

The Realities of Regional Resource Management: Glacier National Park and Its Neighbors Revisited

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Twenty years ago Glacier National Park was considered the park most at risk from external threats, such as mining and timber harvesting on adjacent lands. This finding led to an earlier Article that examined whether Glacier officials were effectively defending the park from these external threats. We concluded that the park's non-confrontational strategies were tenuous at best, but that some protection had been achieved by strong laws enforced by environmental advocates. We also noted the park's early efforts to promote a regional management vision. Since then, the concept of a regional ecosystem that must be protected across formal borders has progressed significantly, though still imperfectly. This Article, based on detailed interviews and documents, is a twenty-year reassessment of resource management in the Glacier region, revisiting controversies from our earlier study and examining several new ones too. It also evaluates the actual forces that drive—and that impede—efforts to manage land in accord with habitat and watershed realities, rather than boundary lines drawn on a map.

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Introduction	234
I. Glacier Revisited.....	240
A. Evolving Laws, Policies, and Priorities	240
B. Changes at Glacier and Its Neighboring National Forests ...	243
C. Other Changes Within the Region	245
II. The Flathead National Forest.....	246
A. A Declining Timber Harvest.....	247
B. Paving the North Fork Road.....	250
C. Energy, Wilderness, and the North Fork.....	251
D. Roads and Motorized Recreation.....	253
E. Relations Between Forest and Park Managers.....	254
F. Railroad Grain Spills and Habitat Conservation Planning..	256
III. Private Lands in the Flathead Valley.....	258
A. Population Growth and Land Use.....	258
B. Scenic Overflights.....	265
IV. The Lewis & Clark National Forest.....	267
A. The Oil and Gas Threat	268
B. The Blackfeet and the Traditional Cultural District	271
C. The Arrival of Gloria Flora and the Protection of the Rocky Mountain Front	275
D. Recreation and the Forest Travel Plan	280
E. Recent Protective Actions on the Rocky Mountain Front...	282
V. The Canadian Flathead	286
A. Looming Mining and Drilling Threats	287
B. The Limits of Canadian Law.....	290
C. U.S. and Canadian Preservation Efforts.....	292
D. The International Joint Commission Option	294
E. Local Negotiations for a Regional Environmental Study.....	298
VI. Toward Regionalism and Coordinated Management.....	300
A. The Allure of Regionalism	300
B. The Crown of the Continent Partnership	302
C. Putting Regionalism in Perspective	304
Conclusion: A Twenty-Year Assessment	305

INTRODUCTION

This Article updates our mid-1980s study of external threats to Glacier National Park.¹ In 1980, the National Park Service issued a *State of the Parks Report* that enumerated and categorized threats to every

1. Joseph L. Sax & Robert B. Keiter, *Glacier National Park and Its Neighbors: A Study of Federal Interagency Relations*, 14 *ECOLOGY L.Q.* 207 (1987).

unit of the national park system.² That report identified Glacier as the most threatened major park unit, detailing an assortment of energy exploration, timber harvesting, road construction, and private land development activities that potentially imperiled the park's ecological integrity.³ Many of these threats originated on adjacent federally managed lands, which led us to examine how Glacier officials were confronting these issues, their relations with neighboring federal land managers, and the broader lessons to be gleaned from these interactions. With the passage of twenty years and the emergence of new ecological management concepts, we returned to Glacier to assess how the park has fared over the intervening years and the progress it has achieved in integrating the park into a larger regional management agenda.

External threats have been a persistent problem for the National Park Service,⁴ as a series of subsequent reports demonstrates.⁵ Once viewed as isolated enclaves, even the most remote national parks must today contend with recurrent development proposals and related environmental pressures on their borders. It does not matter whether the park, like Glacier, is bordered by federally managed national forest or Bureau of Land Management (BLM) lands, or whether it adjoins state or privately owned lands. The problem captured national political attention during the mid-1990s when Yellowstone National Park faced the prospect of a massive new mining operation on its northeastern flank, creating a controversy that was finally resolved only following presidential intervention.⁶

2. OFFICE OF SCI. & TECH., NAT'L PARK SERV., STATE OF THE PARKS 1980: A REPORT TO THE CONGRESS (1980).

3. *Id.* at 52.

4. See JOHN C. FREEMUTH, ISLANDS UNDER SIEGE: NATIONAL PARKS AND THE POLITICS OF EXTERNAL THREATS (1991); OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS (David J. Simon ed., 1988); Robert B. Keiter, *On Protecting the National Parks from the External Threats Dilemma*, 20 LAND & WATER L. REV. 355 (1985); see also Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239 (1976).

5. See U.S. GEN. ACCOUNTING OFFICE, LIMITED PROGRESS MADE IN DOCUMENTING AND MITIGATING THREATS TO THE PARKS (1987); OFFICE OF NATURAL RES., NAT'L PARK SERV., NATURAL RESOURCES ASSESSMENT AND ACTION PROGRAM (1988); OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF INTERIOR, PROTECTION OF NATURAL RESOURCES: NATIONAL PARK SERVICE, REP. NO. 92-J-1422 (1992); NAT'L PARKS CONSERVATION ASS'N, PARKS IN PERIL: THE RACE AGAINST TIME CONTINUES (1992); U.S. GEN. ACCOUNTING OFFICE, ACTIVITIES OUTSIDE PARK BORDERS HAVE CAUSED DAMAGE TO RESOURCES AND WILL LIKELY CAUSE MORE (1994). See also STEERING COMM. OF THE 75TH ANNIVERSARY SYMPOSIUM, NAT'L PARK SERV., NATIONAL PARKS FOR THE 21ST CENTURY: THE VAIL AGENDA 17 (1992); NAT'L PARK SYS. ADVISORY BD., RETHINKING THE NATIONAL PARKS FOR THE 21ST CENTURY 5-6 (2001).

6. The Yellowstone-New World Mine controversy is described and analyzed in William J. Lockhart, *External Threats to our National Parks: An Argument for Substantive Protection*, 16 STAN. ENVTL. L.J. 3 (1997).

