


3-1-1988

Protection of National Parks Through Buffer Zones: Does It Amount to a Fifth Amendment Constitutional Taking?

Daniel J. Anderson

Follow this and additional works at: <https://digitalcommons.law.byu.edu/jpl>

 Part of the [Environmental Law Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Daniel J. Anderson, *Protection of National Parks Through Buffer Zones: Does It Amount to a Fifth Amendment Constitutional Taking?*, 2 BYU J. Pub. L. 71 (1988).

Available at: <https://digitalcommons.law.byu.edu/jpl/vol2/iss1/6>

This Comment is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Journal of Public Law by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

COMMENTS

Protection of National Parks Through Buffer Zones: Does It Amount to a Fifth Amendment Constitutional Taking?

I. INTRODUCTION

Increased degradation of national parks has caused many to question the scope of the Secretary of the Interior's (Secretary) authority to protect national parks. In 1979 the House Committee on Interior and Insular Affairs requested that the National Park Service (NPS) produce a report on existing and threatening degradation of the National Park System.¹ That study, entitled *State of the Parks - 1980*,² identified 4,345 specific threats to national parks.³ Of these threats, over fifty percent originate from activities occurring outside national parks.⁴ Though it can be asserted that the Secretary has an obligation to protect national parks from this degradation,⁵ the Secretary's power is essentially confined to activities occurring within national parks themselves. In the past, environmental groups have been the impetus in providing protection from outside threats. Now it appears as though

1. Hiscock, *Protecting National Park System Buffer Zones: Existing, Proposed, and Suggested Authority*, 7 J. ENERGY L. & POL'Y 35, 41 (1986) [hereinafter *Protecting National Parks*].

2. NATIONAL PARK SERVICE, U.S. DEP'T OF THE INTERIOR, *STATE OF THE PARKS - 1980, A REPORT TO THE CONGRESS* (1980).

3. *Id.* at 5. The Parks Report not only listed specific threats to national parks, but it also listed proposed development projects which are considered to be threatening to the environment. Specific threats to parks include: at Bandelier, Olympic and other parks, increased numbers of campers and backpackers are damaging the wilderness character; at Big Bend and Organ Pipe, cactus collectors are poaching such large quantities of plants that the natural scene is being changed; at Chattahoochee river, raw sewage and chemical runoff is seriously impacting the water quality in the area; at Badlands, fossil collecting has become common place; and at Cape Lookout, off-road vehicles have become a major impact on the resources located there.

Some of the specific development projects which threaten the national parks include: at North Cascades the planned Dam Construction on Copper Creek will impact many unique environmental qualities; at Glacier National Park an open-pit coal mine will impact the national park; at Chaco Canyon oil, gas, coal and uranium developments are impacting the canyon; at the edge of Yellowstone and Grand Teton National Parks proposed geothermal development will threaten both parks; at Indiana Dunes, industrial plants and nuclear plant construction pose a threat to natural and cultural resources. *Id.* at 20-23.

4. *Id.* at viii.

5. *Sierra Club v. Department of Interior*, 376 F. Supp. 90, 91 (N.D. Cal. 1974).

Congress is taking a more active role by providing the Secretary with powers which arguably extend beyond the boundaries of national parks.⁶ The purpose of this comment is to address the Secretary's authority to protect national parks from external threats, and to consider whether the execution of this authority constitutes a fifth amendment taking. The specific topics to be addressed are: 1) an overview of national park protection; 2) a background of the constitutional and common law powers given to the Secretary; 3) legislative enactments which have increased the Secretary's duties over national parks and park peripheries; and 4) whether creating buffer zones is considered a fifth amendment taking. Necessarily, this comment will begin with a detailed discussion of the powers given the Secretary to protect national parks. The first section will be dedicated to this end.

II. OVERVIEW

Since most national parks were originally created in remote areas, there was little concern about establishing a buffer zone⁷ to protect them against exterior threats.⁸ In fact, during its genesis years, the NPS actively sought to attract visitors to national parks, and strived to provide comfortable accommodations for them.⁹ This was in accord with the original mandates given the NPS by the National Park Service Organic Act (Organic Act).¹⁰

Concurrent with the obligation to manage national parks for the enjoyment of the public, the Organic Act also requires that a present use "will leave them [national parks] unimpaired for the enjoyment of future generations."¹¹ Arguably, the Organic Act imposes contradictory mandates. On the one hand, the NPS is to manage national parks for public enjoyment; on the other, national parks are to be protected for future generations. As a result of this conflict, many national parks

6. See *infra* notes 86-107 and accompanying text.

7. A buffer zone is a "[t]erm used in land-use law to describe an area separating two different types of zones or classes of areas to make each one blend more easily with another." BLACK'S LAW DICTIONARY 176 (5th ed. 1979). A buffer zone in this context is a strip of land established to protect national parks from any land use which is considered incompatible.

8. Sax, *Helpless Giants: The National Parks And The Regulation of Private Lands*, 75 MICH. L. REV. 239 (1976) [hereinafter *Helpless Giants*].

9. Keiter, *On Protecting the National Parks From the External Threat Dilemma*, 20 LAND & WATER L. REV. 355, 358 (1985) [hereinafter *External Threat Dilemma*]; R. NASH, WILDERNESS AND THE AMERICAN MIND 325-26 (3d ed. 1982).

10. 16 U.S.C. §§ 1-3 (1982).

11. 16 U.S.C. § 1 states that national parks were created "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such a manner and by such means as will leave them unimpaired for the enjoyment of future generations."

have become nothing more than extensions of urbandom coupled with a scenic view.¹²

As the use of national parks increased,¹³ the Secretary found the Organic Act inadequate to protect national parks from mounting degradation. The necessary protection still seemed to be lacking. As one of the possible responses to this problem, Congress has considered creating buffer zones next to national parks. Though some question whether buffer zone regulations are necessary,¹⁴ others believe that the Secretary currently has inadequate constitutional, common law or statutory authority to protect national parks. As will be shown by the next section, the scope of the Secretary's authority is still substantially undefined.

III. CONSTITUTIONAL AND COMMON LAW PROTECTION POWERS

The Secretary's power to protect national parks originates in the Constitution.¹⁵ This authority, most often found within the ambit of the property clause,¹⁶ has been the primary source of national park protection. Also, there are two other constitutional, and two common law doctrines which have provided protection to national parks. Combined, these five doctrines include: 1) the public trust doctrine; 2) the law of nuisance; 3) the property clause; 4) the commerce clause; and 5) the supremacy clause.

A. *The Public Trust Doctrine*

The public trust doctrine requires the Secretary to act as trustee in maintaining public lands in trust for the people of the United States. Protection of public lands through this doctrine was recognized long before the passage of the 1916 Organic Act.¹⁷ In *Knight v. United*

12. J. SAX, *MOUNTAINS WITHOUT HANDRAILS* (1980). Tourism in the parks today is often little more than an extension of the city. Urbandom in national parks manifests itself through traffic jams, long lines, restaurants, and the unending drone of motors. *Id.* at 12.

13. Recreation is so intense that there is now a 10-year waiting list to be able to float the Colorado River in a private raft. *Battle over the Wilderness*, *NEWSWEEK*, July 25, 1983 at 22 [hereinafter *Battle over the Wilderness*]. In essence, society is "loving our parks to death." *Protecting National Parks*, *supra* note 1, at 40.

14. Buffer zones are not always created through regulations. Buffer zones can be created by land agreements between government and private land owners.

15. Since the power to create national parks is derived from the property and cession clauses under the Constitution, the authority to protect national parks is likewise found in the Constitution. National park protection is mainly based in the property clause, but the supremacy clause and the commerce clause are also doctrines which are available.

16. The property clause provides: "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2.

17. 16 U.S.C. § 1-3 (1982).

*Land Association*¹⁸ the Supreme Court stated "the Secretary is the guardian of the people of the United States over the public lands."¹⁹ This trustee requirement was reinforced in *Camfield v. United States*,²⁰ when the Supreme Court ruled that the federal government "would be recreant to its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize [public lands] for private gain"²¹ Based on this, the Secretary has a trusteeship to protect all federal public lands,²² but query if this includes national parks?

In *Sierra Club v. Department of the Interior*,²³ the court held that the Secretary in fact had a duty of trusteeship regarding national parks.²⁴ The court held that the Organic Act²⁵ and the Redwood National Park Act²⁶ required that the Secretary act as trustee to protect the Redwood National Park.²⁷ Although the public trust doctrine was applauded by many, its current status is less noteworthy. In *Sierra Club v. Andrus*²⁸ the court rejected the public trust doctrine finding that "trust duties [are] distinguishable from statutory duties."²⁹ In *Andrus*, the court stated that amendment 1a-a of the Organic Act made a clear distinction between trust responsibilities and statutory responsibil-

18. 142 U.S. 161 (1891).

19. *Id.* at 181.

20. 167 U.S. 518 (1897).

21. In *Camfield*, a land owner had constructed fences on private lands which effectively enclosed over twenty thousand acres of federal public lands. The Supreme Court upheld a congressional act which prohibited such enclosures of federal lands. *Id.* at 524.

