June 1987

Glacier National Park and Its Neighbors: A Study of Federal Interagency Relations

Joseph L. Sax

Robert B. Keiter

Follow this and additional works at: http://scholarship.law.berkeley.edu/elq

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/elq/vol14/iss2/1

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z389VSP

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcerawlaw.berkeley.edu.
Glacier National Park and Its Neighbors: A Study of Federal Interagency Relations

Joseph L. Sax*
Robert B. Keiter**

TABLE OF CONTENTS

Introduction .............................................. 208
I. External Threats to Glacier National Park ................ 211
II. Park Protection Strategy .................................. 217
   A. An Early Surprise: The Unimportance of Law ........ 217
   B. Glacier As A Sacred Cow ............................ 222
      1. The Park's Moral Capital .......................... 222
      2. Glacier's Unexpended Moral Capital ............... 223
   C. Some Preliminary Observations ....................... 225
III. Glacier and Its Two National Forest Neighbors ............ 227
   A. The Flathead National Forest .......................... 227
      1. An Emerging Sensitivity to Glacier ................. 227
      2. The Primacy of Managerial Discretion ............. 229
      3. Glacier's Tactics: Three Case Studies ............ 230
         a. Oil and Gas Development ........................ 231
         b. Paving the North Fork Road .................... 233
         c. The Cabin Creek Mine .......................... 237
   B. The Lewis & Clark Forest ............................. 240
      1. The Ineffective Tactic of Silence ................ 241
      2. Is Regionalism Inevitable? ......................... 244
IV. Drawing Up A Balance Sheet ................................ 247
   A. Is Glacier's Position Uniquely Strong? .............. 247
   B. An Evaluation of Glacier's Strategy .................. 249
      1. Short-Term: Rearguard Actions ..................... 249
      2. Long-Term: A Vision of the Future ............... 253
         a. The Biosphere Reserve Concept ................ 253

Copyright © 1987 by Ecology Law Quarterly

* Professor of Law, Boalt Hall School of Law, University of California, Berkeley; J.D. 1959, University of Chicago; A.B. 1957, Harvard College.

** Professor of Law, University of Wyoming; J.D. 1972, Northwestern University; A.B. 1968, Washington University.
INTRODUCTION

This Article grew out of simple curiosity about how neighboring federal agencies resolve land use conflicts among themselves—a practical and difficult subject to which little attention has been given.¹ Most of the western national parks are bordered by federal lands administered by the United States Forest Service and the Bureau of Land Management (BLM)—agencies with multiple use mandates including mining, timber harvesting, grazing, and oil and gas development.² Activities on those neighboring lands frequently threaten harm to nearby parklands managed by the United States National Park Service for conservation of natural conditions.³

At one time, boundary lines all but defined the way public lands were managed. Foresters pursued their mission within the national forest limits and, across the border, national park officials prosecuted their quite different mission. Neither group paid much attention to what happened beyond their boundary line. This arrangement stirred little controversy in an era when less was known about wildlife management and when impacts on a common watershed or airshed, then less well understood, seemed less menacing. But modern environmental knowledge and concerns increasingly reveal conventional borders to be dangerous irrelevancies, mocked by acid rain and the perils that confront migratory


³. For background, see THE CONSERVATION FOUNDATION, NATIONAL PARKS FOR A NEW GENERATION: VISIONS, REALITIES, PROSPECTS 141 (1985); see also infra note 4 (park oversight hearings).
wildlife. Because traditional land management builds fundamentally on the idea of a defined boundary—good fences make good neighbors—and rights and responsibilities are defined with respect to such boundaries, the question arises: What happens as the boundary concept ceases to be functional?

Congress has been asking this question in oversight hearings on national parks, but so far has obtained only vague and general answers. Traditionally, federal agency neighbors had no parallel to the protection that the common law of nuisance gives private land owners, who—unlike federal land managers—do sue each other. Congress has usually dealt with its land agencies as if they were islands, each insulated from the other. Indeed, the island is one of the most familiar metaphors for the national parks: islands of preservation, of beauty, and of solitude. As a result, on only a few occasions has Congress enacted legislation addressing the problem of incompatible missions among adjacent federal land agencies. Despite repeated urgings in recent years to enact new legis-

4. See, e.g., Greater Yellowstone Ecosystem: Oversight Hearing Before the Subcomm. on Public Lands and the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs, 99th Cong., 1st Sess. 23, 25, 28, 59 (1985) [hereinafter Yellowstone Ecosystem Hearing]; see also To Reform the Federal Onshore Oil and Gas Leasing Program, Hearings on H.R. 1960, H.R. 4741 and H.R. 4826, Before the Subcomm. on Mining and Natural Resources of the House Comm. on Interior and Insular Affairs, 99th Cong., 2nd Sess. (1986) [hereinafter Onshore Leasing Hearing] (oversight hearings to reconcile oil and gas leasing on public lands with the goals of environmental protection); UNITED STATES GEN. ACCOUNTING OFFICE, GAO/RCED-87-36, PARKS AND RECREATION, LIMITED PROGRESS MADE IN DOCUMENTING AND MITIGATING THREATS TO THE PARKS (1987) [hereinafter GAO REPORT].

5. See Note, Judicial Resolution of Inter-Agency Legal Disputes, 89 YALE L.J. 1595 (1980) (urging that suits should be permitted).


8. See, e.g., 16 U.S.C. § 230a(b) (1982) (establishing a park protection zone around Jean Lafitte National Historic Park); id. § 410ff-4 (requiring comment and consideration for a "proposed Federal or federally assisted undertaking... within or adjacent or related to the [Channel Islands National] park"); id. § 410ii-5(b) (mandating protection of outlying sites at Chaco Culture National Historic Park); 43 U.S.C. § 1636 (1982) (making federal benefits available to Alaskan landowners who agree to manage their land in a manner consistent with federal management of adjoining or "directly affect[ed]" federal land, pursuant to Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3101-3233 (1982 & Supp. III 1985)). The Federal Water Pollution Control Act gives the Environmental Protection Agency authority to veto a Corps of Engineers Permit. 33 U.S.C. § 1344(c) (1982); see Newport Galleria v. De-
tion to protect parks against external threats, Congress has so far declined to do so.\footnote{9} The Park Service, which presumably would benefit from such laws, asserts that no new legislation is needed, even though it considers the national parks to be seriously imperilled by activities on neighboring lands.\footnote{10}

In light of this background, we wondered how park officials dealt with incompatible activities on nearby federal lands.\footnote{11} It seemed to us likely that some basic and important changes were taking place, and we set out to discover them. In 1980, the Park Service formally recognized

\begin{footnotesize}
\begin{enumerate}
\item For the current policy of the Department of the Interior regarding reconciling inter-agency conflicts over external threats, see Report of the Subgroup of the Park Protection Working Group (Submitted to the Under Secretary of the Interior) (June 12, 1985) (recommending interagency notification of ongoing planning activities, good faith efforts to avoid conflicts, increased formal and informal communications among land managers, and improved personnel management to encourage anticipation, avoidance, and resolution of conflicts). Interior's policy has been called into question. See, e.g., Letter from Rep. Bruce Vento, Chair of the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs, to Ann McLaughlin, Under Secretary of the Interior (Oct. 9, 1985) (Commenting on the Working Group proposal, Rep. Vento said, "We are very disappointed with what we believe to be ineffective and inappropriate results.").
\end{enumerate}
\end{footnotesize}
the adverse effects on parks of external activities by issuing a *State of the Parks* report, which enumerated and categorized threats to every unit of the national park system.\(^\text{12}\) We chose Glacier National Park for this case study\(^\text{13}\) because it reported more threats than any other major park\(^\text{14}\) and because of its physical setting, the diversity of its neighbors, and the issues presented by activities on neighboring lands.\(^\text{15}\) In this Article, we describe some of what we learned about Glacier's relationships with its neighbors, we evaluate the Park's success in influencing external activities, and we draw some broader lessons that seem relevant to the park protection debate.

## I EXTERNAL THREATS TO GLACIER NATIONAL PARK

A wilderness-like buffer of undeveloped lands surrounds Glacier, but there are pressures to develop these areas. The park is bordered to the south and west by two national forests—the Flathead and the Lewis & Clark. Each is largely leased for oil and gas development and subject to extensive timber harvesting.\(^\text{16}\) Glacier's western border is delineated

---


\(^{13}\) We conducted formal and informal interviews with various individuals in May and June 1986, and again in late July and August 1986, at Glacier National Park; Flathead National Forest; Lewis & Clark National Forest; Waterton National Park (Canada); Bureau of Land Management Area Office in Great Falls; Kalispell, Polebridge, Choteau, and Missoula, Montana; and Yellowstone National Park, Wyoming.

The names and associations of our interviewees are listed in the Appendix at the end of this Article. A number of interviewees did not wish to be identified, so we usually refer to our sources generally—for example, as "a BLM official" or "a Glacier employee." Sometimes we simply say, "We were told ... ." We have in our files detailed notes of all our interviews.

We also reviewed a great deal of documentary materials, which are in our files or available from the agencies.

\(^{14}\) Strictly speaking, two national recreation areas—Chattahoochee River and Cuyahoga Valley—and Prince William Forest Park, with 64, 58, and 57, respectively, reported more than Glacier's 56 threats. *State of the Parks 1980*, supra note 12, at 52.


\(^{16}\) Both forests have issued final plans that set out management directions for the next 10-15 years. Flathead Nat'l Forest, Forest Serv., U.S. Dep't of Agric., Forest Plan (1985) [hereinafter Flathead Forest Plan]; Lewis & Clark Nat'l Forest, Forest Serv., U.S. Dep't of Agric., Forest Plan (1986) [hereinafter Lewis & Clark Forest Plan]. These plans are required by the National Forest Management Act (NFMA). 16 U.S.C. § 1604(a) (1982). They are accompanied by Environmental Impact Statements (EIS's), as required by 16 U.S.C. 1604(g). *See Flathead Nat'l Forest, Forest Serv., U.S. Dep't of Agric., Environmental Impact Statement on the Flathead National Forest*
by the North and Middle forks of the Flathead River, both of which are "designated" under the Wild and Scenic Rivers Act.17 "Designation" requires that the river's watershed and shoreline be maintained in a "largely primitive" condition,18 a mandate that is not easily achieved on the forest side where commercial timber harvesting is permitted.19

Glacier's northern border is the international boundary with Canada. North and west of Glacier, in Canada, but also within the watershed of the Flathead River, is the site of a proposed surface coal mine known as Cabin Creek. Lying west of Glacier in the North Fork region around Polebridge is largely undeveloped private land with considerable development potential. A state forest, managed under state law for maximum economic return,20 also borders Glacier just across the Flathead River. On the park's southern boundary lie a highway, a railroad track, and a strip of private lands.

The Blackfeet Indian Reservation abuts the park on the east. The reservation, severely depressed economically and suffering from high unemployment, is divided on the issue of development—one faction wishes to develop the land, others desire to preserve it.21 Relations between the Blackfeet and Glacier have long been strained, we were told, largely because the Blackfeet see adjacent lands within the park as an extension of their traditional tribal domain. A typical source of friction is cattle that wander from the reservation onto parklands and compete with park wildlife. The Blackfeet also resist interference by neighboring federal officials in decisions relating to tribal economic development. One result is the presence of oil and gas development on the reservation very near to Glacier's border. The Blackfeet claim rights of use under an 1896 agreement both in the park and in areas of the Lewis & Clark Forest, where oil and gas exploration is proposed.22


19. See infra note 43.

20. MONT. CODE ANN. § 77-1-601 (1985) (stated policy for state land is to "[s]eek the highest development of state-owned lands in order that they might be placed to their highest and best use and thereby derive greater revenue").

21. Because these factions alternately capture control of the Tribal Council in annual elections, park and forest officials told us that they are often frustrated by inconsistent, shifting positions on resource issues of mutual concern.

22. Agreement with the Indians of the Blackfeet Indian Reservation in Montana, Sept. 26, 1895, ch. 398, § 9, 29 Stat. 321, 353-54 (1896) [hereinafter Blackfeet Treaty], quoted in 1
THE GLACIER NATIONAL PARK REGION

(Source: United States Department of the Interior, National Park Service, Glacier National Park Statement for Management (Nov. 1985).)
Glacier is home to the grizzly bear and the gray wolf,\textsuperscript{23} as well as other wildlife species that roam between the park and wilderness areas in the two adjoining forests,\textsuperscript{24} over lands that are valuable for timber harvesting and oil and gas prospecting. The grizzly and gray wolf are "listed" animals under the Endangered Species Act (ESA),\textsuperscript{25} which is administered by the United States Fish and Wildlife Service (FWS). The FWS is responsible for initially determining which species are to be listed as threatened or endangered\textsuperscript{26} and then for reviewing federal agency activities that might adversely affect protected species.\textsuperscript{27} Any proposed federal activity, wherever conducted, that poses a possible threat to the survival of a listed species or its critical habitat can go forward only if the proponent can obtain a so-called "no jeopardy" opinion from the FWS.\textsuperscript{28} Thus, as long as some park species are listed, the ESA occupies a powerful place in the arsenal of park protection.

At Glacier, the grizzly bear makes the ESA an influential but tenuous weapon. The grizzly is perhaps the most popular of all protected animals, and every developmental decision in the region inevitably raises the question: What will it do to the grizzly? Because the grizzly’s habitat radiates out broadly beyond Glacier, and because bear experts view any additional human impact as putting stress on grizzly populations, the prospect of a jeopardy opinion serves as a potential veto on any

\textsuperscript{23} \textsc{Lewis & Clark Plan EIS, supra} note 16, at 3-4 to 3-5. The current Blackfeet position is set out in 2 \textsc{Lewis & Clark Plan EIS, supra} note 16, at app. F-109 to F-119.

\textsuperscript{24} \textsc{National Park Serv., U.S. Dep’t of the Interior, Draft Land Protection Plan: Glacier National Park 7-8 (1985)} [hereinafter \textit{Glacier Draft Land Protection Plan}].

\textsuperscript{25} 16 U.S.C. §§ 1531-1543 (1982 & Supp. III 1985); 50 C.F.R. § 17.11, at 74, 82 (1986); \textit{see} \textit{Glacier Draft Land Protection Plan, supra} note 23, at 7. Two other listed species, the bald eagle and the peregrine falcon, also inhabit or pass through Glacier. \textit{Id.} at 8.

\textsuperscript{26} 16 U.S.C. § 1533.

\textsuperscript{27} \textit{Id.} § 1536(a).

\textsuperscript{28} \textit{Id.} The Endangered Species Act provides that every federal agency is required to consult with the Secretary of the Interior (Fish and Wildlife Service) to assure that none of its actions is likely to jeopardize the continued existence, or adversely modify or destroy the habitat, of an endangered or threatened species. \textit{Id.} § 1536(a)(2). The Secretary, following such consultation, is required to provide "a written ... opinion ... detailing ... [i]f jeopardy ... is found." \textit{Id.} § 1536(b)(3)(A). That is what is familiarly known as the jeopardy opinion. Because the ESA prohibits action that jeopardizes listed species, a jeopardy opinion operates as a veto on the proposed action. The statute does provide a procedure by which exemptions may be obtained from a jeopardy opinion. \textit{See id.} § 1536(e)-(k).
developmental activity in and around the park. So long as the bear remains listed under the ESA, it will be (at least in law) protected from threats to its survival and to the integrity of its habitat. But species can be "delisted" from the ESA if their survival is no longer threatened, and this may happen to the grizzly in the Glacier ecosystem.29

In this Article, we focus primarily on Glacier's relations with its two principal fellow-agency neighbors—the Flathead and Lewis & Clark National Forests.30 These forests are managed by different types of supervisors with quite different perspectives on their relationship to Glacier. The Supervisor of the Flathead is a young, Ivy-League-educated landscape architect.31 The Lewis & Clark Supervisor is from the old school, which is strongly oriented toward traditional commodity uses of the forest.32

The relationship between the Forest Service and the Park Service is a crucial one because national forest lands adjoin or surround much of the national park lands in the American West. Despite their proximity, forests and parks traditionally have been managed independently (with notable exceptions such as cooperative law enforcement or fire management). For example, forests sometimes have been clearcut right up to the boundary line of a park. Forest officials also have assumed in their planning that they shoulder no responsibility for the park next door, despite a shared river or viewscape, or wildlife that freely crosses boundary lines.

29. The United States Fish and Wildlife Service (FWS) cooperates with the Montana Department of Fish, Wildlife, and Parks (FWP) on wildlife matters, and the FWP is presently investigating whether the grizzly bear should be "delisted" from the Endangered Species Act (ESA) as a threatened species in the Glacier region. See MONTANA DEP'T OF FISH, WILDLIFE & PARKS, FINAL PROGRAMMATIC EIS: THE GRIZZLY BEAR IN NORTHERN MONTANA, SUMMARY 29 (1986) [hereinafter MONTANA FINAL PROGRAMMATIC EIS] ("The review in this EIS indicates that the continued classification as threatened [in the northern continental divide ecosystem] needs to be evaluated and the possibility of delisting explored."). Several bear experts and advocates to whom we talked tend to favor delisting, seeing delisting as a measure of the Act's success. But, we were told, environmental lawyers doubt it will occur soon, or they are preparing to fight delisting on the ground that protection under the ESA is essential to the grizzly's survival. For a sense of the local situation, see Robbins, A Town Divided By The Grizzly, N.Y. Times, Aug. 31, 1986, § 6 (Magazine), at 22.