We discovered in our earlier study that the Park Service rarely availed itself of legal remedies that it might invoke to protect park resources from these external threats. Glacier officials were also reluctant to speak out forcefully against development proposals. They often relied on others, in particular environmental advocates, to do much of the heavy lifting for them in protecting park resources, while depending on the park's status as a "sacred cow" to ward off the most serious threats.⁷ Very little has changed in that regard. Despite various legislative proposals,⁸ Congress has been reluctant to give the Park Service authority beyond its park borders.⁹ And the agency, sensitive to the political implications of such efforts, has not sought authority over external matters.¹⁰ To be sure, the Park Service has acknowledged the external threats problem in its 2001 Management Policies document revisions, which admonish park superintendents to participate actively in planning and regulatory processes involving adjacent federal, tribal, state, or private lands.¹¹ But at Glacier, even that recommendation is followed with great restraint.

Glacier provides an ideal setting to study the external threats problem. Like many of our most cherished parks, it was established primarily for its spectacular scenery and abundant wildlife in a pre-ecological era with little regard for such natural features as watersheds or

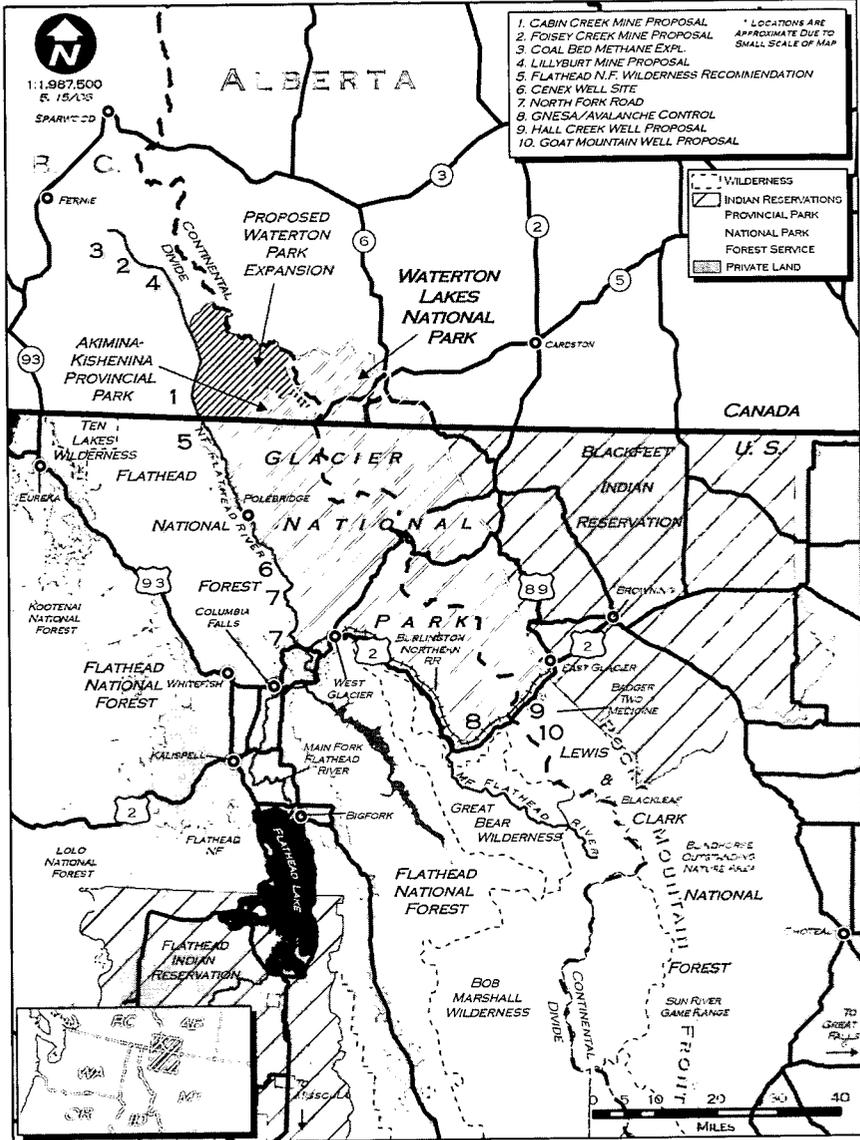
7. Sax & Keiter, *supra* note 1, at 222–26.

8. See H.R. 2379, 98th Cong. (1983); H.R. 5162, 97th Cong. (1982); see also S. 978, Amend. No. 2807, 98th Cong., 130 CONG. REC. 2919–23 (daily ed. Mar. 20, 1984).

9. One of the few comprehensive national park bills of the past twenty years, the National Parks Omnibus Management Act of 1998, gives the Park Service a clear mandate to undertake scientific research in the national parks. It not only obligates the Secretary of the Interior to "improve the [agency's] ability . . . to provide state-of-the-art management, protection, and interpretation of and research on the resources of the National Park System," but also acknowledges that national parks are part of larger eco-regions. Pub. L. No. 105-391, §§ 101, 203, 112 Stat. 3497 (1998) (codified at 16 U.S.C. §§ 5931–5937 (2000)). See also *infra* notes 22–24 and accompanying text.

10. Perhaps the most assertive stance taken regarding the Park Service's legal authority to address external threat problems appeared in a 1998 Solicitor's opinion in the Ozark National Scenic Riverway-Doe Run mining proposal controversy, which concluded that relevant law "infuses the Secretary's decisions with a concern for park values and purposes, and signals caution where [these] . . . could be threatened." See Options Regarding Applications for Hardrock Mineral Propsecting Permits on Acquired Lands Near a Unit of the National Park System, M #36993, at 23 (Apr. 16, 1998). Additionally, the Secretary has a duty "to ensure that potential impacts on park units have been thoroughly examined in the Department's decisionmaking process." *Id.* at 25. See also Sax, *Helpless Giants*, *supra* note 4.