22. The public trust doctrine was reinforced subsequent to *Knight* and *Camfield* in *Utah Power & Light v. United States*, 243 U.S. 389 (1916); *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972). See also Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

23. 376 F. Supp. 90 (N.D. Cal. 1974). The court, in the following year (*Redwood II*) looked at the evidence and found that the logging occurring on the periphery was in fact threatening the periphery of the Redwood National Park. *Sierra Club v. Department of the Interior*, 398 F. Supp. 284 (N.D. Cal. 1975). The studies that were conducted by the NPS recommended that the peripheral lands be obtained to create a buffer zone. In the alternative, it was suggested, that cooperative agreements be entered into which would limit the amount of logging done near the park.

24. 376 F. Supp. at 95-96. This was the first successful attempt by environmentalists to obtain limited protection outside the actual boundaries of national parks. See Hudson, *Sierra Club v. Dept. of the Interior: The Fight to Preserve Redwood National Park*, 7 ECOLOGY L.Q. 781, 815 (1978).

25. 16 U.S.C. § 1 (1970).

26. The court relied on 16 U.S.C. §§ 79a, 79b(a), 79c(d), 79c(e) (1970). Specifically 16 U.S.C. § 79a requires that the Secretary "preserve significant examples of the primeval coastal redwood forests and the streams and seashores with which they are associated for purposes of public inspiration, enjoyment, and scientific study." 376 F. Supp. at 93.

27. The court not only relied on the duty imposed by the public trust doctrine, but the court also recognized a statutorily imposed obligation. *Id.* at 96.

28. 487 F. Supp. 443 (D.D.C. 1980).

29. *Id.* at 449.

ities, and that any mingling of the two was unfounded.³⁰ The public trust doctrine was rejected because "the court viewed the statutory duties previously discussed as comprising *all* the responsibilities which defendants must faithfully discharge."³¹ Consequently, the authority under the public trust doctrine was considered to be included in the statutory obligation of the Organic Act. Even though the public trust doctrine was affirmed as valid by the Ninth Circuit Court of Appeals³² shortly after *Andrus*, most authorities recognized *Andrus* as putting an end to the public trust doctrine.³³ It now appears as though the Secretary can only invoke trustee powers when specifically authorized by statutory enactments.

B. *The Law of Nuisance*

The Second Restatement of Torts defines a public nuisance as "an unreasonable interference with a right to the general public."³⁴ While the common scenario of nuisance law is that of one neighbor bringing suit against another neighbor,³⁵ the government can also bring nuisance suits against private parties.³⁶ In *United States v. Luce*,³⁷ the federal government brought suit against a fish factory because of the "offensive odors" being emitted.³⁸ In granting injunctive relief, the court held that the government had a right to restrain a nuisance when no adequate remedy at law existed.

In the formative years of federal nuisance law, the courts strived to achieve three major objectives through the doctrine.³⁹ These objectives were: 1) preserving the balance of power between the Supreme Court

30. Though the public trust doctrine was severely limited in its scope, the court in *Andrus* stated that "the Secretary has an absolute duty, which is not to be compromised . . . to take whatever actions and seek whatever relief as will safeguard the units of the National Park System." (quoting Senate Report 95-528, 95th Cong., 1st Sess., 9 (October 21, 1977)). *Id.* at 448. Therefore the court was taking with one hand and giving back with the other. The Secretary lost the power to regulate non-federal lands under the public trust doctrine, but the court gave that same power back under the guise of a statutory obligation.

31. *Id.* at 449 (emphasis by the court).

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

33. *Protecting National Parks*, *supra* note 1, at 49.

34. RESTATEMENT (SECOND) OF TORTS § 821B (1979).

35. The Restatement (Second) of Torts defines a private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Id.* § 821D.

36. Government brings suit under the doctrine of public nuisance rather than private nuisance. *Id.* § 821B. See Comment, *Protecting National Parks From Development Beyond Their Borders*, 132 U. PA. L. REV. 1189, 1191-92 (1984) [hereinafter *Development Beyond Their Borders*].

37. 141 F. 385 (C.C.D. Del. 1905).

38. *Id.* at 390.

39. See Note, *City of Milwaukee v. Illinois: The Demise of the Federal Common Law of Water Pollution*, 1982 WIS. L. REV. 627, 633 [hereinafter *Federal Common Law*].

and state governments;⁴⁰ 2) providing a forum for the resolution of interstate disputes;⁴¹ and 3) developing a means for states to protect environmental integrity.⁴² Of these, the main concern was the balance of power between the Supreme Court and state governments.⁴³

While federal nuisance law provided one method of curtailing private activities from occurring next to public lands, federal nuisance law was severely limited by *Erie Railroad v. Tompkins*.⁴⁴ In *Erie*, the Court held there was no federal general common law.⁴⁵ The Court held that the incorrect application of the Rules of Decisions Act⁴⁶ had resulted in an unconstitutional invasion of the states' authority.⁴⁷ As a result, the doctrine of common law nuisance was severely curtailed, although not completely abrogated.⁴⁸

After *Erie*, the doctrine of federal nuisance was not invoked again for over thirty years.⁴⁹ Not until *Illinois v. City of Milwaukee*,⁵⁰ was the doctrine of common law nuisance once again applied.⁵¹ In *Milwaukee*, the Supreme Court revived the federal common law doctrine of nuisance by stating "[i]t may happen that new federal laws and new federal regulations may in time preempt the field of common law nuisance."⁵² The implication of this is that until new federal laws and federal regulations preempt the field, common law nuisance is still a

40. *Kansas v. Colorado*, 206 U.S. 46, 84-85 (1907); *Missouri v. Illinois*, 200 U.S. 496, 520-21 (1906).

41. *North Dakota v. Minnesota*, 263 U.S. 365, 372-73 (1923); *Kansas v. Colorado*, 206 U.S. 46, 84-85 (1907); *Missouri v. Illinois*, 200 U.S. 496, 520-21 (1906).

42. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-38 (1907).

43. *Federal Common Law*, *supra* note 39, at 627-28.

44. 304 U.S. 64 (1938), *cert. denied*, 305 U.S. 637 (1938).

45. Up until this time, Federal non-statutory law had been used: in settling disputes between states; in disputes involving federal questions; in adjudicating cases to which the United States was a party; and in cases when the United States exercised its territorial jurisdiction over territories and federal enclaves. But *Erie* is purported to have "kill[ed] the federal general common law." Comment, *Erie Limited: The Confines Of State Law In The Federal Courts*, 40 CORNELL L.Q. 561, 574 (1955).

46. Judiciary Act of 1789, ch. XX, § 34, 1 Stat. 73, 92 (1789).

47. *Erie Railroad v. Tompkins*, 304 U.S. 64, 78-79 (1938).

48. One reason the doctrine of common law nuisance was not completely abrogated was that individual states could still invoke the public nuisance doctrine. What essentially was abrogated was federal common law nuisance. Note, *Federal Jurisdiction-Environmental Law-Nuisance-State Ecological Rights Arising Under Federal Common Law*, 1972 WIS. L. REV. 597, 602.

49. Between 1938 and 1972 there were virtually no federal nuisance cases decided. See *infra* notes 50-51 and accompanying text.

50. 406 U.S. 91 (1972).

51. *Illinois v. City of Milwaukee* is considered to be the first case which applied the doctrine of federal nuisance law anew. See generally *United States v. Stoeco Homes, Inc.*, 359 F. Supp. 672 (D.N.J. 1973), *vacated on other grounds yet requiring a modification of the injunction*, 498 F.2d 597 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); *United States v. Ira S. Bushey & Sons, Inc.*, 346 F. Supp. 145 (D. Vt. 1972).

52. 406 U.S. at 107.

viable doctrine. Though most cases since *Milwaukee* have involved the protection of air⁵³ and water⁵⁴ quality, some nuisance cases have been asserted upon other grounds.⁵⁵ Because most air and water quality is now controlled by federal statute,⁵⁶ it appears as though the doctrine of nuisance has reverted back to a position of less prominence.⁵⁷ It should be noted, however, that the doctrine of public nuisance could still serve the NPS as a viable means of obtaining national park protection.⁵⁸

C. The Property Clause

Under the property clause,⁵⁹ Congress has been given broad powers to protect federal lands by creating "needful rules and regulations."⁶⁰ In essence, Congress has police powers within states to determine how federal lands will be used and protected.⁶¹ In *United States*

53. *United States v. Atlantic-Richfield Co.*, 478 F. Supp. 1215 (D. Mont. 1979) (injunction ordering fluoride emission levels to be reduced).

54. *United States ex rel. Scott v. United States Steel Corp.*, 356 F. Supp. 556 (N.D. Ill. 1973) (restraining steel producer from discharging waste into Lake Michigan); *United States v. Stoeco Homes, Inc.*, 359 F. Supp. 672 (D.N.J. 1973), *vacated on other grounds yet requiring a modification of the injunction*, 498 F.2d 597 (3d Cir. 1974) (injunction against dredging, filling and construction in a navigable waterway in New Jersey); *United States v. Ira S. Bushey & Sons, Inc.*, 346 F. Supp. 145 (D. Vt. 1972) (ordering greater precautions to be taken to avoid oil spillage on Lake Champlain).

55. In *United States v. Arlington County*, 487 F. Supp. 137, 141-143 (E.D. Va. 1979), it was asserted that a 300-foot office building would be a visual intrusion on the monumental core of Washington, D.C. Although the invocation of the doctrine of nuisance was denied, the court concluded that the Attorney General had standing to instigate the litigation, and to attempt to protect the rights and properties of the United States. The court also held that the Secretary had a right to sue in order to protect national parks, memorials, and monuments. *See also* 12 ENV'T REP. CAS. 1817, 1819 (E.D. Va. 1979); *Development Beyond Their Borders*, *supra* note 36, at 1194 n.33.