Other federal and state agencies also figure in development issues. Subsurface mineral development (such as oil drilling) on national forest lands is under the authority of the federal Bureau of Land Management. 43 C.F.R. §§ 3100.0-3, 3101.1-2, 3101.7 (1986). See generally, Wilkinson & Anderson, Land and Resource Planning in the National Forests, 64 OR. L. REV. 1, 242-72 (1985). An important controversy over proposed road paving in the Flathead National Forest involved the Federal Highway Administration as well as Flathead County, which maintains the road. See infra notes 107-26 and accompanying text.


31. An interview with the Flathead Supervisor, Edgar B. Brannon, appears in the N.Y. Times, Apr. 16, 1986, at A-22, col. 1; see also infra notes 70-71 and accompanying text.

32. See infra notes 141-43 and accompanying text.
Given the proximity and uncoordinated management of forest and park lands, one might expect frequent transboundary conflicts. However, until recently such conflict has been relatively uncommon because much of the forest land is remote and has lain largely undeveloped for many years. Nevertheless, there has been a long, deep rivalry between the two agencies, arising in part from the fact that conservationists persuaded Congress to save some of the most spectacular forest land from the forester's axe by turning it over to the parks. The two agencies also embody the two competing branches of the conservation movement—utilitarianism and preservation.

In order to study relations between Glacier and its Forest Service neighbors, we decided to look at the park’s responses to threats emanating from neighboring lands. We asked Glacier officials to identify what they considered to be the most serious of the fifty-six external threats that they had reported in 1980. They named: oil and gas development in both of the national forests, on state land, and on the Blackfeet Reservation; timber harvesting, especially clearcutting in Canada to salvage lumber subjected to beetle infestation; the proposed Cabin Creek coal mine in Canada; and developmental activity, such as road improvement, in the remote North Fork area of the Flathead Basin. Glacier officials feared that oil and gas activity would intensify human impact in critical corridors for park wildlife, directly through mineral work itself and indirectly by increasing road access for hunters (especially poachers) and recreationists. The Cabin Creek mine and stream siltation from timber har-

---

34. For discussion, see Sagoff, Where Ickes Went Right or Reason and Rationality in Environmental Law, 14 Ecology L.Q. 265 (1987).
35. Not all the reported threats were external, but external threats were by far the most common ones. State of the Parks 1980, supra note 12, at 4.

Park officials talked almost exclusively about potential harm to Glacier, no doubt because we indicated an interest in their efforts to protect the park from current threats. This focus on potential threats does not mean that Glacier has so far escaped actual harm. In fact, Glacier officials have learned to accept a certain amount of damage which they have been unable to control. For example, we were told that the most serious recent pressure arose from large clearcuts in the Kishenehn drainage in Canada designed to harvest beetle-infested trees before they lost their economic value. However, we were also told that the park has not yet been able to document any serious impact from stream sedimentation related to the logging, which began in 1980-1982 and still continues to some extent. Another example, considered under control, is a long-standing controversy over fluoride emissions from a nearby aluminum refining plant. See Keiter, supra note 6, at 379. Other ongoing problems include trespassing cattle from the Blackfeet Reservation (which compete with park wildlife and transport an exotic weed on their hoofs), wildlife poaching from nearby access roads installed to promote oil exploration, and sulphur dioxide emissions from Canadian wells north of Glacier. By far the greatest effect on the historic natural environment, a park scientist told us, comes from suppressing fires that traditionally burned in neighboring forests. Nevertheless, there are not yet reports of grave impairment to Glacier’s resources, and Glacier may be the most ecologically intact national park in the contiguous forty-eight states.
vesting could exacerbate water pollution. Timber harvesting creates unsightly cutover areas that are visible from the park. In addition, Glacier officials worry that a proposal for paving a road parallel to the North Fork of the Flathead River is the first step toward development adjacent to the most remote region of the park, where solitude and pristineness remain primary values.

II
PARK PROTECTION STRATEGY

A. An Early Surprise: The Unimportance of Law

Initially, we assumed that Glacier officials would vigorously assert the legal protection available to the park. Glacier is not in a favorable negotiating position because it has little to give the forests in return for the restraint it seeks over commercial activity on forest lands. However, Glacier could acquire significant leverage over activities on neighboring lands through laws of general application like NEPA and the federal air and water pollution acts, as well as other statutes. Accordin-

38. Ironically, several decades ago Glacier was pressing for the North Fork Road, and for recreational development there, to relieve visitor congestion within Glacier. A. Bolle, The Basis of Multiple Use Management of Public Lands in the North Fork of Flathead River, Montana 198, 210 (1959) (Ph.D. diss., Graduate School of Public Administration, Harvard Univ.).
39. See FLATHEAD RIVER BASIN EIS STEERING COMM., FLATHEAD RIVER BASIN ENVIRONMENTAL IMPACT STUDY: FINAL REPORT (1986) [hereinafter FLATHEAD BASIN STUDY]. Glacier officials also worry that opening the Canadian Cabin Creek mine will make paving the North Fork road inevitable, with the same effects on presently remote areas. See CENTRAL DIRECT FED. DIV., FED. HIGHWAY ADMIN., DEP'T OF TRANSP., FINAL ENVIRONMENTAL IMPACT STATEMENT FOR RECONSTRUCTION OF MONTANA FOREST HIGHWAY ROUTE 61, FLATHEAD COUNTY, FHWA-FPMT-EIS-82-1-D, at 105, 114 (1982) [hereinafter NORTH FORK ROAD FINAL EIS]; see also CENTRAL DIRECT FED. DIV., FED. HIGHWAY ADMIN., DEP'T OF TRANSP., FINAL ENVIRONMENTAL IMPACT STATEMENT, FHWA-FPMT-EIS-82-1-F, at 83 (1983) [hereinafter NORTH FORK ROAD FINAL EIS] ("The remoteness of the North Fork has contributed to a historically low level of activity and impacts.").
40. Flathead and Lewis & Clark officials would like Glacier to help when noxious weed, beetle infestation, or wildfire problems cross the borders. In fact, in the 1950's and 1960's, Glacier applied chemicals to protect the neighboring forests against disease and sprayed DDT on land along the Going-to-the-Sun Highway. C.W. Buchholtz, The Historical Dichotomy of Use and Preservation in Glacier National Park 95-96 (1969) (M.A. thesis, Univ. of Montana). However, as forest officials recognize, "There isn't much [Glacier officials] can do with their constituency. They get hell for anything they do—a tiny timber cut, a burn to control insect infestation..."
43. See Keiter, supra note 6, at 376-77. Glacier has available to it several interesting, but unexplored legal arguments. For example, the National Forest Management Act requires the
ingly, we predicted that invocation of those statutes would be a principal tool for influencing external conduct.44

We could not have been more mistaken.45 Glacier officials rarely mentioned the law in discussing their dealings with neighboring national forests. Indeed, the only “law” they wanted to talk about was something we would not even have considered as an element of their legal position, the designation of Glacier as an international biosphere reserve under a United Nations program.46

During the entire time we spent at Glacier, not one park official brought up the private citizen litigation that thus far has enjoined much

Forest Service to provide for diverse plant and animal communities. 16 U.S.C. § 1604(g)(3)(B) (1982). Glacier has not, however, tried to invoke that requirement, even though management of land to protect species diversity is precisely one of the issues on which it has differences with the forests.

Another unexplored legal possibility arises from the fact that stream siltation may result from timber harvesting in the Flathead River basin. The North Fork of the Flathead River has been designated a scenic river under the Federal Wild and Scenic Rivers Act. 16 U.S.C. § 1274(a)(13) (1982). Section 12 of the Act, 16 U.S.C. § 1283, provides that where national forest land is adjacent to a designated river, the officials in charge of the forest “shall take such action respecting management [of such adjacent lands] as may be necessary to protect such rivers in accordance with the purposes” of the Act, which, as to scenic rivers, is to maintain them “with shorelines or watersheds still largely primitive . . . .” Id. § 1273(b)(2). Section 12 further provides that “particular attention shall be given to scheduled timber harvesting, road construction, and similar activities which might be contrary to the purposes of this [Act].” Id. § 1283(a). If it could be shown that timber harvesting will necessarily prevent the maintenance of a “largely primitive watershed” (a phrase that the Wild and Scenic Rivers Act does not define), Glacier could find itself in a very strong legal position. For wild rivers like the Middle Fork the standard is even stronger—“primitive and waters unpolluted.” Id. § 1273(b)(1). There are also questions as to whether the forest’s water quality management practices for timber harvesting are adequate. See infra note 51. Glacier has not yet pursued any of these possibilities.

Nor, apparently, has Glacier considered traditional legal remedies for damage from clear-cutting across the border in Canada. Whatever the vagaries of international law, article II of the U.S.-Canada Boundary Waters Treaty, infra note 134, does provide that if use of a transboundary river causes injury downstream, the courts of the upstream country are open to the downstream country. See LeMarquand, Preconditions to Cooperation in Canada-United States Boundary Waters, 26 NAT. RESOURCES J. 221, 233 (1986). For a discussion of possible international liability for harmful transnational environmental effects, see Magraw, Transboundary Harm: The International Law Commission’s Study of “International Liability,” 80 AM. J. INT’L L. 305 (1986).

44. Indeed, one of the authors had prepared a report for the park two years earlier outlining its legal rights vis-à-vis its neighbors. See R. Keiter & W. Hubert, An Assessment of Research Needs to Develop Legal Bases for Challenging External Threats to Glacier National Park (July 5, 1984).

45. We are not the first to discover Park Service reluctance to invoke legal remedies. “I think the National Park Service should be using the legal tools that are available. We had extensive hearings on air pollution and threats to the parks, and it’s clear the Park Service is not pursuing its lawful remedies.” Vento Takes Charge, NAT’L PARKS, Mar.-Apr. 1986, at 11, 13 (Interview with Rep. Bruce Vento, Chair, U.S. Congress, House of Representatives, Comm. on Interior and Insular Affairs, Subcomm. on National Parks).

46. See infra note 53. The biosphere reserve concept is discussed infra notes 189-208 and accompanying text. The concept is what international lawyers call “soft law”—agreements to a principle, or nonenforceable commitments, that may be made through designation in an
of the oil and gas activity on the park's borders and has caused the Forest Service to redesign several timber sales. A lawyer who filed several of these cases told us:

The park makes no real effort to develop any constituencies. No superintendent has made any effort to develop relations with environmental groups that would carry their sword. If you say "I'm going to get involved," they'll help, but the Park Service doesn't reach outside, stroke, build alliances. That's one reason why they are in so much trouble in Yellowstone.

Glacier officials do sometimes invoke the law in very limited ways. For example, Glacier called for a full NEPA "environmental impact statement" (EIS) on the entire cycle of oil and gas development in the Flathead and the Lewis & Clark, rather than assessments limited to the impacts of particular exploration proposals. But Glacier does not follow up its official comments by seeking to enforce compliance, despite the availability of a formal administrative mechanism for pursuing such a strategy. Our impression is that Glacier officials do not cite NEPA to assert legal obligations, but rather to emphasize the importance of a full consideration of the cumulative effects of oil and gas development. Park comments treat legal and non-legal issues in the same muted tone—as ways to express concern and to urge greater protection for Glacier.

Upon reflection, we are not so surprised by the failure of park officials to seize upon legal standards for leverage with the Forest Service. Because park and forest officials don't use lawyers in their day-to-day interactions, and don't have ready access to legal advice, they are

---


Glacier officials exhibit some awareness of the actual status of the biosphere reserve designation:

Biosphere reserve designation in concert with various existing legal designations . . . and the pending World Heritage nomination would seem to provide collectively the legal and ethical basis for the highest degree of protection for the North Fork . . . .

Biosphere reserve designation provides a symbolic and practical framework for voluntary efforts . . . . Its voluntary nature—and, specifically, the lack of legal constraints—has been a major factor in the willingness of an increasingly diverse array of Federal, state, and private land administrators to participate in biosphere reserve linkages.


47. See infra notes 94-95 and accompanying text.
48. 40 C.F.R. §§ 1504.1-.3 (1986) (providing for referral of interagency disagreements over projects covered by NEPA to the Council on Environmental Quality); see also notes 94-98 and accompanying text (Glacier's decision to comment on Flathead drilling proposal but refusal to oppose it).
49. See, e.g., 1 FLATHEAD PLAN EIS, supra note 16, at VI-40 to VI-41 (Glacier's letter commenting on Flathead's Plan).
50. The only time the law came into play during our interviews at Glacier was when park and forest officials met to discuss the treaty access claims of the Blackfeet. See supra note 22.
hardly in a position to press complex legal demands, even if they wanted to do so.\textsuperscript{51}

Park officials also lack sophistication about the legal system and how it interacts with what they do. A Glacier executive told us, “Sometimes we have to go to court . . . [but] the attorneys settle out of court on economic grounds, or bring in issues unrelated to land management, and get us bad precedents.” Park managers do not readily accept that legal decisions are constrained by procedural requirements, statutes with specific and limited scope, and difficult problems of proof that may engender compromises. They are unnerved, for example, when a decision rests on a point that they consider irrelevant and that ignores the substantive resource management issue they wanted resolved. “The grizzly bear’s fate,” one expert told us, “is hanging upon ever finer points of law.” In short, Glacier officials seem to have difficulty perceiving the law as a tool by which they can gain leverage over decisions that will affect park resources.

In addition, park and forest officials (like business people with continuing relations)\textsuperscript{52} do not want to deal with each other in a formal legal manner. Indeed, Glacier officials are self-consciously aware of the dynamics of a continuing, mutually dependent relationship.\textsuperscript{53} We were told

\textsuperscript{51} Determining what the law requires can be very complicated. For example, what are the water quality requirements that govern timber harvesting in the Flathead River basin? Because the runoff from lumbering is a “nonpoint” source, no federal quantitative standards govern it. See 33 U.S.C. § 1311 (1982). But see 40 C.F.R. § 131.20(a)(3) (1986) (federal nondegradation standards for national park waters). See also 33 U.S.C. § 1344(f) (1982) (excluding discharge of dredged fill from timber harvest and forest road construction from permit requirements of the Clean Water Act). There are state water quality standards, and the State of Montana has set its highest standard, nondegradation, for waters within or bounding national parks. Under Montana’s regulations, though, runoff from timber harvesting is not considered degradation if “all reasonable . . . conservation practices have been applied.” Montana Water Pollution Control Regulations, 16 Mont. Admin. Reg. § 16.20.701(1)(b)(i) (1986), reprinted in Env’t Rep. (BNA), 2 State Water Laws 831.0501. However, we were told that Montana does not explicitly define these “reasonable practices,” but instead incorporates as its criteria the practices the Forest Service wants to meet. The upshot is that the Forest Service defines for itself its “best management practices.” FLATHEAD FOREST PLAN, supra note 16, at II-40 note. Moreover, those practices are set with reference to timber harvest goals that the Forest Service sets for itself. 1 FLATHEAD PLAN EIS, supra note 16, at II-94 to II-100. For other examples of complex legal questions, see supra note 43.

\textsuperscript{52} See Macauley, Non-Contractual Relations in Business, 28 AM. SOC. REV. 55 (1963) (study finding that resort to legal sanctions in business dealings may have undesirable consequences and thus this tactic is rarely used).

\textsuperscript{53} As a top park official put it:
by an official primarily involved in working with neighboring agencies on external threat problems: "[A]nytime one is forced into something, he will find other things to fight you on. We can lose, rather than gain, ground with hard legislation. It is better to work together with neighbors, and try to understand each other."

In one respect, Glacier's reluctance to deal formally with its national forest neighbors comports perfectly with its long-term strategy on external threats. As we shall see, Glacier's central goal is to legitimize the idea of regional land management and move its neighbors away from traditional boundary or enclave consciousness. To do so, Glacier officials feel that they must keep pressing the notion of a common enterprise with shared interests and goals, and avoid conflict and confrontation. Asserting formal legal rights against their neighbors would undermine this long-term strategy by underlining separateness and reaffirming the significance of boundary lines.

Beyond all this, however, we sensed a more profound reluctance to use law, a feeling that resort to the legal system was an admission of failure. In one revealing example, a ranger recited to us something he had no doubt learned from his superiors: There are three elements to dealing with park management problems—data, policy, and legal—

We start with common interests and shared goals . . . . I use various means to 'sell' what needs to be done. The various cooperative organizations, like the Flathead Basin Commission [Mont. Code Ann. § 75-7-301 to -308 (1985)], are useful. They dealt with phosphates and detergents, not too big an issue. But we can [through the Commission] put important issues on the table to be responded to, such as water quality and the Cabin Creek [Canadian] coal mine. . . . Then, if necessary, we may have to invoke legal standards, like the biosphere reserve.

54. This idea has been around for quite a while. Arnold Bolle proposed joint "planning units" so that the Flathead and Glacier could "work together toward a continuing solution over time" of their mutual problems. A. Bolle, supra note 38, at 220 (At that time, conflict was between timber harvesting and recreation in the North Fork area.).

55. Surely this is one major reason why Glacier doesn't want a park protection act, which would be seen as a bill-of-rights for national parks, and—inevitably in its view—against its neighbors. One park executive told us, "The legislation that has been most helpful is that which doesn't relate specifically to parks, but which focuses on protection of the resource, such as the Clean Air Act." Of course, he meant that he did not want any legislation suggesting that the Forest Service was losing turf to the Park Service, a long-standing sore point between the two federal services. See, e.g., H. Steen, supra note 33, at 113-22, 157-59, 209-13; B. Twilight, supra note 33.