11. NAT'L PARK SERV., U.S. DEP'T OF INTERIOR, MANAGEMENT POLICIES 2001 § 1.5 (2001) [hereinafter 2001 MANAGEMENT POLICIES]. In its 1988 Management Policies revisions, the Park Service took a notably meek position toward its burgeoning external threats problem: "the National Park Service does not support the creation of buffers zones around the parks or seek veto power over activities on adjacent lands, [but] it will work cooperatively with surrounding landowners and managers to help ensure that actions outside the parks do not impair park resources and values." NAT'L PARK SERV., U.S. DEP'T OF INTERIOR, MANAGEMENT POLICIES § 1.4 (1988).



The Glacier National Park Region.

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wildlife habitat. Bisected by the continental divide, Glacier abuts the Canadian border on the north, which is only partially shared by Canada's Waterton Lakes National Park.¹² Highway 2 and parallel railroad tracks

12. The two parks were denominated an International Peace Park in 1932, see Pub. L. No. 72-116, 47 Stat. 145 (1932) (codified at 16 U.S.C. § 161a (2000)), and were recently declared a World Heritage Site, see United States World Heritage Nominations 1985, 50 Fed. Reg. 5014

mark Glacier's southern limit, with national forest land lying just beyond this transportation corridor. Much of the park's western boundary is delineated by the North Fork of the Flathead River, with national forest and interspersed private lands within the same watershed immediately adjacent to it, while unprotected provincial lands in British Columbia span the river to the north. Glacier's eastern boundary abuts the Blackfeet Indian Reservation and some national forest lands. These frontiers leave Glacier as an island amid a vastly larger ecological region that encompasses the North Fork watershed, the Rocky Mountain Front, and internationally significant wildlife habitat extending outward from its borders in every direction. This larger landscape embraces habitat for the grizzly bear, grey wolf, lynx, and bull trout. Each of these species is listed under the Endangered Species Act (ESA),¹³ and they are thus legally critical determinants in management decisions on the U.S. side of the border.

To a considerable degree Glacier confronts the same problems it faced twenty years ago. In our earlier study, we focused on four potential threats: first, timber harvesting and energy exploration in the Flathead National Forest; second, a road paving proposal that would facilitate access into the park's remote northwestern corner; third, a highly contentious Canadian coal mine proposal in the North Fork watershed; and, finally, oil and gas development proposals pending in the Lewis & Clark National Forest on the park's southeastern flank in an area known as the Badger-Two Medicine, where the Blackfeet claim treaty access rights.¹⁴ Although none of these threats has come to pass, several of them are still pending. We have thus revisited these ongoing issues and examined several new ones as well, including new mining and energy development proposals in the Canadian Flathead, escalating private land development in the Flathead Valley, a nascent planning effort in the Highway 2 railroad corridor, and motorized recreation in the national forests.¹⁵

Our central concern in this follow-up study is to determine whether ecologically rational management—embracing actual wildlife habitat and watersheds rather than formal territorial boundary lines—has become a reality in the extraordinarily resource-rich Glacier region. Our conclusion

(Feb. 5, 1985) (nominating Glacier National Park for World Heritage site designation); *see also* 16 U.S.C. § 470a-1 (2000), 36 C.F.R. pt. 73 (2005). Both parks are also designated International Biosphere Reserves.

13. Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531–1543 (2000)); 50 C.F.R. § 17.11, at 14 (grizzly bear), 18 (Canadian lynx), 24 (gray wolf), 46 (bull trout) (2006).

14. Sax & Keiter, *supra* note 1, at 227–46.

15. *See* Michael Jamison, *Glacier Park Still Under Siege*, MISSOULIAN, Feb. 3, 2005. We also update the situation regarding noise from scenic overflights, which we only briefly mentioned in our previous Article.

is that the past several decades have generated a good deal of progress, with wildlife habitat management and other environmental issues becoming significant regional concerns. The explanation, however, is not because the formal boundaries have been expanded, or formal regional management institutions have been created. Change has come about much less directly. We thus explain the real dynamics of emerging environmentally-driven regional land management as it has been occurring in one place. Using a detailed series of localized case studies, we examine three areas adjacent to Glacier to extract these broader lessons.¹⁶

In the adjacent Flathead National Forest, we observe the interlocking importance of reduced mission conflict among neighboring federal agencies and enforcement of powerful federal laws like the Endangered Species Act. A shift in the national forest from a primary dependency on commodity production to recreation has diminished tension between federal land neighbors, to the benefit of Glacier and the region's wildlife. Environmental perils from timber harvesting and road development have sharply diminished, though increased recreational activity presents new challenges. These gains are imperiled, however, by what is occurring on private lands in the Flathead Valley. Here we encountered burgeoning population growth that includes newcomers attracted to the area's natural setting, and environmentally-suspicious residents who are building on sensitive habitat land, while resisting any intrusion on private property prerogatives under the rubric of zoning. This results in some important new environmental benefits, as well as significant new risks.

Glacier's other neighboring national forest, the Lewis & Clark, displays a quite different recent history. Commercial development has also declined there, the result of reduced local economic dependence on resource exploitation, along with the employment of powerful federal environmental laws to block harmful projects. Local conditions have also been affected profoundly through the evolution of a remarkably protective constituency that embraces the region for its extraordinary scenery and wildlife, and has organized to protect it. Together with the nearby Blackfoot tribe, which wants to protect critical parts of the area for its traditional cultural value to the tribe, and a remarkably outspoken Forest Supervisor who gave official sanction to preservation of regional natural attributes, area residents have effectively induced the oil and gas

16. In doing so, we have drawn upon a wealth of documentary evidence as well as extensive interviews with key players involved in these matters, a list of whom is attached as an Appendix. Throughout the Article we will ordinarily identify the interviewees who shared their perspectives with us unless we were requested not to do so, in which case we will simply note that "we were told" or that "an observer said" to denote that the information comes from one of our interviews.

industry to give up exploration of the Rocky Mountain Front, at least for now.

The third major area we discuss, the Canadian Flathead, remains seriously threatened. It seems to lack each of the elements that have contributed to the creation of a protective buffer elsewhere in the region. Canadian environmental laws are weak. The mineral resources in the region are said to be extremely valuable, and British Columbia appears more committed to developing its coal, gold, and coal-bed methane than to protecting habitat in its segment of the Flathead River watershed. Moreover, the local environmental community is still small and its voice muted. An international treaty could potentially help, but both nations would have to agree to invoke it, and thus far Canada has shown no interest in doing so.