56. With the passage of the Clean Air Act and the Clean Water Act, common law nuisance may be preempted. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n.*, 453 U.S. 1, 22 (1981), states: "the federal common law of nuisance in the area of water pollution is entirely preempted by the more comprehensive scope of the FWPCA [Federal Water Pollution Control Act] which was completely revised after the decision in *Illinois v. Milwaukee*." *See also* *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699 (D.N.J. 1982) (holding that certain provisions of the Clean Air Act had preempted federal common law).

57. "The limited usefulness of the nuisance doctrine in preserving the national parks may therefore be more the result of failure to assert it than of any inherent shortcomings in the doctrine." *Development Beyond Their Borders*, *supra* note 36, at 1197. *See also* Note, *Aesthetic Nuisance: An Emerging Cause of Action*, 45 N.Y.U. L. REV. 1075 (1970).

58. It must be remembered that the "nuisance exception . . . is not coterminous with the police power itself, (citation omitted) but is a narrow exception allowing the government to prevent 'a misuse or illegal use.'" *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1236, 1256 (1987).

59. U.S. CONST. art. IV, § 3, cl. 2. *See supra* note 16.

60. U.S. CONST. art. IV, § 3, cl. 2.

61. *United States v. Alford*, 274 U.S. 264 (1927); *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1916); *Light v. United States*, 220 U.S. 523 (1911); *United States v. Lindsey*, 595 F.2d 5 (9th Cir. 1979).

v. Alford,⁶² Justice Holmes, in reference to the property clause, stated: "Congress may prohibit the doing of acts . . . that imperil the publicly owned forests."⁶³ Though this might be viewed as an expansive reading of the property clause, it is not inconsistent with previous Supreme Court decisions.⁶⁴ This reading of the property clause was recently reaffirmed in *Kleppe v. New Mexico*.⁶⁵ In *Kleppe*, the Supreme Court stated: "*Camfield*⁶⁶ contains no suggestion of any limitation on Congress' power over conduct on its own property; its sole message is that the power granted by the property clause is broad enough to reach beyond territorial limits."⁶⁷ *Kleppe* thus indicates that the property clause is now read so broadly that Congress' authority under the clause can be considered to be "without limitations."⁶⁸ Though Congress has been given expansive powers under the property clause, *Kleppe* expressly reserved judgment on the extent to which Congress may regulate activities on neighboring non-federal lands.⁶⁹ Consequently, the scope of power Congress has given to the Secretary is likewise uncertain. Since only a limited number of cases have held that Congress has any regulatory authority over non-federal lands,⁷⁰ the scope of authority delegated to the Secretary is yet to be defined.

62. 274 U.S. 264 (1927).

63. *Id.* at 267.

64. In *Camfield v. United States*, 167 U.S. 518 (1897), the Court said:

While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State which it would have within a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of state legislation.

Id. at 525-26.

65. 426 U.S. 529 (1976).

66. *Camfield v. United States*, 167 U.S. 518 (1897). See *supra* note 64.

67. 426 U.S. at 538.

68. Shepard, *The Scope Of Congress' Constitutional Power Under The Property Clause: Regulating Non-Federal Property To Further The Purposes Of National Parks And Wilderness Areas*, 11 B.C. ENVTL. AFF. L. REV. 479, 491 & n.86 (1984) [hereinafter *The Property Clause*]. See also *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 294-95 (1958); *Alabama v. Texas*, 347 U.S. 272, 273 (1954); *United States v. California*, 332 U.S. 19, 27 (1947); *United States v. San Francisco*, 310 U.S. 16, 29 (1940); *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1914); *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1871); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840).

69. Here the Court stated:

While it is clear that regulations under the Property Clause may have some effect on private lands not otherwise under federal control, *Camfield v. United States*, 167 U.S. 518 (1897), we do not think it appropriate . . . to determine the extent, if any, to which the Property Clause empowers Congress.

426 U.S. at 546.

70. See *United States v. Alford*, 274 U.S. 264 (1927); *Camfield v. United States*, 167 U.S.

In the past, the property clause has been one of the strongest doctrines which the Secretary has relied upon to provide protection to national parks. Yet, the unresolved question of whether the property clause can be read broadly enough to regulate non-federal land for purposes of protecting national parks is still raging. Though the answer appears to be in the negative,⁷¹ there is some authority to the contrary.⁷²

D. The Commerce Clause

Even though the protection of national parks is based on the property clause, the commerce clause⁷³ is also a constitutional power which Congress can use to regulate threatening activities occurring next to national parks. With national parks encompassing over one hundred million acres⁷⁴ and generating billions of dollars annually,⁷⁵ the nexus between national parks and the commerce clause is reflected by the commerce involved.⁷⁶ Although the commerce clause has had limited

518 (1897).

71. Besides the Supreme Court expressly reserving judgment regarding the scope of the property clause in *Kleppe*, there are other concerns why the property clause should not be read too broadly. One such concern is the relationship between the federal government and individual states. "Every expansion of the property clause increases the power of the federal government at the expense of the states' authority, and by the traditional jurisprudence of federalism that is cause for unease." *Helpless Giants*, *supra* note 8, at 254.

72. Since *Kleppe*, the Eighth Circuit Court of Appeals has struck down two attacks which challenged regulations controlling activities occurring on non-federal lands. In *United States v. Brown*, 552 F.2d 817 (8th Cir. 1977), *cert. denied*, 431 U.S. 949 (1977), the court upheld a conviction for duck hunting within Voyageur National Park even though duck hunting was permitted under state law. Here the court specifically held that both *Kleppe* and *Camfield* authorized this use of the property clause. Similarly, in *Minnesota ex rel. Alexander v. Block*, 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), the court upheld a federal statute which restricted motorized travel on non-federal lands and waters, located within Boundary Waters Canoe Area. Here the court reasoned that the regulation of conduct on or off the public land was necessary to protect the area from activities which "would threaten the designated purpose of federal lands." 660 F.2d at 1249.

73. The commerce clause grants power to Congress "to regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

74. "Over the last six decades, our system of national parks has expanded to include well over three hundred areas encompassing over one hundred million acres of land." *Development Beyond Their Borders*, *supra* note 36, at 1190.

75. It has been projected that tourism in Yellowstone National Park injects approximately 610 million dollars annually into Wyoming's economy. Comment, *State Participation in Federal Policy Making for the Yellowstone Ecosystem: A Meaningful Solution or Business as Usual?*, 21 LAND AND WATER L. REV. 397, 400 (1986) [hereinafter *Yellowstone Ecosystem*].

76. In *United States v. 967.905 Acres of Land*, 305 F. Supp. 83 (D. Minn. 1969), *rev'd*, 447 F.2d 764 (8th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972), the District Court described the Boundary Waters Canoe Area located in Minnesota as "attract[ing] Boy Scouts, campers, sportsmen, Izaak Walton League members and others from the entire United States and Canada, usually for several-day to several-week canoe trips, fishing, outings, etc." 305 F. Supp. at 85. The

use in upholding environmental decisions,⁷⁷ Congress does have extensive authority under the clause if desired.⁷⁸ The commerce clause is essentially a dormant constitutional power which could be invoked by Congress to increase the Secretary's power to protect national parks. As park use increases, the commerce clause may become more of a predominant doctrine.

E. The Supremacy Clause

The supremacy clause⁷⁹ can also provide protection to national parks by preempting any inconsistent or conflicting state law which would reduce the effectiveness of any protective federal statutes.⁸⁰ As early as 1824, the Supreme Court recognized in *Gibbons v. Ogden*,⁸¹ that federal law and state law might conflict.⁸² There, the Supreme Court ruled that state law must yield to federal law whenever a conflict arises.⁸³

Though the supremacy clause is rarely invoked in the protection of national parks,⁸⁴ the constitutional power is available if state and federal laws conflict. This is important to the current discussion because if

income into Minnesota because of the Boundary Waters Canoe Area would certainly meet any constitutional challenges regarding interstate commerce.

77. See, *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974); *Leslie Salt Co. v. Froehke*, 578 F.2d 742 (9th Cir. 1978).

78. The strength of the power given Congress can be seen by the number of cases upheld by the Supreme Court under the commerce clause. "With a single distinct exception, [National League of Cities v. Usery, 426 U.S. 833 (1976)] the Supreme Court has not struck down a congressional exercise of power under that clause [the commerce clause] for four decades." *Helpless Giants*, *supra* note 8, at 256. See generally, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Sierra Club v. Morton*, 376 F. Supp. 90 (N.D. Cal. 1974).

79. The supremacy clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

80. *Utah Power & Light v. United States*, 243 U.S. 389, 404-05 (1916); *United States v. Brown*, 552 F.2d 817, 821 (8th Cir. 1977), *cert. denied*, 431 U.S. 494 (1977).

81. 22 U.S. (Wheat.) 1 (1824).

82. *Id.* at 211.

83. *Id.* It should also be noted that rules created by federal agencies have preemptive rights over state legislation. See *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 535 (1959). See generally *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

84. The reason the supremacy clause is rarely invoked is because it has only been in the last few years that states have begun passing state environmental protection statutes which could conflict with federal statutes. *Yellowstone Ecosystem*, *supra* note 75, at 402-03.

buffer zones were created by Congress to protect national parks, the supremacy clause could be invoked to defeat conflicting state law. Whenever state law permitted environmentally threatening activities to harm the national parks, the supremacy clause would preempt the offending activity.