A noteworthy exception to Glacier's reluctance to assert formal legal rights is in its dealings with the Blackfeet. A top park manager told us:

The Blackfeet won't interact with us [the park]. . . . I welcome a court case. I want these issues [access and fencing] off the [bargaining] table. . . . As far as we are concerned the [access] issue is dead. There is a court decision that decides there is no right of access and our management will be based on that. If they want to litigate, so be it. I would welcome clarifying litigation. . . . It will be easier to have a court case. I don't think we've had a very good record in negotiations.

Park conflict with the Blackfeet goes back at least sixty years. See, e.g., C.W. Buchholtz, supra note 40, at 45-46 ("unauthorized" hunting by the Blackfeet of elk "which occasionally wandered from the park onto the Blackfeet Indian Reservation").
"and," he told us, "our goal is to try to deal with the data and policy, and to avoid the legal."

B. Glacier As A Sacred Cow

1. The Park’s Moral Capital

If Glacier officials do not rely on formal legal restrictions or litigation to protect the park, on what do they rely? "The park is a kind of sacred cow," one Glacier manager told us, and park officials think they are pretty good at milking it.56 He explained:

The Forest Service knows they have to work with us; we have a watchful constituency. We have a strong congressional delegation. We could probably get congressional support, if we had our information in order, even if we said there should be absolutely no oil and gas development within one mile of the park.

He offered as examples: Glacier once persuaded the local congressman to support a bill to control noisy helicopter overflights,57 and the park used the media extensively to publicize its case on the Hall Creek oil well in the Lewis & Clark Forest, the Cenex oil well on state lands, and water rights in the Flathead River.58

All our informants outside the park agree that Glacier has a strong public constituency and that the Park Service enjoys high status and great respect. One knowledgeable observer said:

The park has enormous moral capital, and if they waded in to do battle, they could make things very difficult for the Forest Service. If the Park Service simply wrote a letter saying 'this is wholly inconsistent with the mission of the park,' it would be seized on politically and legally. Glacier National Park is the crown jewel of Montana, and if the park was to

56. In regard to the Cabin Creek mine, we were told by a Glacier executive, "We played on the theme of the park as a national, international treasure, as an inviolate sanctuary." Similarly, an official of the Bridger-Teton National Forest in Wyoming, explaining why he yielded to a demand from the National Elk Refuge that he close a road in the forest, said, "Elk have national significance, that’s why we had to accommodate."

57. The most recent version of the bill, H.R. 921, S. 451, 100th Cong., 1st Sess., 133 CONG. REC. S1592 (daily ed. Feb. 3, 1987), would restrict low level flights at Grand Canyon, Yosemite, and Haleakala National Parks, and would mandate a study of aircraft noise throughout the national park system. We were told that planned military overflights have also been prevented, as a result of congressional intervention, at the behest of both Glacier and national forest officials. See also infra note 175.

58. The water rights issue, currently under negotiation with the State of Montana, involves how much water Glacier is entitled to have flow past the park as a federal reserved water right. Cf. Sierra Club v. Block, 622 F. Supp. 842 (D. Colo. 1985) (Federal water rights are impliedly reserved, but federal authorities have no duty to claim such rights.); United States v. City and County of Denver, 656 P.2d 1 (Colo. 1982) (Federal government reserved water rights equal the amount necessary to achieve the primary purpose of the reservation.); see also J. SAX & R. ABRAMS, LEGAL CONTROL OF WATER RESOURCES 493-572 (1986) (discussing the history and legal implication of federal reserved water rights); infra note 209 and accompanying text.
'come unglued' about some project, like an oil well, they could make it a running fight even with the best that industry could muster . . . .

The question is whether Glacier can and does effectively use its considerable reservoir of good will. We recalled the conditional way in which a park official spoke: "We could stop oil and gas work if we had our information in order" and "if we said there should be . . . no oil and gas development." Though park officials identified oil and gas activity near Glacier's boundaries as one of the most serious threats, they do not in fact have their information in order, and they have never explicitly come out for an oil free zone around the park.

2. Glacier's Unexpended Moral Capital

We were quite surprised to discover that Glacier, while it has a small scientific staff, does not produce detailed studies to back up its administrative comments on the potential harm from oil drilling or other activities. The park limits its technical work to monitoring existing situations and provides only its conclusions to other agencies like its national forest neighbors. Although Glacier sometimes has the benefit of work by others (such as the Fish and Wildlife Service when the grizzly is involved), the park's administrative comments don't incorporate that data, even when it is strongly supportive. Moreover, Glacier officials don't prepare technical reports on potential adverse effects even when there is no one else to do the work.

As one Glacier official told us, the park "does not provide documentation; it communicates park values, not formally, but on every occasion. We do not have data or studies, we have an overall strategy." For example, when we asked whether Glacier had a technical position on the adequacy of the Flathead Forest's "best management practices" for controlling the impact on water quality of timber harvesting, we were told that the park simply does not do that sort of work.

Nor does Glacier explicitly come out against development. Traditionally, the park has been loath to speak out on issues beyond its own

---

59. "Our goal is to start edging [development] away from [nearby] parts of the forest."
60. See, e.g., Hall Creek APD, American Petroleum Co. of Texas, Federal South Glacier 1-26, Lease # M53322 (affidavit of Keith Aune, Wildlife Biologist, Mont. Dep't of Fish, Wildlife, and Parks) [hereinafter Keith Aune Affidavit], reprinted in Onshore Leasing Hearing, supra note 4, at 181-88 (Exhibit A to the statement of Lou Bruno, President, Glacier-Two Medicine Alliance); see also GAO REPORT, supra note 4, at 26 (noting Park Service awareness that it lacks "factual data on which to base and to support [its] position").
61. See supra note 51.
62. We were also told, "We don't have in-house capability. Region [the Regional Office] has—I think—one person." The lack of specificity weakens Glacier's effectiveness in the eyes of Forest Service officials: "[Glacier's comments] raise questions; they have concerns that they bring up. . . . A lot of concerns they have are not site-specific, but relate to what long term development means to an area." Officials from the Lewis & Clark flatly denied that Glacier had data to support its misgivings about oil and gas development adjacent to the park.
borders. Glacier's policy is "never say never" to its neighbors.63 "I've always used guarded terms," a top Glacier manager told us, "for example, even with the Lewis & Clark Forest [whose support of oil and gas development is extremely troublesome to Glacier].64 I said only, 'We're very concerned.'" A former superintendent told us, "I never felt comfortable taking a 'no' position." "The most [Glacier] will do formally," an official of an environmental organization observed, "is to send a letter saying, 'Gee, we hope . . . .'

Moreover, Glacier officials are reluctant to use their access to sources of influence.65 For example, they consider ongoing clearcutting in Canada a severe threat to a park watershed.66 Nevertheless, they decided not to seek help from the United States State Department, even though their own efforts with the provincial government had been fruitless. We were told, "There is a limit to how frontal we can be. Timber is not major enough to move up the ladder. It is hard to go to the mat on these smaller issues. If there were really a clear-cut issue, we would go through the State Department." Also, a former high level official, speaking of oil drilling in the Lewis & Clark Forest, told us:

The issue is not that important. It's not as important as the North Fork since it is out of the park drainage. . . . I did do something my predecessor would not, I spoke out on issues outside the park [including oil and gas in the Lewis & Clark], but [beyond speaking out I decided], "let's save our chips for the real zingers."

Is Glacier simply too timid? Issues like timber cuts and oil and gas exploration may be "real zingers," their true danger obscured by sequential development patterns—a well here, a well there, one timber contract at a time. Glacier officials identified these threats as the most serious that they face, and wildlife experts told us that major developmental activity puts intense pressures on park wildlife. Nevertheless, as we shall see, the Lewis & Clark Forest is proceeding full-speed with its plan to meet court-imposed procedural requirements for permitting oil exploration in that area of the forest nearest Glacier.67 And everyone we interviewed is resigned to the prospect that drilling is inevitable despite the park's ob-

---

63. We discovered only one case of open, unambiguous opposition. In 1947, “Park officials confronted the Army Corps of Engineers with an unalterable position opposed to [proposed] dam construction” on the North Fork that would have flooded over 20,000 acres in the park. C.W. Buchholtz, supra note 40, at 74-75; see also infra note 93.

64. See infra notes 141-42 and accompanying text.

65. A former superintendent remarked, "The only time I went outside to get action was on B-52 overflights. I heard about it from the Fish and Wildlife Service, leaked it to the local press, and then Williams [congressional representative for the district] got involved."

66. A well-informed citizen told us that the clearcutting virtually decimated the native trout population in several important spawning streams tributary to the North Fork.

67. See infra text accompanying note 155. However, it may not be possible to drill at the Hall Creek site because the no-jeopardy opinion rests on being able to control access, to which the Blackfeet claim a treaty right. See infra note 152.
jections. Perhaps current exploration will not yield a discovery, as park officials devoutly hope. Even if there is a discovery, mitigation measures may work, as BLM officials claimed to us. But we find it puzzling that Glacier has not taken stronger steps to forestall developments the park itself has identified as the most serious threats on its borders.

C. Some Preliminary Observations

Glacier's management is openly neither optimistic nor pessimistic. They told us that in the Flathead Forest circumstances are ripe for a kind of cross-agency zoning that would ban major developments within a corridor extending several miles out from the park border. But they recognize that such a corridor is unlikely in the Lewis & Clark Forest, where oil and gas prospects are more promising and forest officials are committed to allowing development to go forward. Park officials are looking for a way around the recalcitrant officials in the Lewis & Clark Forest,68 and they told us that some day Glacier may be able to engage its neighbors in a regional approach to managing resources.

One problem with Glacier's approach to park protection is that there is a tension between its short-term and long-term goals. In the short-term, the park is trying to push development back from its borders and to create a sort of low intensity use, or compatible use, buffer zone around the park. As we shall see, this sometimes requires strong, confrontational stands. In the long-term, Glacier hopes to bring about a commitment to regional land management in which, for example, the river basin rather than traditional boundaries will be the focus for decisionmaking, and the main substantive goals will be maintaining genetic integrity and biological diversity.69 Successful regional management, at least in Glacier's view, rests in part on the ability of repeat players to cooperate with one another and to avoid stepping on each other's toes.

Our field work has left us with the sense that Glacier is feeling its way intuitively—groping, to put it more bluntly—as to both of these goals, and that it has not yet come to terms with all the forces at work on the park. Part of the problem, we think, is that the park does not find congenial some of the reality around it. For example, we have already noted that Glacier officials want to stay as clear as they can of the law and legalism (and for reasons that make some sense for them). But one

---

68. We were told by a top Glacier official, "There must be some people in the forest who share our views—we need to find out who they are." Glacier intends to make sure the regional forester "can't turn a blind eye to the issue" by insuring that there will be "more public concern than would ordinarily be brought to bear on those oil wells... The park will stay in the background but push hard."

69. These goals will be discussed when we describe the biosphere reserve concept. See infra notes 189-208 and accompanying text.
result is that they blind themselves to the role that law plays in decisions that affect the park.

Similarly, as we shall see, Glacier officials view the Fish and Wildlife Service almost as an intruder, and the Endangered Species Act as a “slender reed” on which to rest the park’s protection. Yet it seems plain that, given the presence of listed species like the grizzly, Glacier has no more powerful tool than the ESA with which to obtain concessions from its neighbors. And, Glacier officials do not readily acknowledge that NEPA, the planning provisions of the National Forest Management Act, and the policies of the Wilderness Act and the Endangered Species Act—all of which have led to court challenges to traditional national forest management—have been instrumental in inducing sensitivity to resource protection among forest managers. Indeed, park officials have exhibited a kind of amnesia in matters where the law has been the key to controlling development across their borders.

What this suggests is that Glacier so far has been unable to reconcile the tensions between its short-term and long-term goals. Our sense is that Glacier officials are caught up in a complex web of perceptions about what is going on around them. At one level, because law and lawyers and the confrontational legal style is uncongenial to them, they seriously downplay its significance. They believe that their long-term strategy of regionalism can ultimately succeed only by a fundamental change in thinking and a high degree of cooperation among all their neighbors—public and private. At the same time, they see legal solutions (courts, administrative appeals, jeopardy opinions) as taking control and discretion out of their hands, so that they no longer are in charge of their own parks. All of this makes them averse to the sort of structural, rule-determined, consistent results that a legal approach, at its best, promises.

Even if the park accurately believes that to achieve its larger goals it should avoid confrontation, it needs to ask how much this approach will cost it in the short run. If, due to lack of capacity and power to stop harmful developments, serious damage is done to the park before cooperation leads to regional management, then the cooperative approach will have sacrificed the very thing that Glacier managers seek to protect. Park officials seem to think that this dilemma can be resolved through their capacity to expend moral capital if and when a crisis arises. But external threats to Glacier tend to develop incrementally, one oil well at a time, in a way that never presents the park with the kind of discrete, dramatic crisis it stands ready to avert. And, the park’s distaste for confrontation makes it timid in invoking the power of the “sacred cow.”

In the remainder of this Article, we explore the accuracy of these perceptions and the effectiveness of Glacier’s approach to park protection.
III
GLACIER AND ITS TWO NATIONAL FOREST NEIGHBORS

Here we examine the recent history of several major development proposals on the borders of Glacier, focusing principally on proposals in the Flathead and Lewis & Clark Forests (but also noting Glacier's response to threats from Canada, a state forest, and the Blackfeet Reservation). We hope to illustrate how the park has sought to influence its federal neighbors and to venture some tentative conclusions about the effectiveness of its strategy.

A. The Flathead National Forest

1. An Emerging Sensitivity to Glacier

Park officials, local residents, and environmental activists all speak favorably, some even enthusiastically, of the new Flathead managers: Supervisor Edgar Brannon; and District Ranger Tom Hope, who has charge of the North Fork area of the forest. Unlike their predecessors, who apparently turned a deaf ear to outside pressures, Brannon and Hope embrace a new, open management style. They have invited Park Service officials to participate on planning teams, kept citizens informed about ongoing decisions, and listened willingly and patiently to residents and representatives of private organizations. Brannon understands that people want to be heard and to be treated as if their opinions matter, and that such treatment increases their tolerance for a manager who faces competing constituencies. In describing his relationship to Glacier, he told us:

Traditionally we treated each component of the federal lands as an island. I don't see the Flathead as an island. . . . I view protecting Glacier as within my mandate. . . . [The law] gives me fairly broad discretion—to maximize net public benefit, including non-economic considerations. Forest policy has a strong intent and some specific language authorizing us to cooperate with our neighbors.

What does this mean in practice? On "low stakes" issues—terminable annoyances rather than permanent threats to Glacier's ecosystem—the Flathead has been very accommodating and evidently considers Glacier to be one of its constituents. For example, at the park's request,

70. We were told that, during the forest planning process, the Flathead ran a citizen alternative plan through its computers.

71. Brannon was referring principally to the National Forest Management Act, 16 U.S.C. §§ 1601-1687 (1982), which mandates interagency consultation and broad public involvement as part of the forest planning process. Because the Flathead Forest Plan establishes the future direction of forest management, and because park officials commented extensively on the draft Plan, we drew heavily upon the Plan as an objective indication of current relations between the Flathead and Glacier National Park. See 1 FLATHEAD PLAN EIS, supra note 16, at VI-37 to VI-46.
Flathead officials worked assiduously to control noise from oil company seismic activities, thereby mitigating an annoying problem and, we were told, earning intense gratitude and admiration from Glacier staff members. In addition, we were told that the Flathead has agreed to shape several timber cuts to reduce visual impact on the park and, at the behest of environmental groups, has modified the intensity of some timber harvest plans on lands adjacent to Glacier.

The Flathead also has made changes on some bigger issues. Most importantly, its Forest Plan sets aside the northern third of the North Fork region as the Trail Creek Grizzly Bear Management Area, to be managed exclusively to promote grizzly bear recovery and to enhance the opportunity for resettlement of the endangered gray wolf. Timber harvesting and further oil and gas leasing in the Trail Creek Area are prohibited for the next ten years. And, the originally scheduled timber harvesting for this area has been removed from the total amount of timber the forest considers harvestable, a significant act of self-denial for the Forest Service.