We use these detailed case studies from the Glacier region to offer a realistic picture of the challenges and opportunities involved in promoting a more ecologically attuned approach to natural resource management. We begin our follow-up study by noting changes over the past two decades in agency management policies and personnel, as well as in the demographics and economy of the region. We then examine in detail the key external issues confronting the park and observe how these issues have fostered a new though incomplete regionalism. We conclude by identifying the forces that seem critical to determining how the lands neighboring Glacier are used, to the benefit or detriment of the park.

I. GLACIER REVISITED

A. *Evolving Laws, Policies, and Priorities*

Since our prior study, Congress has not altered the basic statutory framework governing the Park Service and Forest Service. The National Parks Organic Act,¹⁷ Multiple Use-Sustained Yield Act,¹⁸ National Forest Management Act,¹⁹ National Environmental Policy Act (NEPA),²⁰ and the ESA²¹ are all intact, even as controversy has swirled around several of them. Yet Congress has not been entirely quiescent. In 1998, Congress

17. Pub. L. No. 64-235, 39 Stat. 535 (1916) (codified as amended at 16 U.S.C. §§ 1-18 (2000)).

18. Pub. L. No. 86-517, 74 Stat. 214 (1960) (codified as amended at 16 U.S.C. §§ 528-531 (2000)).

19. Pub. L. No. 94-588, 90 Stat. 2949 (1976) (codified as amended at 16 U.S.C. §§ 1600-1614 (2000)).

20. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370 (2000)).

21. Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1543 (2000)).

passed the National Parks Omnibus Management Act,²² giving the Park Service explicit scientific research and related management responsibilities,²³ while also acknowledging that parks are part of larger ecosystems.²⁴ In 2000, Congress passed the National Parks Air Tour Management Act,²⁵ which we discuss later in conjunction with Glacier's concerns about helicopter overflights.²⁶ And in the aftermath of several devastating fire seasons, Congress also adopted the Healthy Forests Restoration Act of 2003 (HFRA),²⁷ which gives the Forest Service new wildfire management authority and could reinvigorate its timber program.²⁸

Of much greater potential import are developments emanating from the agencies themselves, which include an array of administrative initiatives with resource management implications. During the 1990s, the Clinton Administration embraced the ecosystem management concept, as it sought to shift federal natural resource policy toward landscape scale planning and biodiversity conservation.²⁹ Driven by its experience with the Pacific Northwest's acrimonious spotted owl litigation,³⁰ the beleaguered Forest Service readily adopted the concept and proceeded to

22. Pub. L. No. 105-391, 112 Stat. 3497 (1998) (codified as amended at 16 U.S.C. §§ 5931-5937 (2000)).

23. See 16 U.S.C. § 5934. This includes an inventory and monitoring mandate, which plainly authorizes—and perhaps even requires—the Park Service to collect scientific information documenting its external threat problems.

24. See 16 U.S.C. § 5923 (directing the Park Service to “conduct multi-disciplinary research . . . on the resources of the National Park System, or the larger region of which parks are a part” and providing for such research arrangements “as will provide full geographic and topical coverage for research on the resources contained in units of the National Park System and their larger regions.”).

25. Pub. L. No. 106-181, tit. VIII, 114 Stat. 185 (2000) (codified at 49 U.S.C. § 40128 (2006)). The act allows the FAA, following an air tour management plan, to ban air tour operators, which Glacier has indicated in its General Management Plan it would like to do. See *id.* § 40128(b)(3)(A); NAT'L PARK SERV., U.S. DEPT OF INTERIOR, GLACIER NATIONAL PARK GENERAL MANAGEMENT PLAN 56 (1999) [hereinafter GLACIER GENERAL MANAGEMENT PLAN], available at <http://www.nps.gov/glac/pdf/gmpfinal.pdf>.

26. See *infra* Part III(B).

27. Pub. L. No. 108-148, 117 Stat. 1887 (2003) (codified at 16 U.S.C. §§ 6501-6591 (2006)).

28. The HFRA prioritizes hazardous fuel reduction projects and other fire control activities on multiple-use lands, while also relieving the Forest Service from full NEPA compliance in an effort to expedite these projects. See 16 U.S.C. §§ 6512, 6513 (hazardous fuel reduction projects); § 6514 (NEPA provisions). Further, the HFRA limits administrative appeal opportunities and encourages the federal courts to expedite judicial review of fuel-related project decisions. *Id.* §§ 6515, 6516. See Robert B. Keiter, *The Law of Fire: Reshaping Public Land Policy in an Era of Ecology and Litigation*, 36 ENVTL. L. 301, 344-50 (2006).

29. See Robert C. Szaro et al., *The Emergence of Ecosystem Management as a Tool for Meeting People's Needs and Sustaining Ecosystems*, 40 LANDSCAPE & URB. PLANNING 1 (1998); Jack Ward Thomas & Jory Ruggiero, *Politics and the Columbia Basin Assessment—Learning from the Past and Moving to the Future*, 19 PUB. LAND & RES. L. REV. 33 (1998).

30. See ROBERT B. KEITER, KEEPING FAITH WITH NATURE: ECOSYSTEMS, DEMOCRACY, AND AMERICA'S PUBLIC LANDS 80-126 (2003).

translate it into new detailed regulations and policy initiatives.³¹ Most notably, the Forest Service made fundamental changes to its National Forest Management Act (NFMA) planning rules, giving priority to ecological sustainability for policy purposes,³² and it undertook several landscape-scale planning initiatives.³³ Although the Bush Administration has since altered these rules and initiatives,³⁴ the Forest Service's own policy priorities include recreational conflicts and the loss of open space—two key issues in the Glacier area.³⁵ Overall, the result has been a dramatic reduction in emphasis on timber production, a new commitment to ecosystem management principles, and a significant restructuring of the agency's workforce toward greater disciplinary diversity.