F. Summary of Constitutional and Common Law Protective Powers

Constitutional and common law doctrines can and have provided protection for national parks. These doctrines, however, are not invoked as often as they could be because more specific legislative enactments are now taking a superior position.⁸⁵ These legislative enactments do not necessarily abrogate the constitutional and common law doctrines, but rather, these statutes provide more specific guidelines by which the Secretary must protect the national parks.

While legislative enactments do not resolve all the problems facing national parks, congressional enactments do provide specific authority through additional national park protection. The next section will focus on some recent legislative enactments specifically, those which effect the Secretary's power to protect national parks.

IV. RECENT LEGISLATIVE ENACTMENTS

Legislative enactments such as the National Environment Policy Act⁸⁶ and the Federal Land Policy and Management Act⁸⁷ have increasingly provided more protection for national parks. For ease of discussion, these legislative enactments can easily be divided into three major categories: 1) legislation which requires proper planning and administration of the NPS; 2) legislation which protects the resources located within national parks; and 3) legislation which permits, yet controls, the development of resources located in or near national parks.

A. Planning and Administration

Under the planning and administration category, some of the major congressional enactments include: the National Park Service Organic Act, and its amendments;⁸⁸ the National Environment Policy

85. *E.g.*, *supra* note 56 and accompanying text.

86. 42 U.S.C. §§ 4321-4370 (1982 & Supp. 1984).

87. 43 U.S.C. §§ 1701-1784 (1982 & Supp. 1985).

88. The National Park Service Organic Act of 1916 gave the NPS the responsibility of protecting national parks from any degradation which would impair the land for future generations. 16 U.S.C. § 1-20 (1982 & Supp. 1985). The Organic Act requires the NPS to "regulate the use of the Federal areas known as national parks, monuments . . . as conform to the fundamental purpose of the said park . . . which purpose is to conserve the scenery and the natural and historic

Act;⁸⁹ the Federal Land Policy and Management Act;⁹⁰ and the National Forest Management Act.⁹¹ These statutes provide for an extensive networking of national park land management. The purpose behind these administrative statutes is to furnish a structured procedure through which governmental agencies can make environmentally sound decisions while providing for public input. Though these statutes often overlap in their mandates, they represent the most comprehensive environmental planning statutes ever enacted.

Perhaps the most far reaching managerial enactment is the National Environmental Policy Act (NEPA). NEPA requires Environmental Impact Statements to be made whenever a major action "significantly affecting the quality of human environment" is proposed.⁹² This provides the NPS the opportunity to carefully review all proposed development on federal lands to determine whether such development is environmentally sound. The passage of NEPA empowered the NPS with the authority to regulate all land uses on federal public lands.

objects." 16 U.S.C. § 1. These charges were strengthened by the 1978 amendments in which Congress reaffirmed its previous mandates while expanding its scope to include all land and water found within national parks. 16 U.S.C. § 1a-1 (Supp. 1984). *See also* 16 U.S.C. § 1c (1974).

89. The National Environment Policy Act (NEPA) of 1969 was one of Congress' first attempts in recent years to provide protection for national parks. NEPA is probably the most comprehensive environmental planning statute ever enacted. This Act creates a procedure by which federal agencies can make environmentally sound decisions. 42 U.S.C. §§ 4321-4370 (1982 & Supp. 1984). The Act requires an Environmental Impact Statement (EIS) to be prepared every time a major action "significantly affecting the quality of the human environment" is proposed. 42 U.S.C. § 4332(c). If an EIS is required, then the agency responsible must first submit a "draft environmental impact statement" (DEIS), whereby the public and interested parties have an opportunity to respond to the proposed activity. After the DEIS is completed, a final EIS is prepared and submitted. 40 C.F.R. §§ 1502-03 (1984). NEPA also requires federal agencies to consult with other federal agencies on the environmental ramifications of any proposed projects. 42 U.S.C. § 4332(2)(C).

90. The Federal Land Policy and Management Act (FLPMA) of 1976 was comprehensive legislation which requires extensive land management. 43 U.S.C. §§ 1701-84 (1982 & Supp. 1985). In this sense it differs from NEPA because NEPA was designed specifically to manage the environment. FLPMA has management directives which mandate the Secretary to protect park resources in a manner that will protect the "quality of scientific, historical, ecological, environmental, air and atmosphere, water resource and archeological values." 43 U.S.C. § 1701(a)(8). FLPMA also arguably requires the protection of public lands which are areas of "critical environmental concern" even if they are out side the national parks. 43 U.S.C. §§ 1702(a), 1711(a).

91. The National Forest Management Act (NFMA) of 1976 was enacted to modify the prior Forest and Rangeland Resources Planning Act. NFMA requires a program to protect, manage and develop the natural forest system. 16 U.S.C. §§ 1600-1687 (1982 & Supp. 1985). Though NFMA was mainly enacted for the development of renewable resource programs, it also requires the Secretary to "protect and, where appropriate, improve the quality of soil, water and air resources." 16 U.S.C. § 1602(5)(c). This protection encompasses, among other things, the protection of the silviculture, forest resources, range, timber, watershed, wildlife and fish. 16 U.S.C. § 1604(g)(3)(A).

92. 42 U.S.C. § 4332(c) (1982).

NEPA also provides limited power to protect national parks from degradation occurring beyond federal public lands.

B. Protection of Resources

Legislation which protects resources located within national parks includes: the Wilderness Act;⁹³ the National Wildlife Refuge System Administration Act;⁹⁴ the Endangered Species Act;⁹⁵ the Wild and Scenic Rivers Act;⁹⁶ and the Clean Air⁹⁷ and Clean Water Acts.⁹⁸

93. The Wilderness Act of 1964 provides for the creation and management of wilderness areas. 16 U.S.C. §§ 1131-36 (1982 & Supp. 1985). A wilderness area is defined as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." 16 U.S.C. § 1131(c). In conjunction with the enactment of the Wilderness Act, the Forest Service designated 54 areas as wilderness areas. 16 U.S.C.A. § 1132(a) (1985). The Wilderness Act also required the Forest Service to study an additional 5.4 million acres which were designated as "primitive areas" to determine their suitability for wilderness designation. This study was to be completed within 10 years and then submitted to the President for final approval. 16 U.S.C. § 1132(b). The Forest Service has also attempted to designate additional wilderness areas through the Forest Service's Roadless Area Review and Evaluation (RARE I,II), though not specifically mandated to do so. *See generally*, Rickart, *Wilderness Land Preservation: The Uneasy Reconciliation Of Multiple And Simple Use Land Management Policies*, 8 B.C. ENVTL. AFF. L. REV. 873, 886-909 (1980).

94. The National Wildlife Refuge System Administration Act of 1966, commonly known as the National Wildlife Refuge System, created a program for providing protection for various types of wildlife. 16 U.S.C. §§ 668dd-668ee (1982 & Supp. 1985). This is one of the few statutes which manages land for the conservation of wildlife. Though the Endangered Species Act (ESA) provides protection for the habitat in which the species lives, ESA is not as all encompassing as the National Wildlife Refuge System. In order for ESA to provide protection to the surrounding lands, it must be determined that a species is in fact listed as an animal or plant which is protectable. By contrast, the National Wildlife Refuge System provides protection to the natural habitat of all animals regardless of whether they have been designated as endangered. The National Wildlife Refuge System has as its directives, a mandate to exclude all uses incompatible with the protection of wildlife. 16 U.S.C. § 668dd(d)(1). As the courts have stated "all national wildlife refuges are maintained for the primary purpose of *preserving, protecting and enhancing wildlife and other natural resources and of developing a national program of wildlife and ecological conservation and rehabilitation.*" *Defenders of Wildlife v. Andrus*, 11 ENV'T REP. CAS. 2098, 2099 (D.D.C. 1978) (emphasis by the court). *See generally* *Defenders of Wildlife v. Andrus*, 455 F. Supp. 446 (D.D.C. 1978).

95. The Endangered Species Act (ESA) of 1973 was passed to protect endangered and threatened species and their critical habitat. 16 U.S.C. §§ 1531-43 (1982 & Supp. 1985). ESA requires the Secretary to identify and designate species of wildlife, fish and plants that are endangered or threatened and to designate areas of critical habitat for the species. 16 U.S.C. § 1533(a). ESA also prohibits people from taking endangered wildlife or plants from the natural areas in which they are found. To "take," as defined by ESA, means "to harass, harm, pursue, hunt, shoot, wound, kill, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Therefore, ESA is a powerful mandate in the protection of resources that are endangered in any way. The Secretary is also required to protect the critical habitat which arguably extend beyond the boundary of national parks.