The Forest Plan further adopts a set of interagency guidelines for grizzly bear management, under which some eighty percent of the Flathead is designated as “essential” habitat to be managed so as to assure the bear’s recovery. The guidelines do not bar timber and mineral development, but they require such uses to yield to the needs of the bear where there is conflict. The Flathead Forest Plan is also innovative in establishing a quantitative range for annual timber harvest, which gives the Forest Service increased flexibility to respond to resource protection

---

73. See Letter from J. Lamar Beasley, Deputy Chief of the Forest Service, to Jon Heberling, Attorney, Kalispell, Mont. (May 22, 1986) (discussing stay of Akinkoka Mountain Timber Sale). We were also told, “If ever there was a good timber sale, that was it.”
74. FLATHEAD FOREST PLAN, supra note 16, at IV-150.
75. Id.
76. 1 FLATHEAD PLAN EIS, supra note 16, at I-13. If the forest declares an area out of bounds to harvesting, but doesn’t reduce the total timber quota, it simply shifts the impacts of lumbering from one part of the forest to another. Reducing the overall quota cuts against the Forest Service’s traditional emphasis on timber production as a primary activity on forest lands, one that generally dominates other multiple-use responsibilities. See Wilkinson & Anderson, supra note 29, at 117-18.
78. FLATHEAD FOREST PLAN, supra note 16, at II-26; see also LEWIS & CLARK FOREST PLAN, supra note 16, at app. K-1 (describing the categories of land management for grizzly bear management in the northern Rocky Mountains); id. at app. I-1 (the wildlife management guidelines).
issues, rather than limiting it to a fixed quota, as in other forests.\textsuperscript{79}

These policies manifest a growing concern for Glacier, but they no doubt also reflect the Flathead’s response to economic forces and to legal pressures from players other than Glacier. To date, the proposal for paving a road in the North Fork region of the forest was vetoed by a FWS jeopardy opinion under the ESA,\textsuperscript{80} further oil and gas leasing remains enjoined by a federal court injunction under NEPA,\textsuperscript{81} and a number of appeals of the Forest Plan have been filed.\textsuperscript{82} Moreover, in the Trail Creek Area there is little promise of oil and gas,\textsuperscript{83} and timber harvesting is not a financially sound venture, at least in the current market.\textsuperscript{84} Whatever the combination of motives, one striking fact is that the Flathead has bound itself for the future as little as possible.\textsuperscript{85}

2. \textit{The Primacy of Managerial Discretion}

However accommodating they have been in certain individual cases, the Flathead managers have consistently acted to maximize their own discretion and flexibility. They still decline to commit themselves to a set of regional management priorities, and they show no interest in cooperative management over matters with regional implications—for example, the extent to which timber harvesting should yield to wildlife or to aesthetics, and the appropriateness of oil development next to Glacier.

In a number of actions, the Flathead managers have tenaciously preserved their discretion. For example, the Trail Creek Area designation is an entirely discretionary category that the forest can change if its management goals change, as happened, according to one of our sources, with a grizzly bear management unit that it had set up previously.\textsuperscript{86} The same is true of the forest’s sliding-scale annual timber harvest.\textsuperscript{87}

\textsuperscript{79} 1 Flathead Plan EIS, supra note 16, at IV-73 to IV-81. We were told that the lumber industry is appealing the Plan on the ground that it does not provide for enough timber harvesting.

\textsuperscript{80} See infra notes 119-21 and accompanying text.


\textsuperscript{82} There have been 39 separate appeals of the Flathead Forest Plan. Telephone interview with James Gladen, Appeals & Litigation Coordinator, Forest Service, Department of Agriculture (May 4, 1987).

\textsuperscript{83} Unlike the Lewis & Clark, we were told, the Flathead is not generally attractive for oil and gas development.

\textsuperscript{84} Several timber sales in the area reportedly have gone unbid.

\textsuperscript{85} One constraint is that the Forest Plan would have to be amended were a “significant change” to occur, and the Forest Service would most likely have to prepare a new EIS. See 16 U.S.C. § 1604(f)(4) (1982).

\textsuperscript{86} The designation is part of the Forest Plan. See supra note 74 and accompanying text; see also supra note 85.

\textsuperscript{87} See supra note 79 and accompanying text; see also supra note 85.
larly, the Flathead refused to propose a wilderness designation that would have imposed a legal barrier to commercial activity within the Trail Creek Area. Yet another example of discretionary management is the Flathead's commitment to water quality, which takes the form of "good management practices" that are articulated and defined under the Forest Service's own administrative judgment rather than under objective effluent limits or ambient water quality standards. Also, the forest has resisted joint management initiatives, and declines to establish any formal buffer zones which would in effect legitimate joint park-forest areas. In sum, the Flathead management apparently views the protection of park resources as something they are permitted, but not obliged to do.

3. Glacier's Tactics: Three Case Studies

The Park Service understands very well how strongly the Forest Service and other neighbors feel about controlling turf. Perhaps this is why Glacier has been reserved in pressing its "real goal"—recognition of the region as the relevant entity for management. Even when responding to specific development proposals that it acknowledges to be serious threats, the park has been more than a little timid. For example, Glacier has not explicitly opposed the forest's decision to authorize oil and

88. See Flathead Nat'l Forest, Forest Serv., U.S. Dept of Agric., Draft Environmental Impact Statement—Supplement II-26 (1984). The only wilderness land proposed is well south of the park, adjoining the existing Bob Marshall Wilderness. Id. at II-25. California v. Block, 690 F.2d 753 (9th Cir. 1982), obliged the Flathead to reevaluate roadless areas for wilderness classification in the forest planning process.

89. See supra note 51.

90. 1 Flathead Plan EIS, supra note 16, at VI-38. Only the river designated as wild and scenic on the Flathead is jointly managed.

91. Id. On buffer zones, see infra note 176. This refusal is consistent with Forest Service policy in general. Forest Serv., U.S. Dept of Agric., Forest Service Manual § 2320.3-2 (Amendment No. 97, Apr. 86).

92. Supervisor Brannon spoke positively to us of laws such as the National Forest Management Act that empower him to consider effects on wildlife and environmental values in a form that actually enlarges his discretion. On the other hand, he expressed no positive feelings about the Endangered Species Act and NEPA, which have parallel goals but cut away at his autonomy and diminish the importance of "turf" boundaries. Similarly, Brannon chastised the Park Service for repeatedly emphasizing Glacier's designation as a biosphere reserve. The park was using that designation to suggest—as he saw it—the establishment of a region-wide, ecosystem-based management area. That, he said most emphatically, entirely misunderstands what a biosphere reserve is meant to do, which is not to create an ecosystem as a management entity. See infra text following note 203.

93. See, e.g., Letter from Alan O'Neill, Assistant Superintendent, to John Dale Gorman, Supervisor, Lewis & Clark National Forest (Apr. 8, 1986) ("[W]e have some concerns . . . [about Running Owl Application for Permit to Drill]."); see also 2 Lewis & Clark Plan EIS, supra note 16, at app. E-13 ("The National Park Service supports a more protective classification . . . "). The strongest statement we found was former superintendent Robert Haraden's comment on the North Fork road paving in North Fork Road Draft EIS, supra note 39, at xxii ("Therefore, improved accessibility . . . must be viewed as incompatible with the park's management philosophy and objectives."). But see supra note 63.
gas exploratory activity in the North Fork region. Sometimes, though, the park speaks out more forcefully—for example, in opposition to the proposed paving of the North Fork Road in the Flathead and against the plan for a coal surface mine (Cabin Creek) in Canada on the upper reaches of the North Fork. These three cases—oil and gas exploration in the North Fork region, the proposed paving of the North Fork Road, and the proposed Cabin Creek mine—reveal how Glacier operates when confronting proposed developments that it views as a danger to the park.

a. Oil and Gas Development

Despite Glacier’s aversion to any oil and gas activity on its borders, the park has never taken a stronger stand than urging the Forest Service to prepare a comprehensive environmental impact statement at the initial leasing stage\(^{94}\) and to consider all the potential effects if a valuable discovery leads to full field production.\(^{95}\) The park is concerned that unless environmental effects are fully considered at the outset, by the time a discovery is made the economic pressure to go forward will be too great to resist, and any limiting lease stipulations will be inadequate to control the momentum.

The Forest Service resolutely opposes a comprehensive impact analysis and insists on segmenting the evaluation process by treating each stage of development separately and site-specifically as it arises.\(^{96}\) Accordingly, in 1980 the Flathead authorized the leasing of forest lands on the strength of an Environmental Assessment\(^{97}\) (a less comprehensive document than an EIS), which did not address the question of full field development in the event of a big discovery. Glacier inexplicably took no steps against this leasing proposal (indeed, the park did not even officially

---

\(^{94}\) See, e.g., 1 FLATHEAD PLAN EIS, supra note 16, at VI-40; see also Letter from Robert Haraden, Superintendent, Glacier National Park, to Lloyd Swanger, District Ranger, Lewis & Clark National Forest (May 10, 1984) (“[A]pproval of the permit to drill constitutes a major Federal action which should be thoroughly considered in an Environmental Impact Statement.”).

\(^{95}\) Oil and gas development is a multiple step process, ordinarily beginning with leasing, and followed by seismic exploration, exploratory drilling, production, and full field development. NEPA requirements assure some degree of environmental analysis at each stage, 42 U.S.C. § 4332 (1982), though there is currently debate over how much analysis is required at the initial leasing stage. See Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983); Conner v. Burford, 605 F. Supp. 107 (D. Mt. 1985), appeal filed, No. 85-3929 (9th Cir. June 17, 1985).

\(^{96}\) 1 FLATHEAD PLAN EIS, supra note 16, at VI-40. This is a regional Forest Service policy, we were told.

\(^{97}\) FLATHEAD NAT’L FOREST, FOREST SERV., U.S. DEP’T OF AGRIC., ENVIRONMENTAL ASSESSMENT OF NON-WILDERNESS NATIONAL FOREST LANDS: OIL AND GAS LEASING, FLATHEAD NATIONAL FOREST (1980) [hereinafter 1980 FLATHEAD ENVIRONMENTAL ASSESSMENT]. After reviewing the proposal, the Fish and Wildlife Service granted a no-jeopardy opinion, conditioned on the inclusion of lease stipulations to control access and activity in critical habitat areas. Id. at 109.
comment on it),\(^9^8\) and the park appears reconciled to the prospect of oil and gas exploration on its flanks.\(^9^9\)

Both the Park Service and the Forest Service urge the propriety of their own approach. Because neither the Forest Service nor the BLM\(^1^0^0\) has ever denied a leaseholder's exploratory drilling application,\(^1^0^1\) Glacier's concerns are not simply hypothetical. The Flathead, on the other hand, claims that so few leases ever reach the production stage that a full environmental analysis at the time of leasing is unnecessary.\(^1^0^2\) More importantly, the Flathead argues that natural resource protection can be assured by inserting stipulations in leases authorizing the Forest Service to impose whatever conditions are necessary, even to the extent of prohibiting extraction.\(^1^0^3\) In theory at least, the same level of protection

\(^9^8\). There is no evidence in the 1980 Flathead Environmental Assessment that Glacier offered any comments on the leasing proposal. However, during the mid-1970's, when the Flathead initially contemplated oil and gas leasing in the forest, the Park Service urged a thorough environmental analysis before leases were issued. Letter from Stanley Doremus, Deputy Assistant Secretary of the Interior, to E.L. Corpe, Supervisor, Flathead National Forest (Nov. 11, 1975); see also C. Fauley, Glacier National Park Briefing Statement 2 (Dec. 15, 1977) ("It is imperative that the effect of development be evaluated. Once oil and gas are discovered, it will be too late.").

\(^9^9\). See Letter from Alan O'Neill, Acting Superintendent, Glacier National Park, to Bernie Lief, Superintendent of Waterton Lakes National Park, Canada (Mar. 12, 1986) [hereinafter O'Neill Letter]. A Glacier official responsible for resource management told us that a well was drilled recently on British Columbia provincial forest lands, less than two miles north of the park boundary and within the North Fork watershed, and another exploratory well was drilled within one-half mile of the park's eastern boundary on the Blackfeet Reservation at Boulder Creek.

\(^1^0^0\). The Bureau of Land Management, Department of the Interior, has formal responsibility for oil and gas leasing on national forest land, 16 U.S.C. § 508(b) (1982); 43 C.F.R. § 3101.7-4 (1986), but in practice it routinely follows Forest Service recommendations. Yellowstone Ecosystem Hearing, supra note 4, at 25-26 (testimony of Robert Burford, BLM Director).

\(^1^0^1\). Environmental Quality Council, Public Hearing, Oil and Gas Tour of the Rocky Mountain Front (Aug. 4, 1986) (statement of Chuck Laakso, BLM employee). The same "no denial" record exists in the Yellowstone region. Yellowstone Ecosystem Hearing, supra note 4, at 26. The Flathead Plan EIS observes that conflicts over oil and gas activity in the forest center around "where," not "if," the activity will occur. 1 FLATHEAD PLAN EIS, supra note 16, at IV-69.

\(^1^0^2\). According to a Forest Service executive:

It's sort of like worst case analysis—worrying about the one-in-a-million chance. . . .

It requires too much effort and cost to do the whole thing in advance. Also we need to be site-specific. . . . An exploratory drill would happen on one to five percent of these leases. Exploratory wells going into production reflect one-tenth of one percent of total leases.

\(^1^0^3\). A policy issue of profound importance is whether resources are adequately protected by the mere presence of lease stipulations that empower the Forest Service to protect them, or whether there should be additional assurance that the authority will be effectively exercised. Increasingly, courts are demanding assurance that the authority provided will actually be effectively exercised. See, e.g., Wyoming Wildlife Fed'n v. United States, 792 F. 2d 981 (10th Cir. 1986); see also Glacier-Two Medicine Alliance, 88 Interior Bd. Land App. 133, 152-55 (1985) (requiring assurance that access to the site will in fact be prevented). A similar issue figures in the proposed coal mine at Cabin Creek, where an International Study Board is examining the mine proposal under two alternative assumptions: A "most desirable" case assumes
is possible whether decisions are made comprehensively, or step-by-step in a segmented fashion. Predictably, the Forest Service’s approach—segmented, site-specific evaluations and broadly worded lease stipulations—maximizes its discretion in determining the future of mineral development in the Flathead.

Local environmentalists successfully challenged the Flathead leases in court. In *Conner v. Burford*, a federal district court rejected the Forest Service position, holding that oil and gas leasing decisions require preparation of a full EIS because the leasing decision is the first, and potentially irreversible, step in a cumulative process. This is precisely Glacier’s view.

It is too early to predict how the oil and gas issue will finally be resolved, because the district court’s NEPA injunction is under appeal and the oil market is currently quiescent. But the lawsuit has heightened the Forest Service’s sensitivity to the regional nature of the oil and gas question, and it might move the Flathead managers to view other development proposals from a regional perspective. The lawsuit also should send Glacier two important messages: The park’s regional planning strategy is legitimate; and Glacier might effectively advance its agenda by recognizing the help it gets from private organizations that share its concerns and that are willing to go to court.

b. **Paving the North Fork Road**

Forest Highway 61 is a dirt road that runs through the Flathead,
parallel to Glacier, and connects the populated area of the Flathead Valley with the remote North Fork region of the park, and with Canada to the north. In 1982, Flathead County, which maintains Highway 61, proposed a plan to widen and pave a ten-mile stretch adjacent to Glacier. The County argued that the road had deteriorated badly and was causing safety problems and substantial maintenance costs. In addition to the County Commissioners, the Flathead National Forest and the Federal Highway Administration (FHA) supported the paving plan. As a major federal action significantly affecting the environment, an EIS was required. The FHA was also required to consult with nearby federal land agencies and the Fish and Wildlife Service about the plan's impact on wildlife protected under the Endangered Species Act.

From the outset, Glacier officials feared that paving Highway 61 might stimulate timber harvesting in the Flathead, development of private lands along the Flathead River, and recreational use in the remote North Fork Region. Nevertheless, consistent with Glacier's traditional reluctance to speak out on issues beyond the park's borders, park officials initially took no position on the paving proposal. Eventually, they asserted that paving "must be viewed as incompatible with the park's management objectives and philosophy." Mild as this statement may seem to outsiders, explicit opposition to developments outside park boundaries represents a radical departure from standard Park Service practice. As soon as the park spoke, it heard sharp criticism, as it still does today.

Undoubtedly, Glacier was emboldened by the broad coalition that developed to defeat the road proposal. Opposed were a majority of local residents, environmental organizations, the Montana Department

107. Although located on Forest Service land, the road was originally built by Flathead County and has been maintained primarily by the County. NORTH FORK ROAD DRAFT EIS, supra note 39, at 2.
108. The portion of the road in question runs between Canyon Creek and Camas Junction.
112. See NORTH FORK ROAD DRAFT EIS, supra note 39, at xxi, 105.
113. Id. at 105, 114.
114. Id. at xxi.
115. "Where is the park boundary? . . . Why do you have a statement for this road?," Glacier officials were asked when they testified critically on the North Fork paving. Corridor/Design Public Hearing: Montana Forest Highway 61, County Road 486, North Fork Flathead Road, Canyon Creek-Camas Junction at Columbia Falls, Mont., at 20-21 (Mar. 17, 1982) (transcript prepared by Preconstruction Bureau, Dep't of Highways); see also id. at 23 ("Glacier Park officials haven't made too many bright decisions inside the park, let alone trying to tell us how to do on the outside of the park."); Wilson: Manage Park Bears First, Hungry Horse News, July 30, 1986, at 10, col. 4 (strongly criticizing Glacier Superintendent's claim that "the grizzly is doomed unless development outside the Park is controlled").
116. NORTH FORK ROAD FINAL EIS, supra note 39, at 101.
117. Id. at 142, 162.
of Fish, Wildlife and Parks, those United States Department of the Interior officials charged with environmental review responsibilities, and the Fish and Wildlife Service. The Fish and Wildlife Service advised the FHA that increased human presence in the North Fork threatened wildlife populations and important habitats, and it issued a jeopardy opinion under the Endangered Species Act finding a threat to both the grizzly bear and the gray wolf. This constellation of forces stalled the paving project, at least for the present. Because a jeopardy opinion is effectively a veto, it alone was sufficient to stop the project, although the breadth of opposition may well have strengthened the resolve of Fish and Wildlife officials.