Changes within the Park Service have not been nearly as extensive. Despite the opportunity provided during the Clinton Administration to embrace ecosystem management, the Park Service showed little overt enthusiasm for the concept as a legal matter. It did not incorporate ecosystem management concepts into its governing regulations and made only limited changes in its planning policies. The Park Service did,

31. See Charles F. Wilkinson, *A Case Study in the Intersection of Law and Science: The 1999 Report of the Committee of Scientists*, 42 ARIZ. L. REV. 307 (2000); George Hoberg, *Science, Politics, and U.S. Forest Service Law: The Battle over the Forest Service Planning Rule*, 44 NAT. RES. J. 1 (2004). On the Forest Service's evolution, see MICHAEL P. DOMBECK ET AL., FROM CONQUEST TO CONSERVATION: OUR PUBLIC LANDS LEGACY 25–44 (2003); DANIEL KEMMIS, THIS SOVEREIGN LAND: A NEW VISION FOR GOVERNING THE WEST 81–92 (2001); JEANNE NIENABER CLARKE & DANIEL C. MCCOOL, STAKING OUT THE TERRAIN: POWER AND PERFORMANCE AMONG NATURAL RESOURCE AGENCIES 57–66 (2d ed. 1996).

32. The Forest Service twice revised its planning rules in recent years, once in 2000 under the Clinton administration's oversight and then again in 2004 under the Bush administration's oversight. Whereas the 2000 revisions introduced extensive ecosystem management-based standards (including a detailed diversity regulation) into the forest planning process, the 2004 revisions sought to simplify the planning process, including eliminating species viability standards and excluding forest plans from NEPA compliance. See National Forest System Land Management Planning, 70 Fed. Reg. 1023 (Jan. 5, 2005) (to be codified at 36 C.F.R. pt. 219); see also Hoberg, *supra* note 31; Robert B. Keiter, *Ecological Concepts, Legal Standards, and Public Land Law: An Analysis and Assessment*, 44 NAT. RES. J. 943, 945–52 (2004).

33. These included the Northwest Forest Plan, the Interior Columbia Basin Ecosystem Management Project, and the Sierra Nevada Ecosystem Project, as well as the controversial Roadless Area Conservation Rule, which sought to protect over sixty million acres of undisturbed national forest lands from industrial incursions. See KEITER, *supra* note 30, at 96–113, 116, 162–69, 278–84.

34. The Bush administration has de-emphasized the ecological aspects of forest management, reversed or altered each of the regional planning initiatives, and effectively jettisoned the roadless area rule. It has prioritized oil and gas development on public lands and has implemented a so-called "Healthy Forests Initiative" designed to diminish NEPA and other legal protections. Notwithstanding these whipsaw-like policy adjustments, as we shall see, both legal constraints and an increasingly recreation-based user constituency, has moved the Forest Service—at least in the Glacier region—toward policies that are more sensitive to the protection of wildlife habitat, and thus less in conflict with its neighboring national park.

35. On the Forest Service's policy priorities, see <http://www.fs.fed.us/projects/four-threats> (last visited June 5, 2006).

however, revise its longstanding Management Policies document,³⁶ which establishes agency-wide resource management principles and standards.³⁷ It now instructs park managers to “use all available authorities to protect park resources and values from potentially harmful activities,”³⁸ to ensure that plans “consider the park in its full ecological . . . context[] . . . as part of a surrounding region,” and to work cooperatively with neighbors to mitigate potential external threats.³⁹ These provisions legitimize the involvement of national parks, like Glacier, in issues beyond their borders.⁴⁰ But they do not give park officials any new powers that extend beyond park boundaries.

B. Changes at Glacier and Its Neighboring National Forests

Over the past twenty years, Glacier has had four different superintendents and several acting ones. During the late 1980s, Superintendent Gil Lusk, described by one employee as a “new paradigm manager,” said, “let’s get off the island” and implored agency employees to reside in the nearby Flathead Valley communities rather than in the isolated park housing enclave.⁴¹ He also issued a striking management strategy document entitled *Future Focus* that called for a proactive approach to both external and internal threats to park resources, including “[p]articipat[ion] in other planning processes in the region that have an effect on Glacier . . . and expansion of our review and comment

36. 2001 MANAGEMENT POLICIES, *supra* note 11. The Management Policies document interprets key Organic Act provisions, concluding that resource protection takes precedence over visitor activities and that park managers are obligated by the “no impairment” mandate to ensure the integrity of park resources. *See id.* §§ 1.4.1 to 1.4.7.

37. The Management Policies document, however, is not a legally binding rule. *See Wilderness Soc’y v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006). *But see Davis v. Latschar*, 202 F.3d 359 (D.C. Cir. 2000). *See generally* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992).

38. 2001 MANAGEMENT POLICIES, *supra* note 11, § 1.5. The Interior Solicitor also issued an important legal opinion construing the Organic Act and related legislation to require the Secretary of the Interior to proceed cautiously when park values are threatened and to examine thoroughly potential impacts to parks. *See supra* note 10.

39. 2001 MANAGEMENT POLICIES, *supra* note 11, §§ 2.3.1, 3.4. But this stops short of authorizing park officials to invoke legal remedies to protect park resources from external threats.

40. The Bush Administration, however, initially took a sharply different approach with its own proposed Management Policies revisions that focused much more on serving recreation than protecting resources, and that would have loosened the existing management standards. Notice of Availability of Draft National Park Service Management Policies, 70 Fed. Reg. 60,852 (Oct. 19, 2005); *but see* NAT’L PARKS CONSERVATION ASS’N, STOP THE REWRITE: NPCA’S MANAGEMENT POLICIES COMMENTS (Feb. 17, 2006), <http://www.npca.org/stopherewrite/comments.html> (critiquing the proposed changes). The Bush Administration has now agreed to mostly retain the existing management standards. *Administration Retreats from Recreation Focus in [Park Service] Management Rules*, LAND LETTER, June 22, 2006.

