing a solution to the problem near Yellowstone.

IV. THE WORLD HERITAGE CONVENTION: INTERNATIONAL COMMITMENT TO PRESERVATION OF YELLOWSTONE NATIONAL PARK AND A REASON TO ESTABLISH BUFFER ZONES AROUND YELLOWSTONE

In November 1972, the world made a commitment to ensure the protection of its natural and cultural treasures. The Convention Concerning the Protection of World Cultural and Natural Heritage (the "World Heritage Convention") was adopted at the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1972 and came into force on December 17, 1975. On December 7, 1973, the United States became a member of the World Heritage Convention and established its international commitment to do its utmost to ensure "the identification, protection, conservation, preservation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 [of the World Heritage Convention] and situated on its territory ...." The purpose of the World Heritage Convention (hereinafter the Convention) was to provide for an administrative, legal, and financial framework for UNESCO and other international organizations to protect sites of natural and cultural heritage around the world.


147. SIMON LYSTER, INTERNATIONAL WILDLIFE LAW 208 (1985).
149. LYSTER, supra note 147, at 209.
in Danger, and a World Heritage Fund to help it achieve its goal.150 The World Heritage List (hereinafter the List) is made up of those sites of cultural and natural heritage around the world that meet the criteria to be placed on the List.151 The other list, the List of World Heritage in Danger (hereinafter the Danger List), was created by the Convention to include those World Heritage sites which are in serious and specific danger from either manmade or natural perils.152

In addition to administering membership on the two lists, the World Heritage Committee is responsible for the World Heritage Fund (hereinafter the Fund). The Fund was established to aid the Convention’s protection of World Heritage sites and is composed of compulsory and voluntary donations from parties to the Convention and other contributions or gifts.153 The compulsory donations are to be given by the member parties every two years in an amount that is tied to a certain percentage of their regular contributions to UNESCO, but never more than one percent of that total amount.154

Selection to the List is based on certain criteria and is dependent on the consent of the state in which the area is located.155 The listing criteria for natural areas includes the value of site; “only physical areas of outstanding universal value” qualify.156 A second criterion for selection is the “integrity” of the site, a term defined in the Operational Guidelines of the Convention. The measurement of integrity is primarily based on the conditions that the site be large enough to include the key components of the process it represents, and that the site be self-perpetuating.157 Significantly, the Operational Guidelines require that sufficient buffer zones should be established around the site and protected whenever necessary to maintain the integrity of the site.158 A third criterion is the state of protection of the area.159 There is no requirement that the area be an established national park or nature preserve for membership on the List, although when proposing a site, a plan of action for protecting the site must accompany the nomination.160 Finally, the Operational Guidelines state that ef-

150. Id.
151. See World Heritage Convention, supra note 148, art.11(2).
152. Id. art. 11(4).
153. Id. art. 15(3).
154. Id. art. 16(1).
155. Id. art. 11(2),(3).
156. LYSSTER, supra note 147, at 213 (citing World Heritage Convention, Art. 2) (emphasis in original).
158. Id.
159. Id.
160. Id. at 216.
forts should be made to ensure that there is no significant bias or disparity between cultural and natural sites on the List.161

The sites that are on the List are also eligible for nomination to the Danger List if the sites are placed in significant or serious peril. These dangers include "large-scale public or private projects or rapid urban or tourist developments."162 The properties on the Danger List are those sites for which conservation will entail major operations and for which assistance under the Convention has been requested.163

Yellowstone National Park was one of the first four areas in the world to be placed on the List.164 The listing of Yellowstone is evidence of its renowned status as one of the most magnificent natural and cultural sites in the world. In December of 1995, Yellowstone was placed on the Danger List by the World Heritage Committee due to the threats from the New World Mine, among other concerns.165 Yellowstone's inauguration to the Danger List made it the second site in the United States to receive such a dubious honor. The Everglades was the first site placed on the Danger List in 1993.166 The concern over the New World Mine has been noticed by the international community. The World Heritage status of the Park offers new incentives and commitments on the part of the United States government to protect Yellowstone. The Convention, to which the United States is a party,167 identifies buffer zones as an important measure of protection for World Heritage sites.168

Articles 4 and 5 of the Convention set out the obligations of the individual states169 under the Convention. Article 4 requires that the individual member "do all that it can [to identify, protect, conserve, preserve and transmit to future generations the cultural and natural