The park, typically, let others lead the opposition. As one Glacier official put it, "We were a second line player, and we hid behind the grizzly bear." It did, however, seize the opportunity to promote regional cooperation by supporting an effort to coordinate land planning in the North Fork. Local officials from the Forest Service and county government were receptive to the idea, and local citizens and officials, along with federal officials in the region, began meeting informally as the North Fork Coordinating Committee. North Fork residents have also developed an area land use plan which they intend to submit to County officials, and they have entered into an Inter-Local Agreement with the

118. At one point, Interior officials were sufficiently concerned that they contemplated seeking a referral to the Council on Environmental Quality (CEQ) under NEPA regulations. See supra note 48. We secured from park files a draft of a Department of the Interior letter to the Federal Highway Administration (FHA) Division Administrator threatening a possible referral. The letter apparently was never sent; a similar letter without reference to the referral appears in the NORTH FORK ROAD DRAFT EIS, supra note 39, at 109-10.

119. Id. at xviii, 117-22.

120. Id. at A-1 to A-8. Following a review of the North Fork Road Draft EIS, the FWS again concluded that paving would jeopardize the grizzly bear and the gray wolf. NORTH FORK ROAD FINAL EIS, supra note 39, at vii, 69, app. A-1 to A-9.

121. "Based primarily on this biological opinion [FWC's jeopardy opinion], and secondarily on the concerns of Glacier National Park, the Montana Department of Fish, Wildlife, and Parks, and input from other agencies and the public, the Forest Highway Program agencies now recommend [an improved gravel road] as the preferred alternative . . . ." NORTH FORK ROAD FINAL EIS, supra note 39, at 69.

122. Id. at 51, 109. At this time, area land managers were already consulting on interregional matters through the Flathead Basin Commission, which was preparing a Flathead Basin Environmental Impact Study. Authority for the Commission is found in MONT. CODE ANN. §§ 75-7-301 to -308 (1985).

123. Interlocal Agreement, North Fork Flathead River Drainage, Flathead County, Montana 1-2 (Sept. 23, 1985) [hereinafter Interlocal Agreement] (between Flathead County Board of Commissioners, Montana Department of Fish, Wildlife and Parks, Glacier National Park, and Flathead National Forest, and Private Landowners (North Fork Improvement Association, North Fork Compact, and North Fork Preservation Association)).

124. North Fork Land Use Planning Comm., Draft North Fork Flathead River Valley Land Use Plan (Summer 1986); see also The North Fork Compact 2 (Aug. 1, 1971), recorded in FLATHEAD COUNTY, BOOK 550, at 835, 836 (signed by several North Fork landowners establishing five-acre minimum residential sites).
Park Service and other land management agencies, arranging to meet regularly to coordinate their plans and to share mutual concerns. This represents a significant step for these private landowners, most of whom are independent people by nature who purposefully moved to the North Fork area to escape the trappings of civilization, including government regulation.

The Flathead has softened its stand on the paving proposal. Originally, the forest supported paving to promote timber harvesting and mineral development. Today, however, the Forest Supervisor takes no position, and he says that he will deal with the issue on a site-specific basis should it arise again. Characteristically, his stance maximizes the Flathead's future discretion. Reminded of the park's unambiguous opposition, and of his own assertion that he sees protecting park values as one of his responsibilities, he replied that the paving "was not a big issue for the Park Service. They preferred that it not be paved, but that was all." That conclusion certainly is not the one we would draw from the oral and written record on the North Fork road controversy. But, it is perfectly consistent with our sense of the approach of the Flathead management: Cool controversy down, try to be accommodating, participate in voluntary cooperative activities, but yield as little authority and discretion as possible in the management of forest lands.

No one believes that the road improvement issue is finally settled. Pressures to pave Highway 61 could be renewed by successful oil and gas exploration, by an improvement in the timber market, or by coal development in the North Fork watershed across the Canadian border. Although Glacier's strategy did not permanently quash the paving proposal, it did advance the park's agenda, and Glacier has weathered public criticism of its opposition to development beyond park borders. The park has set a precedent for involvement in transborder issues and has taken advantage of an opportunity to promote regional cooperation by bringing together various public agencies and private groups to consult and cooperate on the future of the North Fork.

Thus, the road paving dispute provided a success for the park. No doubt it is to some extent a success in the sense of raising regional consciousness, which is surely how Glacier likes to see it. But it would be a serious error to overlook the crucial roles played by the jeopardy opinion and environmental coalition politics or to view the current equipoise as a permanent victory.

125. Interlocal Agreement, supra note 123.
126. See supra note 115.
c. The Cabin Creek Mine

In British Columbia, a few miles north of the international boundary, lies Cabin Creek—a tributary of the North Fork of the Flathead River. Millions of tons of coal lie in the hills near where Cabin Creek meets the North Fork, and a concern called Sage Creek, Inc. wants to develop a coal surface mine there. Glacier officials told us that they consider this project the gravest external threat to the park. They fear not only the human impacts of industrial development but also sediment loading in the Flathead—a particularly ominous possibility should waste-containing earthen settlement ponds collapse.

Although the Cabin Creek project is Glacier’s most serious peril, it is also the park’s greatest success in securing a regional approach to resource management. At the present time, a high level international study board of technical experts is investigating water quality conditions in the Flathead, the effects which the proposed mine would have on the River, and the steps that would be required to maintain fisheries and certain specified levels of water quality. Upon completion, the study will likely be presented as a recommendation to the federal governments of Canada and the United States. Its standards for Flathead Basin users will not be legally binding, but the technical expertise and prestige of the Study Board members will put strong pressure on British Columbia authorities to conform.

If the Province imposes limits on its side of the border, there surely will be pressures for similar controls on the United States side, because the Canadians will be restricting themselves to protect downstream uses of the Flathead across the border. Such self-restraint is unlikely if American users go ahead and pollute the river.

Thus, the study might lead to controls that will be adopted throughout the basin of the North Fork of the Flathead—a real triumph of regional management. How has such an extraordinary possibility come about? Paradoxically, the North Fork’s international status, usually a source of extra difficulty in controlling pollution, in this instance has facilitated protective action. The reasons are geographic, diplomatic, and legal.

Because Canada will receive all the benefits of coal mining at Cabin

---

127. Although it lies outside the forest, we include the Cabin Creek mine here because it lies within the Flathead River basin and the issue is integral to relations between Glacier and the Flathead Forest.

128. Such a collapse occurred at a nearby mine in the summer of 1986. High Country News, June 23, 1986, at 7, col. 2. Ironically, this collapsed mine site was being touted as a state-of-the-art example of mining engineering technology that could be utilized in the Cabin Creek mine.

129. The Study Board report will go to the International Joint Commission (IJC), which will then make recommendations under the U.S.-Canada Boundary Waters Treaty, infra note 134, to the Canadian and United States governments; see also infra note 135 (containing language of the treaty).
Creek, and the United States will feel only harms, a natural coalition of allies arose in the North Fork, including parties who otherwise are sometimes in conflict—Glacier, the Flathead, state and local officials, and private landowners.\textsuperscript{130} With such unanimity, and the support of those with whom they repeatedly deal, park officials were uncharacteristically outspoken in trumpeting dangers to the North Fork environment. They joined with local officials and citizen groups in a successful lobbying effort to secure federal funding for a regional environmental study.\textsuperscript{131} The EPA funded the study, which was published in 1983 as the \textit{Flathead River Basin Environmental Impact Study}.\textsuperscript{132} This five-year, interdisciplinary investigation documented the environmental, demographic, and economic characteristics of the Flathead Basin and examined the potential impact of the Cabin Creek mine on the region's natural resources. It also provided the basis for extensive technical comments submitted by the United States and the State of Montana to the British Columbia government (which favored the Cabin Creek proposal) criticizing the Province's environmental assessment of the coal mine project.\textsuperscript{133}

The Boundary Waters Treaty of 1909 between Canada and the United States served as the vehicle for securing review of the project.\textsuperscript{134} The Treaty provides for a joint reference by the two governments to the International Joint Commission (IJC) for recommendations regarding transboundary water problems.\textsuperscript{135} Glacier solicited the aid of the then local congressman—Max Baucus—to urge the State Department in

\begin{footnotesize}
\begin{enumerate}
\item Wilson, \textit{supra} note 130, at 113-14.
\item \textit{FLATHEAD BASIN STUDY, supra} note 39.
\item United States Technical Review of Sage Creek Coal Limited's Stage II Environmental Assessment and Specific Comments (n.d.).
\item The Boundary Waters Treaty of 1909, Jan. 11, 1909, United States-Canada, 36 Stat. 2448, T.S. No. 548 (effective May 13, 1910) [hereinafter U.S.-Canada Boundary Waters Treaty], provides that "waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other." \textit{Id.} art. IV. Though article II of the Treaty states that nations have exclusive jurisdiction and control over the use of all waters within their boundaries, other language of the article provides that a downstream user injured by an upstream user is entitled to the same rights and remedies he would have if the injury had occurred in the source nation.
\item The High Contracting Parties further agree that any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.
\item The International Joint Commission is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may
\end{enumerate}
\end{footnotesize}
Washington to seek an IJC referral. Such a dramatic step is quite unusual. But the Park Service was in the happy situation of being allied with every other interest group on the United States side, and it considered the Cabin Creek issue to be very serious. Everything came together. The State Department, initially reluctant, decided to pursue the reference because it saw an opportunity to point its finger at Canada as the bad guy for a change. Canada, yet more surprisingly, agreed to the reference, probably perceiving an opportunity to make some modest concessions to United States concerns and to improve its position in seeking concessions on acid rain.

At the time of this writing, the Study Board's recommendations have not yet been issued. However, they promise to be a standard-setting precedent that will influence activities in the North Fork on both sides of the border. Whatever the precise outcome, the North Fork area has been identified as an interdependent region. The detailed Basin Study has laid a technical foundation; the Treaty reference on Cabin Creek provides an example of transboundary working relations; and the State of Montana has given its blessing to the regional concept by establishing by law a permanent Flathead Basin Commission with membership from the governor's staff, the Department of State Lands, the Flathead County...
Glacier officials are understandably pleased to have come this far in obtaining recognition of the region as the appropriate unit of management in the setting of Cabin Creek. They may already have reaped some specific benefits. The moderation shown in the Flathead Forest Plan, discussed above, and restrictions imposed on an oil drilling proposal by a state forest in the North Fork, suggest sensitivity to the need to “keep things clean” on the United States side in order to keep the pressure on Canada. Such sensitivity is itself a modest triumph of regionalism.

B. The Lewis & Clark Forest

On the Flathead side of Glacier, circumstances have pretty much favored the park. There are progressive forest managers, aggressive and visible constituencies united on behalf of resource protection, and no heavy pressures for commodity development. On the Lewis & Clark side, almost the opposite situation prevails. A high pressure, high stakes situation is created by very promising oil and gas lands lying right on the wildlife corridor between Glacier and the Bob Marshall Wilderness. The Forest Supervisor’s stated position is that oil and gas development is

139. Mont. Code Ann. § 75-7-308 (1985). The Act encourages close cooperation among the various governmental entities, but the Commission’s powers are entirely recommendatory. Id. § 75-7-305.

140. Among the restrictions imposed by the State Lands Department are noise muffling, aesthetic design specifications, and timing restrictions to protect area wildlife. Montana Dep’t of State Lands, Preliminary Environmental Review: Proposed Oil and Gas Exploration, Cenex Well #13-11, Coal Creek State Forest, Flathead County, Montana 75 (1984) [hereinafter Cenex Preliminary Environmental Review]; see also Letter from Robert Haraden, Superintendent, Glacier National Park, to Don Artley, State Division of Forestry, Missoula, Montana (Nov. 21, 1984) (identical letter to James Gragg, Dep’t of State Lands, Montana, reprinted in Montana Dep’t of State Lands, Supplemental Information to Oct. 25, 1985 Preliminary Environmental Review: Proposed Oil and Gas Exploration, Cenex Well #13-11, Coal Creek State Forest, Flathead County, Montana (Jan. 23, 1985) [hereinafter Supplemental Cenex Preliminary Environmental Review].

141. This area is called Badger-Two Medicine, and the site of the most controversial recent oil drilling proposal is known as Hall Creek, just a few miles from the park border. We were told that the entire region is a “world class wildlife area.” Though physically also a prime area for wilderness designation—which would bar mineral development—the Forest Service has not proposed such a designation because of opposition from the Blackfeet Tribe, which claims treaty rights of access. See Blackfeet Treaty, supra note 22; see generally, K. Pitt, The Ceded Strip: Blackfeet Treaty Rights in the 1980’s, at 37-40, 63 (1986) (unpublished manuscript) (concluding that the Blackfeet retain unrestricted access rights to this area). On the wilderness issue, see 2 Lewis & Clark Plan EIS, supra note 16, at app. C-15; Forest Serv., U.S. Dep’t of Agric., Lewis & Clark National Forest Plan: Supplement to the Draft Environmental Impact Statement 2-9, 3-3, 3-4 (1984); Lewis & Clark Forest Plan, supra note 16, at 4-6; See also Forest Serv., Dep’t of Agric., Lewis & Clark National Forest Plan: Record of Decision 10 (1986) (decision by James C. Overbay, Regional Forester) [hereinafter Lewis & Clark Record of Decision] (“Because of the oil and gas potential and my belief that exploration should take place to determine the extent of the reserve, I recommend only limited acreage of currently leased land for wilder-
entitled to go forward unless it can be shown to be illegal, and the district ranger is widely said to be an active and enthusiastic proponent of that development. Moreover, there is no strong, vocal, environmentally-oriented local constituency in the Badger-Two Medicine area of the Lewis & Clark, which adjoins Glacier. The area is almost unpopulated except for the small community of East Glacier and the nearby Blackfeet Reservation, whose members have been ambivalent about nearby oil and gas development. How has the park behaved, and how has it fared, in the face of this unwelcoming atmosphere?

1. The Ineffective Tactic of Silence

Although Glacier officials oppose oil and gas development close to Glacier's borders and in critical wildlife corridors extending from the park, they have been no more willing to speak out in the hostile milieu of the Lewis & Clark than they were on the Flathead. Their reticence has made it easier for oil and gas exploration to proceed. For example, in an administrative appeal of the decision granting the Hall Creek oil drilling permit, the appeals board, in rejecting some of the appellant's environmental objections, expressly noted that Glacier's official position was "no opposition" and that the park had only expressed concern that effects be adequately studied. Also, Lewis & Clark officials are emboldened by the park's failure to assert opposition to oil and gas drilling on their borders. The District Ranger told us that "certain elements within the Park Service who only want wilderness" are the ones who convey the impression that Glacier is against oil development, but that opposition is not the park's policy.

The park has made itself vulnerable to such misperceptions. In December 1983, the Forest Service solicited public comments on the Hall Creek drilling application, which proposed a test well very close to Glacier. Although the forest received numerous public comments, Glacier officials, who were specifically contacted by BLM (which has official charge of oil development on the national forests), chose not to respond. The park did not comment until the draft Environmental Assessment was issued, when it suggested that the Forest Service should prepare a

142. The Forest Service's position is that buffer zones or transition zones between the national parks or wilderness and the forests are not permitted. See infra note 176. The Forest Supervisor told us:

We do a professional analysis of the proposal, and if the law permits the activity and any adverse environmental effects can be mitigated, then we have no basis to say no to it. . . . We don't advocate for oil and gas, or for wilderness. We rely upon scientific data to decide whether to authorize the activity.

143. We were told, "The local public is split over the issue of oil and gas development. . . . The economy here is more dependent on the oil industry than it is [in the Flathead Basin]."

complete EIS considering the full cycle of development. Glacier officials did not, however, express clear opposition to the project, and they have not done so even today. Nor have they offered detailed technical data to support their positions, thereby permitting Lewis & Clark officials to deny any adverse effects from drilling.

The park has left it to others—usually the Fish and Wildlife Service and private environmental groups—to carry the ball for them. This strategy can work satisfactorily, as in the North Fork paving controversy. But it is probably failing in the battle over drilling in the Lewis & Clark Forest.

The Fish and Wildlife Service simply has not been able to bear the burden. In the first round of controversy over the expected wildlife impacts of the Hall Creek drilling proposal, FWS issued a jeopardy opinion finding that arrangements for access to the well and the location of production facilities nearby would put too much pressure on the already depressed grizzly bear population. But after Lewis & Clark and oil company officials modified their production and access plans somewhat, the FWS reluctantly issued an amended no-jeopardy opinion, conditioned on the forest limiting access and thus human impact.

A key FWS official described to us the agency's official position in support of its revised assessment: Without "ironclad data" demonstrating harm, the agency had little choice but to issue a no-jeopardy opinion. However, we learned that the FWS still harbors considerable doubt that full-scale oil development will not jeopardize the grizzly bear. We also learned that the FWS is not convinced that the oil companies can be adequately controlled by lease stipulations that give the Forest Service formal power to regulate access and other pressures. Because a FWS official told us of these concerns in a formal interview, we took his comments as a not very subtle way of emphasizing that everyone knowledgeable about oil development in the Lewis & Clark knows that the FWS was reluctant to issue a no-jeopardy opinion, and that pressure was imposed on it to obtain that result.


146. Id. at app. C3-1 (FWS Jeopardy Opinion, June 26, 1984).


148. A federal court of appeals opinion held that FWS biological opinions do not have to be based on ironclad data to stand up. North Slope Borough v. Andrus, 642 F. 2d 589, 609-10 (D.C. Cir. 1980).