41. Interviews with Jack Potter and Brace Hayden.

on other agency plans."⁴² To address the park's myriad external threat problems, Lusk created a new Ecosystem Coordinator position (since changed to Regional Issues Specialist) and hired Brace Hayden, a seasoned Montana state political operative, to deal with the park's external constituencies. Hayden, who remains in that position today, along with a few other long-tenured employees, has given the park some measure of continuity in working with the Forest Service and other neighbors.

Hayden and his colleagues have conceived a regional initiative, known as the "Crown of the Continent," to bring regional land managers together in an effort to integrate park concerns into its neighbors' priorities and agendas.⁴³ That effort, as we shall see, has showed only limited success thus far. During the mid 1990s, Glacier also revised its General Management Plan and resolved "to manage most of the park for its wild character and for the integrity of Glacier's unique natural heritage."⁴⁴ While the plan identifies external threats,⁴⁵ it focuses primarily on internal park issues. The plan does have a strong ecosystem flavor, however, highlighting Glacier's special designations as the world's first International Peace Park, a World Heritage Site, and an International Biosphere Reserve, as well as its role "at the core of the 'Crown of the Continent' ecosystem, one of the most ecologically intact areas remaining in the temperate regions of the world."⁴⁶

There have also been significant changes at the neighboring national forests. Controversy has been a constant on the Flathead National Forest, which sees itself "being beat up from all sides."⁴⁷ The most noticeable change on the Flathead is a drastic reduction in the forest's timber program, which has prompted a corresponding reduction in its workforce and helped force closure of its North Fork Ranger District Office.⁴⁸ Since our prior visit, the Flathead is on its third forest supervisor, and it is now in the process of revising its 1985 forest plan under the new NFMA planning rules. Controversy also continues to dog the Lewis & Clark National Forest, principally over mineral development in the Badger-

42. U.S. DEP'T OF INTERIOR, *FUTURE FOCUS: A MANAGEMENT STRATEGY FOR GLACIER NATIONAL PARK 1987-1992*, at 1 (May 1987).

43. See *infra* Part VI(B) for a discussion of the Crown of the Continent concept.

44. GLACIER GENERAL MANAGEMENT PLAN, *supra* note 25, at 17. It is perhaps also notable that the public strongly urged Glacier officials to "keep Glacier the way it is" during the planning process. *Id.*

45. See, e.g., *infra* notes 147, 157 and accompanying text (discussing commercial overflights).

46. GLACIER GENERAL MANAGEMENT PLAN, *supra* note 25, at 6-8.

47. Interviews with Jack Potter and Michael Jamison. Even the Flathead's forest planner observed: "There is still a lot of public distrust of the Forest Service." Interview with Rob Carlin.

48. Interviews with Jack Potter and Brace Hayden. The workforce reduction estimates vary between 20 and 40 percent.

Two Medicine area and the management of recreational off-road vehicles (ORVs). Relations with the Blackfeet tribe, which claims treaty rights to the Badger-Two Medicine area,⁴⁹ are always uncertain, making the tribe a potential wild card in the forest's resource management decisions. The Lewis & Clark now has its fourth forest supervisor since the mid-1980s. Both forests have witnessed significant diversification in their professional staffs with more biologists and other disciplinary specialists joining the ranks, as contrasted with the traditional emphasis on silviculturalists.

C. *Other Changes Within the Region*

Perhaps the most significant change since we wrote our previous Article has been the flood of new residents into the region, primarily in the Flathead Valley between the park and Kalispell. Many of these newcomers are second-home buyers or footloose cyberspace workers, and some are retired. This means there is less economic dependence on traditional industries like mining and timber harvesting, and more interest in recreational activities that depend on the area's natural resources. At the same time, more recreation means more ORVs, with the stress their use puts on resources. In turn, more people generate more homes and more roads, some in critical wildlife winter range that was previously empty of people. The new residents also bring a complex mixture of values with them—appreciation of the Northern Rockies' natural attributes, combined with strong views about the prerogatives of private property and distaste for anything that smacks of government regulation, zoning in particular.⁵⁰

The Glacier region has also experienced a proliferation of environmental and other citizen groups committed to protecting the area's ecological integrity. These include a local National Parks Conservation Association office, the Swan Valley Coalition, and the Flathead Valley Land Trust. These groups display a striking array of goals and strategies, ranging from the forceful litigation tactics of the Swan Valley Coalition to the cooperative approaches taken by local land trusts. At the same time, various new forums have sprung up to address local and regional environmental issues. These range from the nascent Crown of the Continent Managers Partnership to the Great Northern Environmental Stewardship group and the Flathead Basin Commission. We will examine the role and significance of these organizations below.

49. See *infra* Part IV(B) for further discussion of the Blackfeet's treaty rights to the Badger-Two Medicine area.

50. See *infra* Part III(A) for a further description and analysis of these Flathead Valley demographic and socio-economic changes.

Another important change has occurred across the international border in the Canadian Flathead. Mining in the North Fork watershed was an issue twenty years ago, but its potential scale has greatly increased recently. There are currently proposals not only for gold mining and coal bed methane production, but also for mining valuable metallurgical coal for export to Asia.⁵¹ International and local economic pressures favoring development are intense. Moreover, relations between Canada and the United States have been at a low ebb over a variety of issues. As a result, the prospects for invocation of the Boundary Waters Treaty⁵² are not good, though a reference under the treaty could at least generate a comprehensive regional environmental assessment before any mining begins.

We now turn to the specific controversies brewing in the Glacier region. We begin with the Flathead National Forest and the private lands in the Flathead Valley, and then turn to the Lewis & Clark National Forest, and the Canadian North Fork watershed. Next, we explore the emergence of regional institutions and examine their impact on the various controversies beyond the park's borders. We conclude by assessing the forces that seem to us to be most significant in determining the park's destiny.