161. Id. at 217.
162. World Heritage Convention, supra note 148, art. 11(4).
163. Id.
165. Brooke, supra note 10, at A22. The Committee was also concerned with potential threats to preserved geysers in the Park from energy developers and the invasion of lake trout which threatened to seriously damage Yellowstone's wild fish populations. Wilkinson, supra note 7, at 40.
166. Wilkinson, supra note 7, at 38.
167. The United States ratified the treaty on December 7, 1973.
168. See Lyster, supra note 147, at 215 (citing Operational Guidelines, para. 24).
169. More than 100 countries around the world are signatory members of the World Heritage Convention, including Australia, China, France, India, Mexico, Nepal, Sweden, the former Soviet Union, and the United Kingdom of Great Britain and Northern Ireland. Masterworks of Man and Nature, supra note 148, at 427-28.
heritage indicated by the Convention]... to the utmost of its resources...”170 Article 5 of the Convention requires the individual parties to do specific acts “[t]o ensure that effective and active measures are taken... [to protect the World Heritage].”171 In addition, Article 6(2) requires the members to assist other states in upholding their commitment to the Convention, and Article 6(3) imposes a duty on states not to “take any deliberate measures which might damage directly or indirectly” any site outside of its territory.172 In spite of these duties, there is no enforcement mechanism to ensure that member countries comply with the Convention.

The lack of enforcement mechanism, however, does not limit the effectiveness with which Congress might use the World Heritage Convention to implement buffer zone protection in Yellowstone. The placement of the Everglades ecosystem on the Danger List in 1993 provided an important impetus for Interior Secretary Bruce Babbitt and Florida sugar cane growers to comply with an agreement to restore the precious area.173 Yellowstone is a World Heritage site in desperate need of buffer zone protection. The World Heritage Committee’s Operating Guidelines call for the establishment of buffer zones around any World Heritage site that they would help conserve. Congress has the constitutional authority to protect the national parks from external threats.174 Now is the time for Congress to act to protect one of the world’s greatest natural wonders.

A significant advantage of using the World Heritage status to implement buffer zones and other conservation actions around the Park is the availability of funds through the World Heritage Fund. The Fund is set aside to help further the purposes of the Convention. Certainly one high priority purpose is the protection of Yellowstone. The Fund was established in order to help secure the “protection, conservation, preservation or rehabilitation”175 of sites on the List and the Danger List. Specifically, the Fund can be used to undertake emergency measures to protect the site or to draw up an emergency plan for protecting the site.176 Those sites that are already on the List or the Danger List have priority for obtaining assistance from the Fund.177

Buffer zones are an effective solution to the problem of the New World Mine and Yellowstone. The implementation of such a protec-

170. World Heritage Convention, supra note 148, art. 4.
171. Id. at art. 5.
172. Id. at art. 6(3).
173. Wilkinson, supra note 7, at 38.
174. See Sax, supra note 4; see also supra notes 95-102 and accompanying text.
175. World Heritage Convention, supra note 148, at art. 13(1).
176. Lyster, supra note 147, at 232 (citing Operational Guidelines, para. 62).
177. Id. at 234 (citing Operational Guidelines, para. 78).
tive measure under the impetus and support of the World Heritage Convention and via well-established constitutional authority provides a mechanism under which Congress can grant the NPS authority to protect Yellowstone from external threats.

V.

CONCLUSION: A PUSH IN THE RIGHT DIRECTION FROM THE WORLD

The World Heritage status of Yellowstone National Park, its own separate establishing act, and the external threat of the New World Mine make Yellowstone a perfect candidate for the implementation of buffer zones. A congressional amendment of the Yellowstone Establishing Act would be within the property and commerce clause authority of Congress and would fulfill the United States' moral and ethical, if not legal, obligation to the world under the World Heritage Convention. A buffer zone management scheme that works with local communities and their economic concerns while focusing on the preservation of Yellowstone is an effective solution to the many concerns involved.

The use of buffer zone management and the World Heritage Convention to protect Yellowstone from external threats such as the New World Mine would be a movement away from the traditional management approach in parks. This trend is not something new, however. The NPS and the Forest Service have recognized the need for a change from their traditional approaches and have started integrating new approaches into many of their policy decisions. A movement towards an ecosystem management approach is essential for the continued protection of our national treasures. However, this trend, particularly the buffer zone approach, has been met with great resistance on the part of local citizens around the parks. Buffer zones and ecosystem management can, however, be implemented in a way that will quell many of those fears. The Yellowstone-New World Mine controversy presents Congress with an excellent opportunity to do so.