96. The Wild and Scenic Rivers Act of 1968, 16 U.S.C. §§ 1271-87 (1982 & Supp. 1985), protects rivers with "outstandingly remarkable scenic, recreational, geological, fish and wildlife, historic, cultural, or other similar values . . . for the benefit and enjoyment of present and future generations." 16 U.S.C. § 1271. This Act not only contains provisions that require the protection

These six statutes are representative of the regulations which Congress has drafted to protect both national wildlife (and the habitat) and scenery through out national parks. These comprehensive statutes are more extensive in their periphery protection than either the administrative statutes, or the statutes which allow for development of resources. The reason these statutes provide more protection to national parks is because the protection of wildlife and natural resources necessarily requires that the habitat and/or scenic setting in which the objects are located also be protected. This provides more protection because the NPS can restrict land owners from continuing activities adjacent to the parks which are detrimental to the purpose for which the parks were created.⁹⁹

For example, the Wild and Scenic Rivers Act provides that up to 320 acres on each side of a scenic river can be dedicated as a protectable area. Likewise, the Endangered Species Act (ESA) requires the Secretary to protect the "critical habitat" of any species of plant or animal which is endangered or threatened. As interpreted, ESA has been applied very strictly no matter what the cost.¹⁰⁰ Because of the

of rivers, but it also specifically provides for the protection of the lands surrounding the rivers. The Act provides that "particular attention shall be given to scheduled timber harvesting, road construction, and similar activities" and to provide "safeguards against pollution of the river involved[,] and unnecessary impairment of scenery within the component in question." 16 U.S.C. §§ 1280(a), 1283(a). Section 1274(b) also states that not more than 320 acres on each side of the river should be designated as included within the zone of protection. Therefore, any area less than 320 acres is considered appropriate for protection, even if the zone encroaches onto private lands.

97. The Clean Air Act of 1982 protects our national parks by preserving the sight or vista which is so important. 42 U.S.C. §§ 1857-1857L (1982). The purpose of the Clean Air Act is "to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value." 42 U.S.C. § 7470(2). In the 1977 amendments to the Clean Air Act, Congress required "aggressive steps [be taken] to remedy existing visual deterioration, and to prevent future impairment" of pristine areas where visibility is an important value. *Chevron USA, Inc. v. EPA*, 658 F.2d 271, 272 (5th Cir. 1980). See also Ostrov, *Visibility Protection Under the Clean Air Act: Preserving Scenic and Parkland Areas in the Southwest*, 10 *ECOLOGY* L. Q. 397, 401 (1982).

98. The Clean Water Act of 1977 is a federal enactment which is designed to improve the quality of the nation's water. 33 U.S.C. §§ 1251-1376 (1982 & Supp. 1985). Through this Act, Congress has sought to "prevent, reduce, and eliminate pollution" and "to plan the development and use of land and water resources." 33 U.S.C. § 1251(b). Therefore, the protection of water resources, (and all things which are affected by the preservation of clean water) is an additional step which Congress has taken to protect the integrity of national parks.

99. For example, the NPS can prohibit logging in an area if the logging is occurring close to endangered species.

100. In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the Court found that an endangered species known as the snail darter, was being threatened by the Tellico Dam then currently under construction. Though the dam was almost 80% completed when the snail darter was discovered, the Court found that the 78 million dollars thus far spent in construction, would have to give way to a permanent injunction. In thus holding, the Court stated:

value of endangered species and scenic preservation,¹⁰¹ statutes like the Wild and Scenic Rivers Act and ESA can regulate activities occurring beyond the actual situs of national parks.

C. Controlled Resource Development

The legislation which allows, yet controls, the development of natural resources located in or near national parks include: the Surface Mining Control and Reclamation Act;¹⁰² the Multiple-Use Sustained Yield Act;¹⁰³ and the Geothermal Steam Act.¹⁰⁴ These statutes are indicative of some of the recent protective statutes which have been en-

[T]he plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as "incalculable." Quite obviously, it would be difficult for the Court to balance the loss of a sum certain—even \$100 million—against a congressionally declared "incalculable" value

Id. at 187-88. Therefore, in October 1978, Congress created a new cabinet-level committee to resolve irreconcilable conflicts between ESA and federal projects. In January, 1979, the newly appointed committee infuriated some members of Congress by ruling that the snail darter did indeed outweigh the completion of the Tellico Dam. Congress finally exempted the Tellico Dam from ESA in September 1979, and the snail darter's fate hung on the success of a transplantation program. G. COGGINS & C. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCE LAW* 600 (1981). It can therefore be seen, that ESA is one statute which has been interpreted very strictly.

101. It has been calculated that society would be willing to pay 3.5 billion dollars a year to preserve the visibility in Grand Canyon National Park. To protect the visibility in parklands located in the southwest, an annual payment of 6.2 billion dollars by society has been calculated. Schulze, Brookshire, Walther, MacFarland, Thayer, Whitworth, Ben-David, Malm, Molenaar, *The Economic Benefits of Preserving Visibility in the National Parklands of the Southwest*, 23 NAT. RESOURCES J. 149, 149 (1983).

102. The Surface Mining Control and Reclamation Act (SMCRA) of 1977 goes beyond any previous mining regulation (Mining Law of 1872, 30 U.S.C. §§ 21-54 (1982)) and allows any party to petition the Secretary to designate any particular area as unsuitable for surface coal mining. 30 U.S.C. §§1201-1328 (Supp. 1985)(emphasis added). See also § 1272(c)(Supp. 1984). SMCRA states that an area may be designated as unsuitable for mining if the mining will "affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific and aesthetic values and natural systems." 30 U.S.C. § 1272(a)(3)(b).

103. The Multiple-Use and Sustained-Yield Act (MUSY) of 1960 provides that "it is the policy of the Congress that the natural forests are established and shall be administered for the outdoor recreation, range, timber, watershed and wildlife and fish purposes." 16 U.S.C. §§ 528-531 (1982). The purpose of MUSY is to provide a compromise through which land can be used in two or more compatible ways. MUSY protects renewable resources by managing their extraction, while MUSY regulates the time necessary for adequate regeneration. MUSY provides additional protection to national parks by not allowing too much resources to be taken from national parks without adequate time for regeneration.

104. The Geothermal Steam Act of 1970 gave the Secretary the right to issue leases for the development and production of geothermal steam. 30 U.S.C. §§ 1001-25 (1982 & Supp. 1985). Before any serious exploration or development of geothermal steam can begin, an operation plan containing a narrative statement describing the proposed measures to be taken for the protection of the environment is required. The topics which require attention include "the prevention or control of (1) fires, (2) soil erosion, (3) pollution of the surface and ground water, (4) damage to fish and wildlife or other natural resources, and (5) air and noise pollution." G. COGGINS & C. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCE LAW* 451 (1981).

acted to allow development of natural resources located in national parks. The main thrust of these statutes are to allow development of natural resources in such a manner that national parks are not seriously degraded. These statutes provide for extensive reclamation while attempting to manage renewable resources in a manner which allows adequate time for regeneration.¹⁰⁵

Perhaps a good example of a resource development statute is the Multiple-Use and Sustained Yield Act (MUSY).¹⁰⁶ The purpose of MUSY is to protect renewable resources from complete extraction while allowing time for adequate regeneration. Harvesting trees is one example where MUSY applies. Under MUSY, an average range is required to lay dormant with no logging allowed for a predetermined period of years.¹⁰⁷ Once logging has occurred, the land is left until the trees are sufficiently mature before logging is once again permissible.

D. Summary of Recent Legislative Enactments

As the foregoing discussion indicates, Congress is constantly providing more protection to the ever-increasing fragility of national parks' ecosystems. Though this is an impressive list of legislative enactments, most of these statutes have been enacted or seriously amended in the last two decades.¹⁰⁸ One problem with this is that these statutes were not passed with the intention of being national park bandages.¹⁰⁹ Their application is designed to prevent future degradation. Applying these statutes in a retroactive fashion will most likely not produce the anticipated results. The NPS cannot fulfill the requirements outlined in some of these statutes because the degradation has already exceeded the

105. 30 U.S.C. § 1265(b)(24) (1982), provides that mining and reclamation operations shall operate to the extent possible, in a manner which will use the best technology available to minimize disturbances and achieve enhancement of resources. *See also In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1313 (D.D.C. 1978) (requiring some of the land to be restored to a condition better than before the mining). Also, "Sustained-Yield" of the Multiple-Use and Sustained-Yield Act (MUSY) means "the achievement and maintenance in perpetuity . . . of the various renewable resources of the national forests *without impairment* of the productivity of the land" (emphasis added). 16 U.S.C. § 531 (1982).

106. 16 U.S.C. §§ 528-31 (1982). *See supra* note 103 and accompanying text.

107. Different types of trees have different regeneration periods allotted to them by the Forest Service. This protects national parks by allowing trees to fully mature before harvesting. Not only does this strengthen forests, it also provides protection for the watershed and silviculture. The period of time given by the Forest Service for regeneration is generally longer than the time allotted by private entities. For example, the rotation period for Douglas Fir is 100 years for the Forest Service, while private forest harvest rates vary from 40-60 years. G. COGGINS & C. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCE LAW* 472 (1981).

108. *See supra* notes 86-107.

109. Most of these statutes were passed with an eye to the future. The purpose was not to repair past occurrences, but rather, to prohibit future occurrences.

standards outlined. This is why even more stringent regulations are still being proposed.¹¹⁰ With so many statutes, the question still arises whether the Secretary currently has adequate explicit/implicit authority to protect national parks from exterior threats. The Parks Report indicates that 4,345 threats currently exist.¹¹¹ Because over half of these threats originate from outside the national parks, it has been proposed that buffer zones be created to deal with exterior threats. The next section will address buffer zones and the fifth amendment takings clause as a legal obstacle to their creation.