II. THE FLATHEAD NATIONAL FOREST

Glacier's westernmost neighbor—the Flathead National Forest—provides a dramatic example of transition away from traditional conflict among adjacent federal enclaves and toward a more ecologically managed area. The 2.3 million acre Flathead National Forest abuts Glacier's western and southern boundaries with the North and Middle Forks of the Flathead River serving as the dividing line. About 45 percent of the Flathead's acreage is congressionally designated wilderness, including the Bob Marshall, Great Bear, and Mission Mountains wilderness areas. The North and Middle Forks are federally designated Wild and Scenic Rivers. The Flathead has long been a major timber producing forest. When we visited in 1986, the Flathead projected massive timber sales and was intent on issuing oil and gas leases to promote energy exploration, some in the North Fork area adjacent to the park.⁵³ It had also supported paving the North Fork road to enable access into that remote region, which would not only facilitate additional timber harvesting and energy exploration but could promote further subdivision

51. See *infra* Part V(A) for a more detailed discussion of these Canadian mineral development proposals.

52. Boundary Waters Treaty of 1909, Jan. 11, 1909, U.S.-Can., 36 Stat. 2448.

53. Sax & Keiter, *supra* note 1, at 231-33.

development as well.⁵⁴ We noted the Flathead supervisor's willingness to consider Glacier's concerns, despite his reluctance to make binding protective commitments on the park's behalf. Managerial discretion, we remarked, seemed to be the *modus operandi* on the Flathead.⁵⁵

Though developmental issues are not entirely off the table today, management of the Flathead forest has continued to evolve in a way that benefits the park. Such changes, however, are attributable more to hard-edged legal standards, third-party watchdogs, and local socio-economic trends than to any concerted strategy pursued by park officials. An aggressive litigation campaign by environmental groups significantly curtailed the Flathead's timber harvesting program during the 1990s, just as earlier litigation had blocked its oil and gas leasing program.⁵⁶ A new wilderness designation proposal is on the drawing boards, and conflicts over motorized recreation are being addressed. And as noted above, broader institutional changes within the Forest Service have also helped to alter its approach to resource management on the Flathead. The agency's NFMA planning rule revisions, showing a new commitment to ecosystem management principles, and a new generation of Forest Service personnel, evidence this change.⁵⁷ The changes are both cause and effect. Environmental education has spawned a new generation of employees who see the world differently. And new public demand—reflected in the changing regional economy and the growing populace—has revised the agency's view of its mission. As a knowledgeable local journalist observed: "The Forest Service has experienced a sea change in its culture."⁵⁸

A. A Declining Timber Harvest

The most notable change in the Flathead over the past twenty years has been a major reduction in its timber program, the result of steady ESA pressures and relentless lawsuits and administrative appeals. In its 1985 forest plan, the Flathead projected an annual timber sale of 100 million board feet,⁵⁹ some of which would come from the North Fork region adjacent to the park. This would have created wildlife habitat

54. *Id.* at 234. After the paving proposal had died during the early 1980s owing to a FWS jeopardy opinion, the Forest Supervisor told us in 1986 that he did not have an opinion on the paving and would deal with the issue on a site-specific, project basis if it arose again. *Id.* at 236.

55. *Id.* at 227–30.

56. *See infra* note 80; *see also* Swan View Coalition, What We Have Accomplished Locally and Nationally, <http://www.swanview.org/accomplish.html> (last visited Mar. 25, 2006).

57. *See supra* Part I(B).

58. Interview with Michael Jamison.

59. *See* U.S. FOREST SERV., DEP'T OF AGRIC., FLATHEAD NATIONAL FOREST: FOREST PLAN, RECORD OF DECISION 8 (1986); *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1994).

fragmentation, water quality, aesthetic, and other problems associated with heavy industrial activity and roadbuilding in this remote region. Although Glacier did not contest the final forest plan, thirty-nine administrative appeals were filed by private organizations, with several arguing that the timber projections and related road construction imperiled the “threatened” grizzly bear and violated the agency’s biodiversity conservation obligations.⁶⁰

Eventually, the ESA issue reached the Ninth Circuit Court of Appeals, which ruled in *Resources Limited v. Robertson* that the forest plan’s high volume timber program could jeopardize the grizzly.⁶¹ Related litigation challenged how the forest plan addressed old growth habitat and species, arguing that the Flathead had not adequately protected viable populations of old growth dependent species.⁶²

In response, the Flathead has amended its forest plan twenty-five times. Two of these plan amendments—numbers 19 and 21—have significantly curtailed the forest’s timber program. Amendment 19, adopted in the wake of the *Resources Limited* litigation, nearly halved the forest’s annual timber harvest level.⁶³ The amendment also implemented far-reaching road closures, reducing the forest’s open road mileage from 1900 to 1600 miles over a five to ten year period.⁶⁴ That change reflects a “need to increase grizzly bear security and reduce

60. See John G. Mitchell, *War in the Woods: Swan Song*, AUDUBON, Nov. 1989, at 92, 110.

61. 35 F.3d 1300, 1304-05 (9th Cir. 1994), *rev’g in part* 789 F. Supp. 1529 (D. Mont. 1991). The Ninth Circuit found that

the Forest Service acted arbitrarily and capriciously in concluding . . . that the Plan would not jeopardize listed species even at timber harvest levels of 100 mmbf [million board feet] /year. The Forest Service’s own studies raise serious questions about the effects on the grizzly bear at the 100 mmbf/year harvest level. The Forest Service’s reliance on the FWS’s opinion was not justified in light of its failure to provide the FWS with all the data and information required . . .

Id. at 1305. The court, however, rejected several NEPA claims, finding in part that the Forest Service could delay its cumulative effects and other analyses until specific timber sale proposals arose. *Id.* at 1305-07. See also *Swan View Coalition Inc. v. U.S. Fish & Wildlife Serv.*, 824 F. Supp. 923 (D. Mont. 1992) (refusing to dismiss plaintiff’s ESA section 9 grizzly bear taking claim related to road density as established in the Flathead forest plan).

62. U.S. FOREST SERV., DEP’T OF AGRIC., FLATHEAD NATIONAL FOREST: FOREST PLAN AMENDMENT 21, RECORD OF DECISION, MANAGEMENT DIRECTION RELATED TO OLD GROWTH FORESTS 3 (1999) [hereinafter FLATHEAD FOREST PLAN AMENDMENT 21].