149. In fact, a BLM executive told us that:

[T]he Fish and Wildlife Service was concerned [about the Hall Creek project]. I
Private environmental groups also have had only modest success. Their administrative appeal of the decision to permit oil drilling to the Interior Board of Land Appeals has temporarily halted drilling plans. The Board found several deficiencies in the permit, particularly uncertainty as to whether the Forest Service had the means adequately to restrict access to the area from the Blackfeet Indian Tribe, and it remanded the matter to determine that question. The matter is now back in the hands of Lewis & Clark officials, who are actively attempting to meet the requirements for access control.

Also, as in the Flathead Forest, private environmental groups successfully challenged the Lewis & Clark's environmental review of the oil and gas leasing process as inconsistent with NEPA. They obtained an injunction against further leasing in the forest until an EIS is prepared that evaluates the full cycle of development. But we were told that forest officials interpret the decision as applying only to pending lease applications, not to existing leases that were not challenged. Thus, their working assumption is that the injunction has no effect on the several controversial drilling proposals that are now pending, including those very near the park border.

The outcome of all this is that Lewis & Clark officials are pretty much continuing with business as usual. They were delayed on Hall Creek by the possibility of a jeopardy opinion under the ESA, and have been temporarily set back by lawsuits and administrative appeals. However, they apparently see those decisions as imposing only procedural or managerial obstacles which can be overcome. For example, they are now preparing a full EIS for a new drilling proposal, rather than a briefer environmental assessment as before. But, their oil and gas development agenda has not changed, even though they know perfectly well that Glac-

---

151. Id. at 154.
152. On one issue—controlling access and poaching by the Blackfeet—the requirements will not easily be met. The Blackfeet, under an 1896 Treaty, supra note 22, claim a right of access both to parts of the forest and Glacier National Park for hunting, timbering, and fishing. The Blackfeet claim they can ignore closures on an existing road when they wish to exercise their claimed treaty rights. See United States v. Kipp, 369 F. Supp. 774 (D. Mont. 1974). But cf. United States v. Dion, 106 S.Ct. 2216 (1986) (holding that the Eagle Protection Act abrogated tribal treaty rights and thereby precluded a treaty-based defense to an Endangered Species Act charge).
154. See Park County Resource Council v. United States Dep’t of Agriculture, 613 F. Supp. 1182, 1185 (D. Wyo. 1985), aff’d, 817 F. 2d 609 (10th Cir. 1987). But, though the 10th Circuit affirmed the district court’s decision authorizing leasing based on an environmental assessment, it rejected the district court’s holding barring NEPA challenges to already issued leases.
cier, despite its formal reticence, opposes drilling at Hall Creek and elsewhere on the edge of the park.\textsuperscript{155}

So far, neither Glacier's timid opposition, nor the Endangered Species Act, nor litigation under NEPA has stopped developmental momentum in the Badger-Two Medicine area. Park officials now are reconciled, though unhappily, to the likelihood that exploratory drilling will go forward.\textsuperscript{156} They rest their hope on the chance that commercial quantities of oil and gas will not be discovered in environmentally critical areas and that the most serious damage—which occurs at the full field development stage—will never come to pass.

2. \textit{Is Regionalism Inevitable?}

Paradoxically, pressure for regional management arises from the very recalcitrance of Lewis & Clark officials to consider Glacier's needs, and from the park's own position as one element in the regional ecosystem. The Lewis & Clark's unyielding traditional stance in favor of commodity development has earned them strong disfavor, even among their natural allies. For example, BLM officials, who have formal authority over mineral development in national forests but who routinely go along with what the forest managers want are noticeably upset with the Lewis & Clark. At the forest's behest, the BLM put its stamp of approval on plans for oil and gas development and then was hit with an administrative appeal which it lost.\textsuperscript{157} Local BLM officials have been chastised for not doing what the law requires of them, and they look bad. Furthermore, there is a blot on the BLM's professional reputation for technical work, and it must go back and redo a substantial amount of work. "I spent eighteen months on the Hall Creek matter," a BLM official told us, "and it's all down the tubes."

More significantly, the problems on the Lewis & Clark have generated dissension and instability among its fellow federal agencies, an atmosphere that is not favored in federal land management. The BLM ordinarily attempts to bring everyone into agreement before proceeding

\textsuperscript{155} There is no evidence Lewis & Clark officials have been diverted at all from their agenda of promoting oil and gas development. The park knows this, and, when pressed, officials will admit it. One top official said, "Though our people will be on their planning team... I don't think for a minute they [Lewis & Clark] invited us for any reason but to sell us a bill of goods about how good their process is." Another told us:

Right now the park is helpless to stop oil and gas drilling [on the Lewis & Clark]. Talking to Dale [Gorman, the Forest Supervisor] and Lloyd [Swanger, the District Ranger] and their staffs, I know they don't have the preservation ethic, and their public is in Great Falls. They get away with things that couldn't happen on the Flathead. ... The next step is to drill more wells. ... They will drill. I'm convinced of that.

\textsuperscript{156} O'Neill Letter, supra note 99.

\textsuperscript{157} See supra notes 150-51 and accompanying text.
with an oil and gas project on lands for which they are responsible. But on the Lewis & Clark, environmental groups have brought appeals and lawsuits (even if their effects are only temporary). The Fish and Wildlife Service also is not at all happy with the outcome: It has felt pressure to go along and complains quite openly about it. The discontent of the Park Service is manifest, and Glacier officials talk about bringing their unhappiness with the Lewis & Clark management before the Regional Forester. A well-informed observer told us that "the regional office [of the Forest Service] was 'pissed off' at Gorman and Swanger [the Supervisor and District Ranger, respectively] because every time they turned around there was controversy, and they were getting beat up. . . . The Forest Service feels quite beleaguered, at least some days of the week." This is not how the federal bureaucracy likes to do business.

Apparently, Lewis & Clark managers feel the sting of disapproval from their BLM colleagues and recognize that they are out of step with the trend toward greater interagency cooperation and greater environmental sensitivity. They are making changes, at least in their procedures. For example, in responding to a new drilling application—the so-called Running Owl well—the forest managers are proceeding quite differently. Recognizing that the area is grizzly bear and mountain goat habitat, they plan to do a full environmental study rather than a more limited assessment as before. They also propose to consult with Glacier during the environmental study process, having identified "the effects on Glacier National Park and adjacent wilderness" as one of the issues to be addressed in the environmental analysis. And they indicate that they will examine the area's roadless condition and wilderness character,

---

158. Early in the Hall Creek case, BLM sensed that there was no consensus among the affected agencies, and BLM therefore did not want to proceed until each involved federal agency agreed to the plan. However, because the tradition has been to follow the recommendation of the Forest Service as the surface management agency, we were told that the State Director of the BLM ordered "that the Forest Service has the right to decide what they want and you [local BLM officials] should march along with the tune played by them."

159. See supra notes 148-49 and accompanying text.

160. This project presents potential impacts to the wildlife corridor similar to those posed by Hall Creek. See supra note 141; LEWIS & CLARK FOREST PLAN, supra note 16, at 3-32 to -33, 4-4, app. K-1.

161. FOREST SERV., U.S. DEP'T OF AGRIC. & BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, STUDY PLAN FOR RUNNING OWL FED 1-35 APD, CHEVRON, USA, INC. 14 (1986) [hereinafter RUNNING OWL STUDY PLAN] (The Running Owl well is now known as Badger Creek well). An additional sign of change is the intention of Glacier officials to participate in the study process, rather than wait until the work is done and then comment, as they did at Hall Creek. Letter from Alan O'Neill, Acting Superintendent, Glacier National Park, to John Dale Gorman, Supervisor, Lewis & Clark National Forest (Apr. 8, 1986).

162. Forest Serv., U.S. Dep't of Agric. & Bureau of Land Management, U.S. Dep't of the Interior, Content Analysis on Scoping Period for Chevron EIS 23 (July 22, 1986) (answering comments received on the Running Owl well) (released with RUNNING OWL STUDY PLAN, supra note 161).
as well as its intangible values, including aesthetic values.\textsuperscript{163}

The recently-issued \textit{Lewis & Clark Forest Plan} also reflects awareness of Glacier's concerns. It does not withdraw any proposed oil and gas development, but it does provide that special leasing stipulations are required.\textsuperscript{164} It also reduces timber harvesting in areas close to Glacier and shifts those timber quotas to the southern part of the forest.\textsuperscript{165} Some twenty-thousand acres formerly designated for commercial logging will now be managed largely to maintain their natural appearance.\textsuperscript{166} And, as the Flathead did,\textsuperscript{167} the Lewis & Clark adopted the interagency grizzly bear management guidelines and designated ninety-eight percent of the forest adjacent to the park as Situation 1 lands.\textsuperscript{168}

So, even on the Lewis & Clark, change is taking place. Even these traditional, inward-looking forest managers no longer assert that every effort to get them to respond to park needs is simply an indirect way of expanding park boundaries \textit{de facto} or "locking up" vast additional tracts of public land. Perhaps this thought is unspoken,\textsuperscript{169} but the silence is significant. However grudging it may seem, there is change when the Lewis & Clark management says: "We recognize that other entities exist and we try to protect other entities, for example, by screening sights or noise . . . ."

Many knowledgeable observers still insisted to us that the Forest Service is "timber driven," despite its public assertions, and that commodity goals still prevail over every other goal. But we see real and irreversible pressures away from such institutional single-mindedness: laws that legitimate and demand transboundary planning; litigation pressures by citizen groups; growing local constituencies with environmental and recreational demands; and the quiet influence of neighbors like the national parks.

\textsuperscript{163} \textit{Id.} at 19, 24-25.
\textsuperscript{164} \textit{Lewis & Clark Forest Plan, supra} note 16, at 4-5, 4-6, 6-24.
\textsuperscript{165} \textit{Id.} at 1-13. But overall the \textit{Forest Plan} appears dramatically to increase the total timber harvest over the 50-year life of the \textit{Plan}. See \textit{id.} at A-16; \textit{Lewis & Clark Plan EIS, supra} note 16, at 2-68, 2-69, 4-43, 4-45.
\textsuperscript{166} \textit{Lewis & Clark Forest Plan, supra} note 16, at 1-13. The \textit{Lewis & Clark Record of Decision} for the \textit{Plan} explicitly cites concern for Glacier as a principal reason for the shift in timber planning, \textit{supra} note 141, at 23, and the forest's \textit{Environmental Impact Statement} makes reference to the 1983 \textit{Glacier Resources Management Plan, supra} note 15, as a reason for minimizing visual impacts from logging activity near the forest-park boundary. 1 \textit{Lewis & Clark Plan EIS, supra} note 16, at 4-59.
\textsuperscript{167} \textit{See supra} notes 77-78 and accompanying text.
\textsuperscript{168} \textit{Lewis & Clark Forest Plan, supra} note 16, at app. K-1, K-3.
\textsuperscript{169} Such \textit{rhetoric} is still mouthed at congressional hearings where park protection legislation is proposed. \textit{See, e.g.}, 1982 \textit{Public Land Management Hearings, supra} note 10, at 923 (Letter from Atlantic Richfield Co.) ("The language . . . is so far reaching that economic activity adjacent to (or related to) the [national park] system could be paralyzed.").
The full test of how much change has taken place is yet to come. Our study took place during a particularly quiescent period when depressed timber and oil markets created little immediate developmental pressure. On the Flathead, we heard, three years of timber lay sold but still uncut, so local residents dependent on the timber industry had no present basis for complaining about wood harvesting limits. It remains to be seen whether the Flathead will maintain discretionary designations like the Trail Creek Bear Management Area against stronger economic pressures.\textsuperscript{170} And, no one thinks the North Fork road improvement issue is permanently decided. It also remains to be seen how the Lewis & Clark will finally resolve the Hall Creek project and the Running Owl proposal. As for the Cabin Creek mine proposal and the Cenex well, our informants told us that both are poor investments and may well die of their own economic infirmities.

\textit{A. Is Glacier's Position Uniquely Strong?}

At one level, what we learned is specific to Glacier and its distinctive situation. At the least, we hope that our field study will reveal how one national park deals with threats from beyond its borders, and will add some useful information to the debate over proposed park protection legislation. We hope too that we have added to our understanding of administrative behavior. We would be surprised to find that what we have observed in attitudes about using the law, avoiding confrontation, and maintaining discretion differs measurably from one national park or region to another.

Nevertheless, we want to emphasize that Glacier enjoys a more favorable position than most other national parks, and its difficulty in controlling external threats is likely to be experienced even more keenly elsewhere in the national park system. Not only can Glacier take advantage of the potent Endangered Species Act, but along with Yellowstone it is the only park outside Alaska to have a significant population of grizzly bears,\textsuperscript{171} the most highly visible and politically important species listed

\textsuperscript{170} To ask [a developmental agency] to take another mandate seriously is easy only if it impacts their primary objectives marginally... There are very few incentives that can be offered to agencies to persuade them to move away from traditional... modes of action.” S.L. YAFFEE, PROHIBITIVE POLICY: IMPLEMENTATION OF THE ENDANGERED SPECIES ACT 97 (1982).

\textsuperscript{171} “[T]he Selway Mountains in eastern Washington, the north Cascades in western Washington, and the Selway Bitterroot region in Idaho, have had only sporadic grizzly sightings during the past decade. The Cabinet-Yaak ecosystem in northwestern Montana is under considerable development pressure... and bear numbers... are at a precariously low level.” Keith Aune Affidavit, supra note 60, reprinted in Onshore Leasing Hearing, supra note 4, at 181-82.
under the Act.\textsuperscript{172} It might fairly be said that the entire land management scheme surrounding Glacier is built on the grizzly. The bear's presence has mobilized citizen watchdog groups,\textsuperscript{173} forced other federal agencies to cooperate in management planning that crosses boundary lines, and provoked the development of a program of cumulative effects modelling that encourages forest service managers to adopt an expansive, long-range perspective in their planning processes.

Glacier also benefits from political and legal factors that promote cooperative joint action. For example, in the case of the proposed Cabin Creek coal mine, the Boundary Waters Treaty provided a framework for regional, interagency, and intergovernmental participation that will not be easy to duplicate in other settings. Also, the presence of a jointly managed wild and scenic river strengthens cooperative activity between Glacier and the Flathead Forest, and Glacier is one of only twenty-five biosphere reserves managed by the National Park Service.\textsuperscript{174}

Moreover, Glacier's neighbors may be unusually sensitive to their national park neighbor. True, few park managers would choose as neighbors the present staff of the Lewis & Clark or the troubled Blackfeet Reservation. But Glacier is fortunate in that it primarily deals with the Forest Service, whose multiple-use mission substantially overlaps that of the Park Service, and whose mandate under laws like the National Forest Management Act encourages collaboration with the parks. Working with national forest supervisors is undoubtedly easier than developing relations with the military.\textsuperscript{175} Moreover, little private land adjoins Glacier, and the private tracts in the sensitive North Fork area are largely

\textsuperscript{172} See MONTANA FINAL PROGRAMMATIC EIS, supra note 29, at 26 (1986) ("Public perception, on a local as well as a national level, of grizzly bear population status and of the management abilities of responsible agencies greatly influence management programs.").

\textsuperscript{173} A well-connected local person said, "[T]here is a chance of stopping them [the oil companies]." An oil man said to me, "We're going back to Wyoming. Every time you try to do something in Montana, someone sues you."

\textsuperscript{174} Listing of Biosphere Reserves in the United States (June 9, 1986) (provided by the National Park Service). These include: Big Bend, Big Thicket, Redwood, Cumberland Island, Cape Lookout, Channel Islands, Denali, Everglades, Glacier Bay, Glacier, Great Smoky Mountains, Haleakala, Hawaii Volcanoes, Isle Royale, Death Valley, Joshua Tree, Gates of the Arctic, Noatak, Olympic, Organ Pipe Cactus, Rocky Mountain, Sequoia-Kings Canyon, Congaree Swamp, Virgin Islands, Yellowstone.

\textsuperscript{175} One park superintendent told us he sometimes can't get officials at a nearby military base even to notify him when they take actions affecting the park; and if they do advise him, it may be after the fact. Interview with William Ehorn, Superintendent, Channel Islands National Park, California, in Ventura, Cal. (Apr. 24, 1986). Other park officials have spoken out on:

\begin{quote}
the military's disregard of natural areas. As a national park ranger, I have been 'strafed' by a Navy jet in a rain forest and surrounded by attack helicopters . . . .

More serious, 20 uniformed soldiers marched through Olympic National Park last fall, leaving campfire scars in subalpine meadows and all their garbage behind.
\end{quote}

held by proprietors who share Glacier's goal of retaining a remote, "end-of-the-road" area.

B. An Evaluation of Glacier's Strategy

1. Short-Term: Rearguard Actions

Glacier's short-term goal is to identify a defensive perimeter that includes the park's watersheds, some adjacent critical wildlife corridors, and a buffer of several miles from the border, and within this perimeter to prevent industrial (mines and oil wells) and infrastructural (highway) development. But Glacier does not pursue a consistent pattern of action. The evidence suggests that the park makes case-by-case judgments on just how much opposition is prudent and proceeds accordingly. Though Glacier took a firm, rather confrontational stand against the proposed Cenex well on state forest lands in the North Fork region, the very word "buffer" is still poison in legislative and some administrative circles. See Yellowstone Ecosystem Hearing, supra note 4, at 94, 115, 132. "We had excellent relations with the Flathead, but you can't talk about buffer zones with them," a former park executive said. "No buffer zones," a Lewis & Clark executive told us.