V. PROTECTION THROUGH BUFFER ZONES: A CONSTITUTIONAL TAKING?

Degradation threatening national parks has put many agencies and environmental groups on a bandwagon proclaiming that most periphery problems can be handled through the creation of buffer zones.¹¹² In the past, the federal government created buffer zones by purchasing land surrounding national parks.¹¹³ On February 19, 1981, however, Secretary of the Interior James Watt announced that a "moratorium" would be placed on all land acquisition efforts by the NPS.¹¹⁴ The NPS could no longer purchase surrounding lands to protect national parks, rather, the NPS was required to create buffer zones through alternative means.¹¹⁵ The purpose of this section is to consider

110. See National Park System Protection and Resource Management Act, *infra* notes 142-44 and accompanying text.

111. See *supra* note 3.

112. *Protecting National Parks*, *supra* note 1. One problem with buffer zones is that property is an interdependent network of competing uses. Land does not exist independent of other land. Land disregards legal boundaries. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 150 (1971). A second problem which government faces is where will the buffer zone end? "Does it stretch from the Atlantic to the Pacific?" *Battle Over the Wilderness*, *supra* note 13, at 29. "Congress cannot give the Park Service full police powers outside its boundaries without deciding where that power should end. . . ." *Helpless Giants*, *supra* note 8, at 265. "To a significant extent the problem centers on the existence of adjacent lands, and there will always be new lands adjacent to any new boundary." Sax, *Buying Scenery: Land Acquisitions For The National Park Service*, 1980 DUKE L.J. 709, 720-21 [hereinafter *Buying Scenery*]. As was stated in *Nollan v. California Coastal Commission*, 107 S. Ct. 3141 (1987), "a buffer zone has a boundary as well, and unless that zone is a 'no-man's land' that is off-limits for both neighbors (which of course is not the case here) its creation achieves nothing except to shift the location of the boundary dispute further on to the private owner's land." *Id.* at 3149 n.6. Though many agencies laud the creation of buffer zones, buffer zones do have their limitations.

113. "[W]henver the focal points have been threatened by outside activity, the simplest and most effective response has been for the government to acquire additional surrounding land as insulation." *Development Beyond Their Borders*, *supra* note 36, at 1190.

114. Lambert, *Private Landholdings in the National Parks: Examples from Yosemite National Park and Indiana Dunes National Lakeshore*, 6 HARV. ENVTL. L. REV. 35, 38-39 (1982).

115. For national parks created before 1959, the NPS can only acquire full fee title in land if

whether buffer zone regulations can rise to the level of a fifth amendment taking.

A. *Introduction Into the Takings Clause*

The fifth amendment provides that "private land shall not be taken for public use without just compensation."¹¹⁶ One of the unsolved questions of the past two centuries concerning this provision has been: what factors are actually necessary to constitute a taking? This question is especially troublesome when a "taking" is allegedly caused by governmental regulations rather than a physical invasion.¹¹⁷ In *Pennsylvania Coal Co. v. Mahon*,¹¹⁸ the Supreme Court, stated that a regulation can constitute a taking¹¹⁹ if the regulation has "gone too far."¹²⁰ The question which necessarily follows is: when has a regulation "gone too far?"¹²¹

it can be explained why none of the following alternatives are suitable: 1) cooperative agreements 2) tax incentives 3) zoning 4) transfer of development rights 5) easements 6) leases 7) purchase and sellbacks or 8) land exchanges. It can therefore be seen that the Secretary considers land acquisition as no longer being a viable method of national park protection. *Id.*

116. The fifth amendment to the United States Constitution states: "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. V. This same provision is made applicable to states through the fourteenth amendment. U.S. CONST. amend. XIV. See *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 239 (1897); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980).

117. For many years courts did not recognize a regulation as rising to the level of a taking, but this view has changed over time. As Justice Brennan stated in *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621 (1981) (Brennan, J., dissenting):

Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state . . .

Id. at 652.

118. 260 U.S. 393 (1922).

119. It should be recognized that under the doctrine of eminent domain, government actually acquires title to the private owner's property. When government does not acquire title to the land, but rather, imposes regulations which interfere with the private enjoyment of the land, this form of taking is referred to as "inverse condemnation." Since government never acquires the land in fee, inverse condemnation suits are somewhat different than pure takings cases. In *Agins v. Tiburon*, 447 U.S. 255 (1980), the court phrased inverse condemnation as "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *Id.* at 258 n.2.

120. Thus, the actual analysis by the court over the last half century has been an attempt to define what factors the court should look at in determining if a regulation has "gone too far." Justice Holmes stated: "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). See also *Agins v. Tiburon*, 447 U.S. 255 (1980); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

121. Though there is no precise criteria, the Court has indicated some of the circumstances under which governmental action *does not* rise to the level of a taking. Two of these factors are:

B. Buffer Zone Regulations and *Penn Central*

In 1978, the Supreme Court enunciated its most recent test for determining whether a taking has occurred.¹²² This test, found in *Penn Central Transportation Co. v. New York City*,¹²³ announces a three part test which requires a balancing of governmental and private interests. These interests are: 1) the character of the governmental action;¹²⁴ 2) the extent to which the value of the land has been diminished;¹²⁵ and 3) the extent to which the regulation has interfered with the investment-backed expectations of the property owner.¹²⁶

1) it is generally held that a mere diminution in the value of one's land is not enough to constitute a taking. As Justice Holmes stated in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." 260 U.S. at 413. See also *Kirby Forest Indus. v. United States*, 467 U.S. 1 (1984); *Hodel v. Virginia Surface Mining & Reclamation Assn.* 452 U.S. 264, 296 (1981); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *HFH, Ltd. v. Superior Court*, 542 P.2d 237 (Cal. 1975), *cert. denied*, 425 U.S. 904 (1976); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Elucid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mulger v. Kansas*, 123 U.S. 623 (1887). 2) it is not enough that the owner is denied the highest and best use of his land. See *United States v. Causby*, 328 U.S. 256, 262 & n.7 (1946). While no one single factor is dispositive, when both factors are present, the court may find a taking to have occurred. See also Comment, *Private Property and Environmental Regulatory Takings: A Forward Look into Rights and Remedies, as Illustrated by an Excursion into the Wild Rivers Act of Kentucky*, 73 Ky. L.J. 999, 1010 (1985).

122. Though this is the most recent test enunciated by the Supreme Court, the standards outlined are still developing. This was once again demonstrated by the recent decision of *First English Evangelical Lutheran Church v. Los Angeles*, 107 S. Ct. 2378 (1987). Four times in the past decade the Supreme Court has been asked to consider whether a temporary taking is compensable. See *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *San Diego Gas & Electric Co., v. San Diego*, 450 U.S. 621 (1981); *Agins v. Tiburon*, 447 U.S. 255 (1980). Four times the court has been unable to reach the merits of the case. In *First English*, the Court finally reached the merits of the case and handed down one of the furthest reaching decisions of this era. In *First English*, the Supreme Court held that the just compensation clause of the fifth amendment requires the government to pay interim damages (interim damages are damages which arise when land has been temporarily taken. Land owners seek damages for the interim between which the regulation is imposed, and the government either invalidates the regulation or agrees that a taking has occurred). The just compensation clause has never been read so broadly. Because of this broad interpretation of the fifth amendment, buffer zone creation seems even less tenable than ever before. The court recognized that the *First English* holding would "undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations," but the Court stated that the invalidation of an unduly burdensome ordinance may change a "taking" into a "temporary taking," a remedy insufficient to meet the demands of the just compensation clause. 107 S. Ct. at 2389.

123. 438 U.S. 104 (1978).

124. *Id.* at 124.

125. *Id.*

126. *Id.* at 124-25. Though "investment-backed expectations" appeared to be somewhat ambiguous at first blush, the Supreme Court in *Agins v. Tiburon*, 447 U.S. 255 (1980), stated that the Court was actually inquiring whether the regulation was denying the owner the "economically

1. *The character of the governmental action*

The first prong of the *Penn Central* test asks, "what character has the governmental action assumed?"¹²⁷ Governmental action can take one of two forms. It can occur as a physical invasion, or a regulation.¹²⁸ Buffer zones are regulations; therefore, the character of the governmental action can be classified as regulatory in nature. This determination, however, does not end the inquiry. The validity of the regulation must also be brought into question.¹²⁹

a. *Unfair regulations.* In the past, when national parks were created, Congress protected the focal interest of the parks by acquiring more land than was actually necessary.¹³⁰ Consequently, there was no need for a designated buffer zone. Sufficient land was purchased to act as a "built-in" buffer zone.¹³¹ The question is: should buffer zones be created any differently today? Though scarcity of land and prohibitive costs¹³² may encourage a change,¹³³ these reasons do not justify Con-

viable use of his land." *Id.* at 260.

127. Comment, *A New Approach to Regulatory Taking Analysis*, 1 B.Y.U. J. PUB. L. 399, 405 (1987) [hereinafter *Regulatory Taking*].

128. *Id.* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Here the Court stated, "[m]ore recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property." *Id.* at 430.

129. Assuming arguendo, that buffer zones are valid, see *infra* text and accompanying notes 152-55, the impact upon private land caused by buffer zone regulations should nevertheless be questioned. Since the fifth amendment is "designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (emphasis added), constitutionally mandated compensation may be necessary to alleviate the individual hardship caused by the new regulations. See also *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-25 (1978); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

130. *Development Beyond Their Borders*, *supra* note 36, at 1190. For example, Cuyahoga Valley National Recreation Area established in 1974 was established to protect numerous sites of historical significance. "The legislative history of the Act make it clear that the use of scenic easements should be a major part of the land acquisition program for the area." (Emphasis added). Comment, *Parks, People, and Private Property: The National Parks Service and Eminent Domain*, 16 ENVTL. L. 935, 953 (1986). See also 16 U.S.C. § 430oo (1982) (regarding acquisition of Antietam Battlefield).