178. The placement of Yellowstone on the List does have its critics, however. One of the most outspoken is Montana Senator Conrad Burns, who asked: "Why should we allow the U.N. to pick and choose when these [mining] laws and rules should be allowed to work?" Wilkinson, supra note 7, at 39. Senator Burns' concerns about international intervention in the New World Mine conflict have been rather eloquently and sufficiently rebuffed by Bob Ekey, spokesman for the Greater Yellowstone Coalition: "If Sen. Burns is so concerned about international bodies coming in and hijacking Yellowstone, he ought to be asking himself why he is so eager to let a Canadian mining company come into this country and exploit a law that puts Yellowstone at risk." Id.


Local citizens will have more input under a buffer zone management scheme. This is not an attempt by a far off, centralized, federal government to make commands as to how these people are allowed to live. Rather, it is a system designed to get agencies and citizens to work together to make decisions about how to protect important resources and find sustainable economic activities. The decisionmaking is controlled by the park manager because the first priority is the protection of the park’s resources, but buffer zones require that citizens be involved in the decisionmaking. By virtue of some type of thirty/fifty funds the people in these communities will have support for finding new economic opportunities. It is also possible to use these funds to help acquire more private land in order to protect Yellowstone.

Buffer zones do not stop all development; there is no per se prevention of any activity in buffer zones. If it is certain that the New World Mine is developed in such a way as to cause no damage to Yellowstone resources, then it might even be allowed in the buffer zones. One step in this direction would be for Noranda to find some other process for disposing of the mine tailings; the proposed impoundment is one of the greatest sources of controversy. In fact, implementation of buffer zones might provide incentives for mining companies to develop inexpensive, lower impact mining processes, and provide the lucky inventor with an economic windfall. If the minerals in these buffer zones are so important and valuable, some entrepreneur will certainly have the initiative to find a cost-effective method of mining, in spite of any buffer zone restriction.

Buffer zones add flexibility to public land management around national parks. The bill that was proposed by Congressman Richardson called for the creation of a National Recreation Area around the New World Mine. At the moment this bill awaits its day before the House Resources Committee, but it is most likely doomed and is a less effective protection proposal than buffer zones. House Bill 1846 does not permit any mining in the proposed Yellowstone Headwaters National Recreation Area. Such an approach can help save Yellowstone from the New World Mine, but it is bound to meet with vehement resistance from the local citizens and the mining companies that do provide society with an important commodity. Buffer zones would allow mining in mineral rich areas around the Park so long as they do not damage Yellowstone’s resources.

The most significant difference between House Bill 1846 and a buffer zone approach is that Mr. Richardson’s bill is another quick fix solution to one threat. It may, if passed into law, prevent the New World Mine from being developed in such a way as to cause no damage to Yellowstone resources, but it is bound to meet with vehement resistance from the local citizens and the mining companies that do provide society with an important commodity. Buffer zones would allow mining in mineral rich areas around the Park so long as they do not damage Yellowstone’s resources.

181. See supra note 30.
World Mine and other destructive mines, but it does not provide a solution to other kinds of external threats to Yellowstone. A buffer zones management scheme would allow the Yellowstone managers to effectively preserve the Park's resources from future developing threats from outside activities. If Yellowstone is truly going to be preserved for present and future generations, then the people responsible for protecting the Park must be given the ability to perform their duty.

House Bill 1846 and other restrictive approaches also disregard the concerns of the citizens around the Park. It will be very difficult to protect Yellowstone by simply expanding the Park's preservation boundaries. Buffer zones can be implemented in a way that will ensure that fairness, communication, and cooperation become the name of the game in preserving our national treasures. In implementing buffer zones, it is important to stress that the idea is both to preserve the protected resources and to ensure sustainable development.

The World Heritage Convention advocates that buffer zones be used to protect the sites that it designates as the most valuable sites in the world. The United States gave the world the idea of national parks.\(^{183}\) Hopefully, the United States can now accept a gift in return. The World Heritage Convention, through the use of buffer zones, offers Congress an effective and innovative way to protect Yellowstone from the New World Mine. It allows us to say to the rest of the world that we recognize the true value of our national parks concept, and we are committed to maintaining our wealth in natural areas.

\(^{183}\) See supra note 2 and accompanying text.