As for Forest Service policy on "Buffer Zones"... we... are directed not to maintain "undeveloped wildland" as buffers to Wilderness. I believe this direction has been used as a reason not to consider "buffers" on National Forest System Lands adjacent to National Park Systems Lands. However, direction is clear that we need to consider effects of actions on these adjacent lands, and coordinate management decisions. The term "Buffer Zone"... appears to be the problem.

Letter from F. Carl Pence, Forest Planner, Bridger-Teton National Forest, to Robert B. Keiter (July 30, 1986) (ref. 1650); see also 1983-1984 Public Land Management Hearings, supra note 10, at 433-34 (Letter from the Minerals Exploration Coalition) ("The intent of the legislation... seems to be the creation of additional 'buffer zones' around the National Parks."); 1982 Public Land Management Hearings, supra note 10, at 918 (Letter from Wester Timber Association) ("The bill, in effect, creates an unspecified buffer strip around each unit of the National Park System.") Buffer zones were one goal of proposed park protection legislation which has not yet been enacted. National Park System Resources Act of 1986, S. 2092, 99th Cong., 2d Sess., 132 CONG. REC. S 1561 (daily ed. Feb. 25, 1986) ("The Secretary [of the Interior] may designate... park resource protection areas within the... boundaries of contiguous federally managed areas."). However, it is noteworthy that the Plan for the Bridger-Teton National Forest recommends against oil and gas leasing within a half-mile of Grand Teton National Park. Forest Officials Say New Plan Not an "About-Face," Daily Boomerang (Laramie, Wyo.), Aug. 23, 1986, at 10.

Apparently, there was a Forest Service document ordering forest officials to work cooperatively with park managers, but it is not current policy and we cannot get anyone to supply us with a copy. "I finally found out that the Memorandum of Understanding I had seen regarding interagency cooperation on buffer zones around National Parks was a draft prepared by the Washington Office... [It has not been released in final...]." Letter from Nancy J. Cotner, Area Manager, BLM, Great Falls, Mont., to Robert B. Keiter (July 18, 1986).

Letter from Robert Haraden, Superintendent, Glacier National Park, to Don Artley, Chief, Planning Bureau, State Division of Forestry, Montana Department of State Lands (Nov. 21, 1984) ("We do not agree with [your] conclusion... that 'approval of the Plan will not jeopardize the environmental quality of adjacent lands, including... Glacier National Park...'). See also CENEX PRELIMINARY ENVIRONMENTAL REVIEW, supra note 140, app. B (three previous letters from Glacier indicating potential environmental problems); SUPPLEMENTAL CENEX PRELIMINARY ENVIRONMENTAL REVIEW, supra note 140 (further Glacier..."
received some concessions, the park is reluctant to take as strong a position against development proposals in the Flathead and the Lewis & Clark. And it has been even more reticent with the Blackfeet, though a well was drilled on the Reservation at Boulder Creek very near the park border.

The problem with Glacier's individualized approach is that it opens the park to charges that political judgments temper its concerns for the regional environment—a charge that Forest Service officials have been quick to level. It may prove impossible for Glacier to work out a comprehensive, consistent position on commercial oil and gas development that satisfies each of its neighbors. But without some such position the park is seriously undercutting its regional agenda. Also, the park is undermining the position of its natural allies whose efforts have thus far been largely responsible for saving the park from drilling on its borders, and who may prove instrumental in persuading the Forest Service to take seriously a regional perspective.

If the case-by-case strategy described here is likely to work anywhere, it ought to work at a park like Glacier with visible, dramatic resources like the grizzly bear and the bald eagle. But even at Glacier, park officials have adopted a high-risk approach that forces them into fighting a series of rearguard actions, challenging one proposal after another.

Glacier's position is actually quite fragile because the weapons in this rearguard action are unpredictable and outside its control. At Hall Creek in the Lewis & Clark, for example, once the forest complies with

comments). The proposed Cenex well is located approximately one mile beyond the park's western border, just outside the riparian zone of the North Fork.

178. Among the restrictions imposed by the State Lands Department are noise muffling requirements, aesthetic design specifications, and timing restrictions to protect area wildlife. CENEX PRELIMINARY ENVIRONMENTAL REVIEW, supra note 140, at 74-75.

Yet, even the Cenex well proposal—an important precedent as the first instance of drilling in the North Fork region—would have gone through had not environmental organizations persisted in their opposition. Environmentalists filed a lawsuit against the project alleging that the state's environmental review process violated the Montana Environmental Protection Act, MONT. CODE ANN. §§ 75-1-101, -201 (1985). North Fork Preservation Ass'n v. Dep't of State Lands, No. DV-85-131B (Dist. Ct. Mont. filed Feb. 20, 1985). The project, as well as the lawsuit, is currently stalled by a title defect, and we were told Cenex has had trouble raising exploration money as the site is not considered attractive by knowledgeable investors.

179. Memorandum from Robert Haraden, Superintendent, Glacier National Park, to Area Director, Bureau of Indian Affairs (Aug. 6, 1985) (Ref. No. L2423); Letter from Robert Haraden to Chief Earl Old Person, Chairman, Blackfeet Tribal Council (May 31, 1985); see also Letter from Robert Haraden to Mike Fairbanks, Superintendent, Blackfeet Indian Agency, Bureau of Indian Affairs (Sept. 1, 1982). We were told that the Reservation is economically quite hard-pressed with very high unemployment, and the park is reluctant to be perceived as an opponent of economic development.

180. Lewis & Clark officials told us, for example, that the park had not opposed drilling on Blackfeet lands located near the forest's proposed Hall Creek well. Why, they asked, is one well thought troublesome when the other is not? See supra text following note 144.
NEPA requirements the only constraint on drilling is the requirement in the FWS's no-jeopardy opinion that access to the drill site be controlled. Whether that is possible depends on whether the Blackfeet (who claim rights of access under a treaty) can be kept out, a question that the forest and the Blackfeet will probably litigate. At Cabin Creek, the Canadian government has so far saved the day by agreeing to a study board reference under the United States-Canada Boundary Waters Treaty, apparently because Cabin Creek is a useful pawn in the larger international maneuvering on acid rain. Oil and gas leasing on both forests has been halted by NEPA litigation, but not necessarily for good, because NEPA requirements can be met by more extensive EIS's. Moreover, while NEPA regulates wells on the national forests, it does not protect the park against developments on state forest lands; today such developments are constrained only by a title defect and poor economics. And, not even NEPA litigation has restrained oil exploration on the Blackfeet Reservation. Finally, the protection of the ESA, as park officials repeatedly note, depends on the uncertain listing of the grizzly bear and the pertinacity of beleaguered FWS officials.

Under such circumstances, it is risky to fight threats one by one as they arise. The practical question, of course, is not whether Glacier's situation is desirable, but whether there is a preferable alternative. Although no one can say with confidence that a different approach would be more effective, Glacier has clearly rejected a search for structural solutions in favor of case-by-case negotiation. For example, despite their aversion to oil and gas development on the edges of the park, Glacier officials have not taken a general position against mineral leasing of peripheral lands. To date, virtually all the non-wilderness lands in the adjoining forests have been leased. Nor has the park played a role in proposals for wilderness designation of lands around the park's borders, though such designation would limit or prohibit mineral development. Indeed, we got the distinct sense that park officials had never really paid attention to the Forest Service wilderness classification process, nor

181. See supra notes 141, 152; see also Glacier-Two Medicine Alliance, 88 Interior Bd. Land App. 133, 154 (1985) ("No analysis of the effect of not being able to deny access to the members of the Blackfeet Tribe of Indians has been made a part of the EA, and a question remains as to the ability to deny this access.").


183. See supra note 29 and accompanying text.

thought it bore on them.\textsuperscript{185} And, of course, the Park Service position that it needs no additional protective legislation against external threats helps assure that it will get none.

Granted, it is far more difficult, both technically and politically, to take a position on oil leasing or wilderness designation outside the park than it is to focus on damage from a particular site-specific development. However, the case-by-case approach contributes to a momentum that favors development. For example, once leases are issued, oil company lessees understandably assume that they will be permitted to go forward with development. Leasing is taken as a signal that mineral development is permissible.\textsuperscript{186} Once a lease is signed, the companies spend money—first on surveys, then on seismic activity, then on exploration. And, they hire experienced lawyers (as at Hall Creek) to represent them in each stage of the permit proceedings.

Moreover, a study of the stipulations imposed on leases reveals a clear assumption that development will be allowed unless there is some legal reason to restrain it—such as a requirement of the Endangered Species Act or a wilderness designation.\textsuperscript{187} Because Glacier’s objections to development are broader than these formal legal constraints, there is a certain misfit between the park’s agenda and the lessees’ perceived legal rights. Yet, park officials, perhaps because they disfavor legalistic behavior, did not seek a role in the original formulation of lease stipulations to make them conform more fully to Glacier’s concerns.

We are not claiming that Glacier’s strategy of rearguard actions is bound to fail. Prediction is difficult, principally because Glacier’s sacred cow status is such a wild card. But surely the odds are against it in a war of attrition fought against powerful and determined economic interests. “Money can always wait.”\textsuperscript{188}

\textsuperscript{185} When we asked a Glacier official with lengthy tenure at the park about Glacier’s role, if any, in the RARE II wilderness process, he was quite vague and finally said, “[W]e must have played a low profile on that.” A former high official said, “[W]e played no role in forest service wilderness, nor did the Park Service anywhere in the country to my knowledge.”

\textsuperscript{186} According to a 1980 Solicitor’s Opinion from the Denver Region, U.S. Dep’t of the Interior, “No precedent exists for denial of an application for a permit to drill under an onshore oil and gas lease based on environmental protection considerations . . . such denial would have constitutional implications concerning the taking of property rights and the payment of just compensation . . . .” Quoted in Onshore Leasing Hearing, supra note 4, at 519 (testimony of Edward R. Madej, Consultant, Sierra Club); see also Onshore Leasing Hearing, supra note 4, at 350, 353 (statement of Norman J. Mullen) (describing the Forest Service’s indication of its helplessness to prevent wildlife damage in the Grand Mesa National Forest on land that had once been leased). In fact, the Department of the Interior has no record of a denial of any application for a permit to drill in the Yellowstone region. See Yellowstone Ecosystem Hearing, supra note 4, at 26.

\textsuperscript{187} The stipulations are reprinted in Flathead Forest Plan, supra note 16, at app. O-1 to O-16.

\textsuperscript{188} J. Sax, Defending the Environment 51 (1970).
2. Long-Term: A Vision of the Future

Glacier’s short-term strategy seems best characterized as a mixture of optimism, good luck, and confidence in the power of public opinion to prevent ruinous development on Glacier’s borders. But does the park have a broader vision of what an adequately protected park would be, and how such a park would relate to its neighbors, both public and private? In short, does the concept of regional land management—which Glacier invokes so frequently—have any specific content? The answer seems to be “yes”: Glacier’s vision builds on an international program of “biosphere reserves.”

Biosphere reserves are one element of the United Nations Educational, Scientific and Cultural Organization’s (UNESCO’s) “Man in the Biosphere” program, which began in 1970. The idea for a biosphere reserve system originated at an international conference sponsored by UNESCO and others to establish a program for rational use and conservation of the earth’s living natural resources. Participating countries establish a national committee to nominate biosphere reserve designations, which are then submitted for approval and acceptance by UNESCO. Designated places are not simply reserves, they are also places for ecological research and for education.

We remarked earlier that Glacier officials have used the park’s biosphere reserve designation to persuade others of its international status. The park does “wave the biosphere reserve flag” for tactical advantage, but it also takes the concept more seriously—as the basis for a theory of regional resource management. Indeed, our impression is that Glacier has adopted the biosphere reserve concept as its central policy idea for park protection and as its guidepost for understanding the implications of policies that protect the park from activities beyond its borders.

a. The Biosphere Reserve Concept

The biosphere reserve concept is twofold. First, it is a scientific pro-


gram for the designation of representative ecosystems, including well-preserved natural systems, to be managed for the protection of their biological diversity and integrity and the maintenance of the variety of species they contain and their genetic diversity.\textsuperscript{192} Second, it contemplates management of nearby areas on an economically viable, sustained-yield basis. This dual aspiration apparently arose from concern about less developed countries, where people sometimes destroy the very resource base that sustains them.\textsuperscript{193}

The goals of the biosphere program are as attractive as they are all-encompassing: identifying representative ecosystems, maintaining their biological integrity,\textsuperscript{194} promoting research and education, and providing for the well-being of nearby human populations. One element of the program anticipates "socio-benefits that flow from the sustainable productivity of rational systems, rather than protection \textit{per se}. Biosphere reserves, in principle, are flexible enough to accommodate both perspectives."\textsuperscript{195}

The biosphere reserve also offers a rare example of a true regional conception of land management aspiring both to resource preservation and to community sustenance.

Unless the much larger area outside of such reserves is subject to sound land use policies and practices, resource values cannot be sustained over the longer term. That is one of the basic axioms of the Man and the Biosphere Program of which the biosphere reserve is the \textit{in situ} component.\textsuperscript{196} . . . In the final analysis, the biosphere reserve is a new, overarching concept aimed at welding together a combination of land uses to the common purpose of conserving representative ecological areas.\textsuperscript{197}

\textit{b. Glacier's Use of Its Biosphere Reserve Designation}

Glacier has taken up the biosphere concept as precisely the mandate it needs.\textsuperscript{198} The park's enthusiasm is not surprising. Designation be-


\textsuperscript{193} \textit{ See Kellert, Enhancing Public Appreciation of the Role of Biospheres Reserves, in Toward the Biosphere Reserve, supra note 189, at 123, 125.}

\textsuperscript{194} "Preserv[ing] biological diversity" is already a congressional policy in the Foreign Assistance Act. \textit{See 22 U.S.C. § 2151q} (Supp. III 1985); \textit{see also supra note 43.}

\textsuperscript{195} Sadler, \textit{Nature Conservation in the Canadian Rockies—Man and Biosphere in Regional Context}, in \textit{Toward the Biosphere Reserve, supra note 189, at 83, 84} (citation omitted).

\textsuperscript{196} \textit{Id.} at 83 (citation omitted).

\textsuperscript{197} \textit{Id.} at 86.

\textsuperscript{198} Generally, national park managers have been slow to see the biosphere reserve concept as a basic idea on which to build.

In general the managers that came to the conference did not necessarily relate to the
stows international status and importance, and the biosphere reserve program states a scientific agenda\(^9\) that can garner general support. This is not to suggest that scientific data is a substitute for policy preferences and choices. Plainly it is not.\(^2\) It is only to say that some goals—such as maintaining biological diversity—will doubtless garner broad public and governmental support. Insofar as the Park Service promotes such a goal, its agenda will likely trump the traditional commodity program of neighboring agencies. Thus, from a Park Service perspective, the biosphere reserve concept could be a way out of prospective stalemates where the park’s preservation goals come into direct conflict with the competing goals—such as commodity development—of its neighbor federal agencies.

Glacier’s enthusiasm is unfortunately a little premature. First, biosphere reserve designation is not a legal mandate, but simply a United Nations program in which the United States participates.\(^2\) Officially, biosphere program... Strong testament to this was the running joke... about Man and the Biosphere dedication plaques. ... Some managers didn’t even know where their plaques were. Others indicated that the plaque was the only visible sign of the program.

Peine & Morehead, Synopsis of the Conference on the Management of Biosphere Reserves, in TOWARD THE BIOSPHERE RESERVE, supra note 189, at 1, 1.\(^199\)

199. It is important to distinguish this scientific goal—protecting biological integrity—from the use of the park as a scientific laboratory (e.g., catching, collaring, and studying bears), a policy that, we were told, Glacier generally opposes.


201. The concept is beginning to receive some popular attention, however. See, e.g., Eckholm, New Tactics Transform Wildlife Conservation, N.Y. Times, Nov. 18, 1986, at 17, at 22, col. 2 (midwest ed.).

Senator Chaffee’s National Park System Resources Act of 1986, S. 2092, 99th Cong., 2d Sess., 132 CONG. REC. S1561 (daily ed. Feb. 25, 1986), included provisions that gave more formal status to biosphere reserves. Section 110 of the bill provided that the Secretary of the Interior shall provide Congress with recommendations for needed adjustments in biosphere reserve boundaries to include contiguous federal lands, and shall offer proposals to assure that such contiguous lands will be managed to protect the core area.