131. This is demonstrated by Congress' attempt to resolve the Redwood National Park controversy by enacting a statute which would give the Secretary the authority to acquire the land necessary to protect the Redwood National Park. The statute in part reads:

In order to afford as full protection as is reasonably possible to the timber, soil, and streams within the boundaries of the park, the Secretary is authorized, by any of the means set out in subsections (a) and (c) of this section, to acquire interests in land from, and to enter into contracts and cooperative agreements with, the owners of land on the periphery of the park and on watersheds tributary to streams within the park

16 U.S.C. § 79c(e) (1982).

132. In a survey sent to national parks superintendents, the question asked was whether deferring land acquisition was saving any money? The response (in rough estimates) was that: [n]inety percent of the superintendents reported that the lands in question has at least

gress' change from its former method of purchasing buffer zone protection.¹³⁴ "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."¹³⁵ Congress should not be able to reach its same ultimate objective through land regulation which it formerly achieved only through land acquisition. If land is going to be regulated in such a manner, government should have to compensate for it.¹³⁶

b. Buffer zones and federalism. Buffer zone creation on state land is a federal action which may encroach upon a states' sovereign power. If individual states (wherein national parks are located) do not want buffer zones,¹³⁷ a conflict between state and federal power may arise which reflects upon the validity of the governmental action. Though buffer zones can be viewed as having worthy objectives, if individual

doubled in value over the last five years and had at least tripled over the last ten. Eighty-five percent estimated that land values had at least quintupled and fifty percent said they had risen ten-fold or more over the last ten years. For old parks, values reportedly had increased from fifty-to one-hundred-fold since the date of the park's establishment; in a few cases (doubtless with some hyperbole) superintendents even reported a thousand-fold increase.

Buying Scenery, supra note 113, at 720-21.

133. National parks are one of the nations' greatest resources, and should aggressively be protected. This is especially imperative in light of the fact that national parks are irreplaceable commodities.

134. The Constitution does not say that private land should not be taken for public use with just compensation except when costs are prohibitive, rather, the Constitution provides that private lands shall not be taken for public use, without just compensation. U.S. CONST. amend V. Former Secretary of the Interior James Watt has been quoted as saying: "We need to acquire more parkland, and I'm hopeful that within the next year or so . . . we'll be able to aggressively increase the amount of acreage required for national parks and refuges and wetlands. But right now we don't have the economic strength in this country [to do so] . . ." Therefore, if James Watt recognizes that the United States does not have the economic strength to increase national parks, then the NPS should have to wait until the United States does have the economic strength to acquire the land through proper means. *Battle over the Wilderness, supra* note 13, at 25.

135. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

136. "Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as a formal condemnation or physical invasion of property." *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting).

137. States may not want buffer zones to be imposed on national parks within their boundaries because it could inhibit the development and progress of the land within the state.

states oppose the land use regulations,¹³⁸ then the character of the governmental action may be improper.¹³⁹

The federal action of creating buffer zones is particularly offensive because "[t]he preservation of the environmental quality . . . is a subject particularly suited to administration by the states. Congress has recognized that even where extensive federal environmental legislation exists, the primary responsibility for implementing environmental policy rests with state and local governments."¹⁴⁰ Therefore, imposing buffer zones upon states, and private land within states, could be an improper use of federal power.

In fact, in 1966 the Department of the Interior was asked whether federal zoning could be imposed on land located in an area designated as a national park.¹⁴¹ In responding to this question, the Solicitor of the Department of the Interior stated:

Since zoning involves a purely local situation, and since it is difficult, if not impossible, to justify the Federal zoning power in connection with any constitutionally granted power, it is our opinion that in the absence of a cession by a State and acceptance by the United States of legislative jurisdiction over a specific area authorized for Federal administration, the zoning statute suggested in your memorandum would be held to be unconstitutional.¹⁴²

According to the Solicitor, zoning private land located within areas designated as national parks would be an infringement upon a state's rights. By analogy, buffer zones which are created *outside* areas designated as national parks would similarly be an infringement upon the

138. Representatives from five western states whose federal land holdings total more than fifty percent of the land located within their boundaries are very concerned with the creation of buffer zones. The impact that buffer zones might have on a state's development are far reaching. For instance, a representative of Utah, noted that if lands adjacent to parks were to be protected within a ten-mile radius of the parks, this would essentially "tie up, basically, all of southern and eastern Utah." *Development Beyond Their Borders*, *supra* note 36, at 1209. (The five states which have more than fifty percent of their land occupied by federal land holdings are: Alaska 90.5%, Nevada 87.6%, Utah 65.1%, Idaho 63% and Oregon 52.5%. Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817 n.1 (1980). Other states which would be dramatically affected by buffer zones are: Wyoming 48.6%, California 46.1%, Arizona 44.2%, Colorado 35.6%, New Mexico 33.5%, Montana 29.6% and Washington 29.1%. *The Property Clause*, *supra* note 68, at 483).

139. Though state opposition to federal statutes may be superceded by the supremacy clause, the purpose of this analysis is to question the nature of the governmental action (under *Penn Central*) rather than challenge Congress' power to enact such legislation.

140. In *State ex. rel. Andrus v. Click*, 97 Idaho 791, 798, 554 P.2d 969, 976 (1976). See also 42 U.S.C. § 4331(a).

141. Buffer zones are more egregious than the example here because in this example, the private land in question was actually located within the boundaries of a national park.

142. *Helpless Giants*, *supra* note 8, at 248.

state's rights. Buffer zones should arguably only be created when a state has ceded the land to the federal government.

Congress' overreaching is further demonstrated by the opposition which arose against the passage of the National Park System Protection and Resources Management Act (Parks Protection Act).¹⁴³ When the Parks Protection Act was introduced into Congress, one of the strongest arguments against its passage¹⁴⁴ was that the bill gave the Secretary too much power to control the activities located on the periphery of national parks. Members of the House committee who opposed the bill concluded:

[L]ocal and state governments, who through no fault of their own are located adjacent to national parks, should not be asked to sacrifice their growth and the economic well-being of their citizens because of perceived threats against park resources which emanate from beyond the borders of their neighboring parks without an adequate opportunity for input into the identification of, and amelioration of, any such perceived problems.¹⁴⁵

Therefore, if states oppose¹⁴⁶ the passage of legislation like the Parks Protection Act, then by analogy the validity of the governmental action in creating buffer zones must also be questioned. Though states should not be completely free to designate which regulations are acceptable and which ones are not,¹⁴⁷ there is also much controversy over Congress' correct role in regulating federal lands.¹⁴⁸

143. H.R. 2379, 98th Cong., 1st Sess. (1983); H.R. 5162, 97th Cong., 2nd Sess. (1982). *External Threat Dilemma*, *supra* note 9, at 357 & n.6.

144. The bill passed the House by a margin of almost four-to-one, (The vote was 321 "for" and 82 "against") but the Senate failed to adopt it. *Id.* at 357 & n.7.

145. *Development Beyond Their Borders*, *supra* note 36, at 1209.

146. Though commentators acknowledge that government regulations can in theory produce more efficient results, commentators also contend that this is only true in theory and not in practice. The sheer physical immensity of any effort to regulate land uses beyond the local level exceeds the capabilities of even the best planners. Beyond this, government may be vulnerable to short term political pressures causing land decisions to be nothing more than a series of political compromises. *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1587 (1978) [hereinafter *Zoning*]. See also Stroup & Baden, *Externality, Property Rights, and the Management of our National Forests*, 16 J. L. & ECON. 303, 305 (1973).

147. One way to restrict overreaching of Congressional power is to provide a state veto power on any proposed national environmental legislation. Though the validity of such a state veto may be challenged under *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) (holding a section of the Immigration and Naturalization Act unconstitutional because it allowed either house of Congress to invalidate an executive decision regarding the status of an alien), the Nuclear Waste Policy Act, 42 U.S.C. §§ 10101-10226 (1982), is one example of such a state veto provision. Whether the Supreme Court will uphold this type of a provision has not been tested, but it has been argued that *Chadha* would not apply. See Davenport, *The Law of High-Level Nuclear Waste*, 53 TENN. L. REV. 481, 500-01 (1986).

148. This unrest is demonstrated by the recent "Sagebrush Rebellion." The sagebrush rebel-

c. The constitutionality of buffer zones. While the Redwood National Parks cases were being tried,¹⁴⁹ the Office of Management and Budget (OMB)¹⁵⁰ was asked to evaluate a bill which was drafted to give the Secretary power to control activities occurring outside Redwood National Park.¹⁵¹ As a result of the OMB's evaluation, the bill was never submitted to Congress.¹⁵² The main reason the bill was never submitted was that the OMB determined:

During the interagency review of this legislation, a substantive problem was identified which is of concern to us. By attempting to extend the degree to which the Federal Government can regulate the use of private property without creating a compensable taking, the bill would provide for a precedential and major expansion of the Property Clause of the U.S. Constitution which we believe should not be undertaken.¹⁵³

Rather than solely relying on the property clause in stating that the Redwood legislation would be unconstitutional, the OMB also indicated that the bill "might violate the fifth amendment, which prohibits the taking of property without just compensation."¹⁵⁴ Therefore, if the OMB believed that exercise of this power by the Secretary over non-

lion was "an aggregation of legislative attempts by the 'western public land states' to wrest ownership of certain lands from the federal government." Note, *The Sagebrush Rebellion: Who Should Control the Public Lands?*, 1980 UTAH L. REV. 505, 505. Some states went so far as to pass legislation which claimed to vest ownership of federal lands in the states. Nevada passed such legislation which provides that: "[s]ubject to existing rights, all public lands in Nevada and all minerals not previously appropriated are the property of the State of Nevada and subject to its jurisdiction and control." *Id.* at 512-13.