The biosphere reserve designation must be distinguished from World Heritage Site designation, which Glacier seeks (unsuccessfully so far), and which does carry some legal obligations. World Heritage sites are governed by an international convention in which each nation agrees to “endeavor, in so far as possible, and as appropriate for each country ... to take the appropriate legal, scientific, technical, administrative and financial measures necessary for ... identification, protection, conservation, presentation and rehabilitation ... .” Protection of World Cultural and Heritage Convention, done Nov. 23, 1972, art. 5(d), 27 U.S.T. 37, 41, T.I.A.S. No. 8226, at 5, 1037 U.N.T.S. 151, 154 (entered into force Dec. 17, 1975); see 16 U.S.C. § 470a-1 (1982); 36 C.F.R. §§ 73.1-.17 (1986); see also Memorandum from Associate Solicitor, Conservation and Wildlife, to Assistant Secretary for Fish and Wildlife and Parks, U.S. Dep’t of the Interior (Jan. 21, 1981) (unpublished opinion on Implementation of World Heritage Convention and P.L. 96-515) (arguing that the implementing federal statute does create domestic legal obligations); J.H. Jackson, The Application of International Conventions in Domestic Law of the United States (Sept. 1986) (unpublished paper presented to the 1986 Colloquium of the United Kingdom Committee of Comparative Law). But see Australia v. Tasmania, 46 A.L.R. 625, 663 (1983) (Australian High Court held that “[T]he
Glacier knows this, but park officials still repeatedly talk of reserve designation as creating legal obligations. The neighboring forests take a much narrower view of the significance of biosphere reserve designation, and apparently see the park’s broader interpretation as a threat to their autonomy. The Flathead Forest Supervisor told us:

A biosphere reserve is not a legal designation of anything. There is no inherent legal sanction on doing anything. It is just a label saying they are participating in a very broad program. You can have a mine in the biosphere program. You can have junkyards. People have an emotional view about the biosphere. There is nothing in it about preservation. We recently read all the biosphere documents. If you read the documents you’ll see it’s more of a network, including a variety of lands, managed and unmanaged, for research. It is an effort to learn about the effects of various kinds of management on ecosystems. It is a question of what role management chooses to play. Our Coram Experimental Forest is in the program.

Second, the biosphere reserve concept is still at the conceptual stage. There is so far no concrete notion of how biological preservation in a core reserve area is to be integrated with sustainable productive use of resources for the people in the peripheral areas. The biosphere reserve concept, however evocative an idea, remains a vague one. It is not surprising, as Glacier officials themselves recognize, that there is “presently little local or regional understanding of the concept and suspicion that this is another lockup program under a different name.”

Park officials are nonetheless making valiant efforts to bring the biosphere reserve idea to life within the Glacier region. They are identifying and actively seeking to protect essential elements of Glacier’s biological integrity (such as wildlife corridors beyond park boundaries for genetic

obligations imposed by the [World Heritage] Convention are political or moral, but not legally binding.”).

While Glacier has been nominated, along with its companion Waterton Lakes National Park in Canada, as a World Heritage site, it has not yet attained that designation. We were told that the Canadian government has withdrawn its support at the request of the British Columbia government. A Glacier official told us, “We sort of hoped it would slip through, but they stopped it.” The fear is that Heritage Site designation would have legal “teeth,” and could tie the hands of the British Columbia government in settling the Cabin Creek controversy. See also Memorandum from Chief, International Park Affairs Division, to Assistant Solicitor, Parks and Recreation (June 12, 1986) (Subject: International Joint Commission Studies; Glacier National Park; World Heritage Implications, Ref. No. L66(773)) (discussing the current status of the Glacier nomination to the World Heritage List).

202. See supra note 46; see also Haraden, Development of Nonrenewable Resources and Glacier National Park Biosphere Reserve, in TOWARD THE BIOSPHERE RESERVE, supra note 189, at 114.

203. See supra note 201.

204. “The approach is still being tested and must be regarded as evolving rather than developed.” Sadler, supra note 195, at 86.

exchange), while reconciling themselves to losing some amenities that are not vital from a biological perspective (such as scenic vistas). They also appear to be shifting toward a more science-directed perspective in defining the purpose of national parks. Indeed, there is a certain irony in Glacier yielding on scenic amenities which, irrelevant from a scientific perspective, helped establish the parks in the first place and are still a primary attraction to visitors. The reason for the change is clear enough. As external effects become more and more important, the parks will be able to limit external development only if park values can override the multiple-use values of neighboring agencies, particularly the Forest Service. A potential vehicle for such an override is a deep scientific mission that focuses on preventing irreversible harm to basic resource stocks.

c. Other Initiatives for Regional Cooperation

Glacier officials also appreciate that the national parks cannot limit the uses of neighboring lands until they begin taking some affirmative responsibility for the well-being of adjacent communities. The park is beginning to think about its responsibility to people and to the local economy. We were told that "each agency becomes more involved in issues that previously were only the concern of the other. Now there is a greater tendency to understand, empathize, compromise, than if you stayed back behind your own boundary." Insofar as this is the case, it betokens a radical revision of perspective for a notoriously insular agency.

There is considerable evidence that Glacier officials no longer, as the saying goes, "see the world only from the back of their own entrance signs." As we noted earlier, Glacier encouraged the negotiation of an agreement with a number of landowners in the North Fork area to maintain large-lot, low-intensity use. It helped form an "interlocal agreement" among public agencies and associations of North Fork landowners, and it cooperated in the drafting of a proposed North Fork land use plan. Glacier also helped spearhead the lobbying effort that secured funding for the Flathead River Basin EIS Study and ultimately


207. Glacier National Park... is largely appreciated for its spectacular scenery, its symbolic association with the American West, and the opportunities it presents for viewing visible, abundant, and large wildlife. The general public's recognition of it as a national park appears to have little relation to its ecological or scientific value. Kellert, supra note 193, at 124.

208. This suggests a way in which the park's short-term strategy might be integrated with its long-term goals: By developing top quality scientific briefing papers on all issues of peripheral development affecting the park, park officials could increase their prestige, credibility, and influence. There is presently a great unfilled need for such technically reliable studies.
convinced the Montana legislature to create the Flathead Basin Commission.

Moreover, Glacier is making some concessions regarding its own interests. None are major, but they at least symbolize the park’s recognition that it must affirmatively attend to the needs of neighboring human communities and that it cannot concern itself solely with protection of Glacier’s natural features. For example, in negotiating for the park’s water rights in the North Fork, Glacier does not demand maintenance of virgin flow, but agrees that water may be appropriated sufficient to support future compatible private uses such as stock watering, irrigation, and domestic supply.209 We were told that Glacier has agreed to accept some visual disamenities to the park and is reconciled to protecting the quality of park resources, rather than demanding a pristine buffer for the park.210

Glacier is still far from solving its community relations problems, but it is trying to implement the sustaining-without-destroying concept even with its most difficult neighbor, the Blackfeet.211 For example, the park has been urging the tribe to eliminate cattle grazing near the boundary because cattle trespass into the park, compete for forage with Glacier’s wildlife, and transport into the park seeds of exotic plants on their hooves. Trespassing cattle have long been a troublesome problem for Glacier, and for years Glacier and the Blackfeet have disputed over installing and paying for a fence to restrain the cattle. For all the trouble they cause, the grazing cattle do not provide the Blackfeet much income. Glacier is now proposing to the Blackfeet that they replace grazing with a trophy-hunting industry, which would rely on exiting migratory park animals.212 Park officials contend that their proposal substitutes for an economically marginal, ecologically destructive activity a more profitable, ecologically acceptable one.

209. S. Ponce, Executive Briefing: Status of Water Rights for Glacier National Park (May 1, 1986) (Water Rights Branch, Nat’l Park Serv.); see also supra note 58.

210. A formal version of this approach was developed for the management of wilderness in the national forests. See G. STANKEY, D. COLE, R. LUCAS, M. PETERSON & S. FRISSELL, THE LIMITS OF ACCEPTABLE CHANGE (LAC) SYSTEM FOR WILDERNESS PLANNING (USDA Forest Serv. Research Paper No. INT-176, 1985). We were told that the idea has been picked up by park officials. See also National Park Serv., U.S. Dep’t of the Interior, Report on Impact of Special Designation 11 (Mar. 25, 1986) (prepared by Glacier officials for the International Joint Commission International Study Board) (“[The Limits of Acceptable Change] process is being used to assure that the unique qualities of the North Fork ecosystem will not be eroded and lost through time.”).

211. A tribal member conveyed some sense of the distance yet remaining between the park and the Blackfeet by telling us that “the park treats the Blackfeet like a third world nation. It says we must stay undeveloped to protect the park.”

212. We were told by a Glacier official that most of the cattle do not belong to the Blackfeet because grazing is by lease on reservation land. He added that a similar trophy hunting plan succeeded with the Apaches.
V

FINAL REFLECTIONS

A. The High Price of Discretion

Though they are in a sense adversaries, the park superintendent and the forest supervisor understand each other very well. They are professional managers who want to maximize their own judgment, discretion, and inventiveness, and to be free of outside forces dictating what shall happen on their turf. They do not seek to determine the fundamentals of forest or park policy; rather, they accept without hesitation the authority of Congress to set mandates for the public lands. But they want broad mandates so that they aren't reduced to mere pawns mechanically applying rules. If there were a managerial motto at Glacier, and indeed throughout the public domain surrounding Glacier, it might well be: Law is a shackle, only discretion liberates.

In this light, what at first seemed paradoxical and unlikely becomes more coherent. We wondered, for example, why Glacier officials oppose park protection legislation even when they seem to be losing out on issues like oil development on neighboring national forests. Now we know: As land managers, they resist being more rule-bound. Seeking maximum discretion themselves, they are acutely conscious that their Forest Service counterparts likewise value autonomy, and they don't feel comfortable having veto power over decisions on another manager's turf.

We also think that we know why Glacier officials seem ungrateful to Fish and Wildlife Service officers who have helped them by issuing, or threatening to issue, jeopardy opinions under the ESA. The Fish and Wildlife Service is an outsider, and its intervention threatens a loss of discretion. The same reason explains Glacier's lack of contact with citizen environmental groups, and the virtual amnesia of Glacier officials about lawsuits, injunctions, and administrative appeals.

But the Glacier management's commitment to discretion generates a serious problem for them: It makes impossible consistent solutions for problems. Instead, a species of political judgment tends to dominate results. For example, because it is hard to put pressure on the economically depressed Blackfeet, Glacier officials keep silent while the Tribe installs a precedent-setting, potentially destructive oil well on Glacier's boundary. When decisions are discretionary, there is no objective basis for saying "no" to the Blackfeet. Having once said "yes" to peripheral development, it is difficult to say "no" to essentially identical proposals on the ground of grave damage to basic park resources.

Indeed, the park managers' abstract commitment to maintaining managerial authority can hinder park protection. This is perhaps best illustrated by their unyielding stance against any legislative solution to problems of peripheral development despite the fact that other ap-
approaches are not sufficient. In a sense, Glacier's Superintendent summed up this perspective when he observed, "Congressional legislation never comes on a silver platter."

We were surprised that Glacier officials, facing what seems to us to be, at best, a difficult situation, still believe in the talismanic force of the national parks and feel confident that they can mobilize the press, public opinion, and the Congress to protect the park from grave perils. They may be right about a visible, dramatic danger like the Cabin Creek mine. But they may be dead wrong when, like oil and gas development, the threat develops incrementally, without discrete dramatic episodes.

B. The Role of Law

The progress that has been made so far involves a good deal more legal coercion than park officials are willing to acknowledge. They believe that left to their own devices, and in light of changing public values about such matters as wildlife protection and clean water, park managers and their counterparts in neighboring agencies will be able to work out reasonable solutions like those emerging in the North Fork area. But Glacier officials also are quite aware that what seems "reasonable" to national forest managers is shaped by public values and, most importantly for their purposes, by congressional recognition of those values. They know that their neighbors' attitudes and behavior are affected by laws mandating species protection and clean air and water, and by more general pro-environmental laws like NEPA, Federal Lands Policy Management Act, and National Forest Management Act (NFMA). But we were nonetheless astonished at how little weight Glacier officials attached to the coercive aspects of those statements of national policy, and at how resolutely they ignored the fact that NEPA produces injunctions, that NFMA gives rise to administrative appeals of forest plans, and that the ESA generates jeopardy opinions. We could not imagine any Glacier official saying to us what a local reporter observed as if it were the most obvious thing in the world: "The Forest Service only fears the jeopardy opinion and prosecution under NEPA."

C. A Race With Time

Glacier is constrained by bureaucratic prudence and timidity. It is reluctant to use the law; highly deferential to the traditional turf prerogatives of its neighbors; and hesitant to subject itself to criticism by speaking out forcefully on transboundary issues. It is not that Glacier's

213. For example, Congress responded with explicit prohibitory legislation when it appeared that geothermal development on Yellowstone's borders might imperil that park's geysers. 30 U.S.C.A. § 1005 (West Supp. 1987).
officials lack a vision of what the future should be, nor that they are wrong in believing that their vision of regionalism and commitment to biological and genetic conservation will eventually prevail. As we have emphasized, events are in motion that set the stage for important long-term changes in federal land management, and Glacier is affirmatively trying to shape that future.

But Glacier is in a race with time where present dangers threaten irreparable, incremental harm. The question is how much the park will sacrifice in the short run before some new and enlightened conception of land protection prevails. Glacier officials seem unable to bring themselves to do all that is needed to mobilize effective means to their admirable ends. One of our most striking findings was the central role of private groups that used the legal system to control threatened damage to the park. We were surprised at how often outside organizations held the critical leverage in the resolution of conflict between Glacier and its national forest neighbors. Having seen how the park operates, what we learned is not so surprising. Whether Glacier officials lack appreciation of the power relationships that are at work around them, or they lack experience working with these realities, the result is that Glacier is becoming largely a bystander as decisions are made that will determine its destiny.

POSTSCRIPT

On April 13, 1987, the BLM Great Falls Area Office issued a Decision Notice reauthorizing the American Petrofina drilling permit application for the Hall Creek site in the Lewis & Clark National Forest.\textsuperscript{214} The BLM concluded that the Forest Service has adequately addressed each of the remand points in the Interior Board of Land Appeals’ 1985 decision, specifically finding that the Forest Service has adequate authority to enforce its road closure orders against the Blackfeet and thus can insure compliance with the terms of the FWS “no jeopardy” opinion.\textsuperscript{215} Eleven appeals—initiated by the Blackfeet as well as by environmental groups—have been filed with the BLM challenging this decision.\textsuperscript{216} Meanwhile, the Lewis & Clark is continuing with its environmental impact study of the Running Owl drilling application, and will address the cumulative environmental impact of the Hall Creek and Running Owl wells on the Badger-Two Medicine region.

\begin{footnotes}
\textsuperscript{215} See supra notes 144-56 and accompanying text.
\textsuperscript{216} Telephone Interview with Gary Slagel, Acting Area Manager, Bureau of Land Management, U.S. Dep’t of the Interior (May 18, 1987).
\end{footnotes}
APPENDIX

List of Individuals Interviewed

1. Kathy Athenslager (Seasonal Naturalist, Glacier National Park)
2. Bill Barmore (National Park Service Biologist, retired)
3. Arnold Bolle (Dean, Forestry School, University of Montana, retired)
4. Edgar Brannon (Supervisor, Flathead National Forest)
5. Wayne Brewster (United States Fish and Wildlife Service)
6. Mark Brunson (Reporter, Daily Interlake, Kalispell, Montana)
7. Bill Bryan (Environmental Activist, Bozeman, Montana)
8. Chuck Carr (New York Zoological Society)
9. Tim Clark (Wildlife Biologist)
10. Buzz Cobell (Ranger, Glacier National Park)
11. Nancy Cotner (Area Manager, Bureau of Land Management, Great Falls, Montana)
12. Bob Dunkley (Planner, Glacier National Park)
13. Keith Fellbaum (Chief of Maintenance, Glacier National Park)
14. Tom France (Attorney, National Wildlife Federation, Missoula, Montana)
15. Bob Frauson (Ranger, Glacier National Park, retired)
16. John Frederick (North Fork Resident, Polebridge, Montana)
17. John Gatchell (Montana Wilderness Association, Helena, Montana)
18. John Dale Gorman (Supervisor, Lewis & Clark National Forest)
19. Gary Gregory (Resource Specialist, Glacier National Park)
20. Robert Haraden (Superintendent, Glacier National Park, retired)
22. Phil Hocker (Environmental Activist, Jackson, Wyoming)
23. Joe Jessupe (Environmental Activist, East Glacier, Montana)
24. Charles Jonkel (Professor, University of Montana, Missoula)
25. Randy Kaufman (Ranger, Glacier National Park)
26. Loren Kreck (Environmental Activist, Columbia Falls, Montana)
27. Dave Lange (Ranger, Glacier National Park)
28. Bernard Leiff (Superintendent, Waterton Lakes National Park)
29. H. Gilbert Lusk (Superintendent, Glacier National Park)
30. Leo Marnell (Scientist, Glacier National Park)
31. Bob Martinka (Montana Fish, Wildlife & Parks Department, Helena, Montana)
32. Clifford Martinka (Scientist, Glacier National Park)
33. Ernie Nunn (Assistant Supervisor, Bridger-Teton National Forest, Wyoming)
34. Lance Olsen (Great Bear Foundation, Missoula, Montana)
35. Alan O'Neill (Assistant Superintendent, Glacier National Park)
36. Kenneth Pitt (Attorney, United States Department of Agriculture)
37. James A. Posewitz (Chairman, United States Section, Flathead River International Study Board)
38. Matt Reid (Wyoming Wildlife Federation)
39. Bill Rohrer (Environmental Engineer, Chevron, Casper, Wyoming)
40. Don Schwennesen (Reporter, Missoulian, Missoula, Montana)
41. Chuck Sigler (Chief Ranger, Glacier National Park)
42. Gary Slagel (Environmental Specialist, Bureau of Land Management, Great Falls, Montana)
43. Dick Smith (Land Management Planner, Lewis & Clark National Forest)
44. Lloyd Swanger (District Ranger, Lewis & Clark National Forest)
45. Jim Tilbe (Manager, Drilling Operations, Western Canada Shell Oil)
46. Tom Thompson (Businessman, Glacier Highlands, West Glacier, Montana)
47. John Warne (Consulting Geologist, Billings, Montana)