149. See *supra* notes 23-27 and accompanying text.

150. The Office of Management and Budget has as one of its responsibilities the duty of reviewing all proposed Department legislation. 31 U.S.C. § 16 (1970), Exec. Order No. 11,541, 3 C.F.R. 141 (1970).

151. *Helpless Giants*, *supra* note 8, at 248-49.

152. The bill in part provided:

The Secretary of the Interior is further authorized to identify and establish zones outside the boundary of Redwood National Park but within watersheds . . . [and] shall promulgate and enforce such reasonable rules and regulations, including reasonable restrictions on harvesting of timber, within such zones as are necessary to provide continuing protection to the lands and other resources within the park. Provided, however, that nothing in this provision shall be considered as authority to acquire lands or interests in lands within such zones through the adoption of such rules and regulations; and, provided further, that any regulation adopted by the Secretary that is deemed by a court of competent jurisdiction to require the taking of a property interest compensable under Article 5 of the Constitution of the United States shall have no effect.

Id. at 248-49 n.56.

153. *Id.* at 249.

154. *Id.* at 249-50. The proposed bill stated that if a court found that the regulation had constituted a taking, then the regulation was to be deemed "of no effect." See *supra* note 152. Therefore, it would appear that the bill itself recognized that the creation of zones could constitute a taking for which compensation would be due.

federal lands next to the Redwood National Park could result in a taking, then by analogy, creating buffer zones which effectuate the same result could also constitute a taking.¹⁵⁵

2. *Diminution in value*

The second prong of the *Penn Central* test requires an analysis of the diminution in value of the land affected by buffer zones.¹⁵⁶ As was previously mentioned, a mere diminution in value (in most cases) will not constitute a taking.¹⁵⁷ *Hadacheck v. Sebastian*,¹⁵⁸ has long stood for this proposition. In *Hadacheck*, the Court upheld an ordinance which required a property owner to close his brickyard even though the diminution in value was from \$800,000 to \$60,000.¹⁵⁹ Though today's courts may still tolerate a certain amount of diminution in value before adjudging that a taking has occurred,¹⁶⁰ courts will most likely not allow a diminution in value as great as *Hadacheck* simply for the creation of buffer zones.¹⁶¹

The reason why courts will not allow such a diminution in value is that the legislative objectives in creating buffer zones are arguably less significant than the ultimate objectives sought in *Hadacheck*.¹⁶² In *Hadacheck*, the Court upheld the state ordinance on the ground that it was for the health, safety and welfare of the people.¹⁶³ The ordinance was considered a valid exercise of state police powers. Buffer zone regulation, by contrast, does not protect the health, safety and welfare of

155. Because the OMB is an administrative agency its opinions have limited application to legislative and judicial determinations. The importance of this response by the OMB is that it affected the ultimate submission of the bill. Arguably its analysis must have some validity.

156. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

157. See *supra* note 121.

158. 239 U.S. 394 (1915). See also *Elucid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Mulger v. Kansas*, 123 U.S. 623 (1887).

159. 239 U.S. at 405. It should be noted, that this diminution in value was an allegation, not a finding of fact. *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 901 (Fed. Cir. 1986), *cert. denied*, 107 S. Ct. 926 (1987).

160. "While virtually all physical invasions are deemed takings, (citations omitted) a regulatory program that adversely affects property values does not constitute a taking unless it destroys a major portion of the property's value." *First English Evangelical Lutheran Church v. Los Angeles*, 107 S. Ct. 2378, 2393 (1987) (Stevens, J., dissenting). See also *United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455, 459 (1985).

161. The creation of buffer zones will cause a great diminution in value. As stated in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), "this is not a case in which Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property." *Id.* at 180. Consequently, like in *Kaiser Aetna*, government will have to compensate the parties which have been substantially damaged.

162. See *infra* notes 164-65 and accompanying text.

163. 239 U.S. 394 (1915). This case can also be analyzed under the doctrine of public nuisance. The court upheld the validity of the ordinance because of the public nuisance present.

the people,¹⁶⁴ but rather, buffer zones are designed to preserve wildlife and aesthetic beauty.¹⁶⁵ Thus it is questionable whether the Court's impetus in *Hadacheck* would similarly apply to buffer zones.

Beyond this, a second reason why courts will not allow such a diminution in value is that land subject to such environmental restrictions may be worth very little relative to its value if available for development. "Traditional analysis suggests that the large diminution in value resulting from such restrictive regulations would by itself indicate a taking."¹⁶⁶ The diminution in value caused by buffer zone creation is great, because in order to provide the protection needed, buffer zones must enforce stringent regulations requiring a substantial reduction in land value.¹⁶⁷ Arguably, the impact upon land value caused by buffer zones should be enough to meet the diminution in value prong of the *Penn Central* test.

3. *Investment-backed expectations*

The third prong of the *Penn Central* test requires an analysis of the extent to which a regulation has interfered with the investment-backed expectations of a property owner.¹⁶⁸ One problem with the investment-backed expectation prong is that the Court has failed to define what "investment-backed expectations" really are. One year after *Penn Central*, the Court attempted to elucidate the third prong by adding that a taking can occur when a regulation deprives an owner of the

164. A state government, as far as the Constitution is concerned, holds police powers to protect the health, safety and welfare of its residents. By contrast, federal powers must be found within one of the enumerated powers of Article I, Section 8 of the Constitution. Analysis of Article I, Section 8 leads to the conclusion that there is no federal power to act for the general welfare of the people. Therefore, Congress has only implied police powers whereby they can act for the welfare of the people. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 121 (2d ed. 1983).

165. The problem that Congress faces in creating buffer zones is that the imposition of the regulations necessary to create buffer zones is beyond Congress' powers. See *supra* note 166. Also, wildlife, natural resources, and aesthetic beauty are items considered less legitimate than the regulation of public health. Davis, *The National Trails System Act And The Use Of Protective Federal Zoning*, 10 HARV. ENVTL. L. REV. 189, 251 (1986).

166. *Zoning*, *supra* note 146, at 1620.

167. Though a diminution in value may be acceptable to some extent, there must also be limitations placed on how far the land use can be regulated. For example, the Park Service should not be able to prohibit agricultural landowners from using pesticides that are generally used on agricultural lands elsewhere. Nor should it prevent private owners from using conventional fire-fighting techniques, even where the Service has decided the best strategy is to let the fire burn itself out. Also, "if farming were prohibited in order to preserve the land's wild appearance . . . acquisition with compensation would probably be necessary." *Helpless Giants*, *supra* note 8, at 270-71.

168. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124-125 (1978).

"economically viable use of his land."¹⁶⁹ This new interpretation, however, has not proved to be any more helpful.¹⁷⁰

While the Supreme Court has not addressed this issue, some state courts have grappled with the test. In *Commonwealth v. Stearns Coal & Lumber Co.*,¹⁷¹ the Supreme Court of Kentucky indicated in dicta that a land owner's investment-backed expectations could have been violated if a regulation which prohibited mining and the clear-cutting of timber had been fully implemented.¹⁷² Therefore, if prohibiting mining and the clear-cutting of timber could satisfy the investment-backed expectation prong in Kentucky (arguably), then any buffer zone regulation prohibiting this level of activity could also arguably satisfy the investment-backed expectation prong.¹⁷³

VI. CONCLUSION

With the current reading of the fifth amendment takings clause, buffer zone regulations adjacent to national parks will most likely constitute a compensable regulatory taking. As Congress continues to propose new legislation for national park protection, Congress should seriously consider the propriety and the effectiveness of such legislation. Though the scope of the property clause appears to have expanded over the last few decades, creating land use regulations without providing just compensation appears to have contracted.

Whatever the fate, the creation of buffer zones without just compensation forces "some people alone to bear public burden[s] which, in all fairness and justice, should be borne by the public as a whole."¹⁷⁴ "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."¹⁷⁵ Buffer zone regulations must there-

169. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

170. *Regulatory Taking*, *supra* note 127, at 407.

171. 678 S.W.2d 378 (1984).

172. *Id.* at 381. The regulation which imposed this restriction was the Kentucky Wild Rivers Act. The Wild Rivers Act had been fully implemented in Kentucky. The court indicated that a taking would have occurred because "[t]he land had to remain practically untouched and in a primitive natural state." *Id.*

173. The "investment-backed expectations" test appears to focus on future losses rather than immediate diminution. In this manner it is able to distinguish itself from the second prong of the *Penn Central* test. "The Court noted that no 'set formula' existed to determine, in all cases, whether compensation is constitutionally due for a government restriction of property. Ordinarily, the Court must engage in 'essentially ad hoc, factual inquiries.'" *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

174. *First English Evangelical Lutheran Church v. Los Angeles*, 107 S. Ct. 2378, 2388 (1987) (citations omitted).

175. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

fore be carefully evaluated to determine whether national park protection outweighs individual property rights.

Daniel J. Anderson