63. U.S. FOREST SERV., DEP’T OF AGRIC., FLATHEAD NATIONAL FOREST: FOREST PLAN AMENDMENT 19, DECISION NOTICE, ALLOWABLE SALE QUANTITY AND OBJECTIVES AND STANDARDS FOR GRIZZLY BEAR HABITAT MANAGEMENT 26 (1995) [hereinafter FLATHEAD FOREST PLAN AMENDMENT 19] (reducing authorized timber harvest level from 100 million board feet (mbf) annually to 54 mbf). The decision explains that only 10 mbf of the 46 mbf reduction is due to grizzly bear habitat requirements and that the remainder is due to an “updated analysis of the standards and guidelines of the existing Forest Plan.” *Id.*

64. Recently, local environmental groups have filed a new lawsuit alleging that the Forest Service has violated the ESA by not closing certain Flathead forest roads in accord with the Amendment 19 standards. April Reese, *Grizzlies: Groups File Suit Against Flathead National Forest over Missed Deadline for Road Closures*, LAND LETTER, May 18, 2006.

human-caused mortality if we are to allow the grizzly bear population to recover to the point that [ESA] protection is no longer needed,” and to “improve the habitat effectiveness for numerous species of wildlife, including wolves, fisher, lynx, elk, wolverine, and marten.”⁶⁵ Four years later, Amendment 21 was adopted “to reverse the trend of declining amounts of old growth forests” by “limit[ing] vegetation management actions, including commercial timber sales, within existing old growth to those actions necessary to restore or maintain old growth composition and structure consistent with historical succession and disturbance regimes.”⁶⁶ These forest plan amendments squared with broader ecological management principles that the Forest Service—driven by the ESA, NFMA, and other environmental laws—was implementing nationwide.⁶⁷ The resulting curtailment of timber harvesting and road building benefits neighboring Glacier and the regional ecosystem.⁶⁸

Concerns persist, however, about potential delisting of the Northern Continental Divide Ecosystem grizzly bear population, which would radically alter the local legal status quo.⁶⁹ Most people we spoke with did not see delisting of the grizzly bear as imminent due to a lack of reliable population data and continued bear losses in the Flathead’s South Fork

65. FLATHEAD FOREST PLAN AMENDMENT 19, *supra* note 63, at 9. Driven by the presence of the ESA-listed grizzly bear, Amendment 19 required the Forest Service to consult with the FWS under section 7 of the ESA to ensure that timber harvesting activities and road densities did not “jeopardize” the bear. See 16 U.S.C. § 1536(a)(2); *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985) (describing the section 7 consultation process).

66. FLATHEAD FOREST PLAN AMENDMENT 21, *supra* note 62, at 7. Notably, in an effort to retain some discretionary authority, the amendment rejected the argument that the forest should establish quantitative standards for the size and spatial distribution of old growth patches as well as connecting corridors, asserting the need to maintain flexibility “given the diverse and constantly changing conditions that exist across the 2.3 million acre Flathead National Forest.” *Id.* at 10. Moreover, the plan amendment revised the list of all-important management indicator species, eliminating three species (pileated woodpecker, marten, and barred owl) but then adding ten new sensitive species (including the common loon, flammulated owl, fisher, wolverine, and lynx) due to ongoing population viability concerns. *Id.* at 11–12.

67. See *supra* note 31 for sources discussing the Forest Service’s evolution as an agency.

68. Most of the cutting in the North Fork area is now fire-related thinning or salvage logging, which remains highly controversial across the national forests. See Marc Fink, *Logging After Wildfire: Salvaging Economic Value or Mugging a Burn Victim?*, 19 J. ENV’T. L. & LITIG. 193 (2004). On at least one occasion, Glacier officials expressed concern over the proposed Moose salvage sale in the North Fork, commenting about the cumulative effects of this project in proximity to past logging activities. Interviews with Jack Potter and Brace Hayden. But following recent Forest Service changes to its NEPA categorical exclusions and NFMA planning rules, the park and its environmental group allies may find it more difficult to participate in or to challenge future salvage and other timber cutting proposals. National Environmental Policy Act Determination Needed for Fire Management Activities; Categorical Exclusions, 68 Fed. Reg. 33,814 (June 5, 2003). See *supra* notes 32–34 for a discussion of the forest planning rule changes.

69. The FWS’s Yellowstone grizzly bear delisting decision has spurred speculation that the Northern Continental Divide bear population could be next. See *Removing the Yellowstone Distinct Population Segment of Grizzly Bears from the Federal List of Endangered and Threatened Wildlife*, 70 Fed. Reg. 69,854 (proposed Nov. 17, 2005) (to be codified at 50 C.F.R. pt. 17).

area.⁷⁰ In any event, the Flathead's timber harvest may encounter even more obstacles with the addition of two new species—the Canadian lynx and bull trout—to the endangered species registry,⁷¹ notwithstanding the Bush Administration's well-documented reluctance to list additional ESA species.⁷² Along with the grizzly bear and wolf, these new listings will require even more extensive consultation between the Flathead and the Fish and Wildlife Service (FWS) before timber sales or other project decisions are finalized. Habitat demands for these species could also render the forest vulnerable to related NFMA and NEPA challenges.⁷³

B. *Paving the North Fork Road*

As noted above, twenty-plus years ago Glacier officials were seriously concerned about a North Fork road-paving proposal that would facilitate access into the remote northwestern corner of the park. Route 486, the gravel road in question, runs northeast across Flathead forest lands and links the town of Columbia Falls with a Park Service road running parallel to the North Fork of the Flathead River. The road then runs north across public and private land to the small community of Polebridge, and on to the Canadian border. It provides access to scattered private lands that are seeing a growing number of summer homes. After some initial reticence, Glacier spoke out with uncharacteristic force against the 1982 county paving plan as “incompatible with the park's management objectives and philosophy.”⁷⁴ Glacier was joined in its opposition by a broad coalition of federal and state agencies as well as environmental organizations and local residents. Eventually, the FWS issued a jeopardy opinion under the ESA, finding

70. Interviews with Keith Hammer and Tom France. See Richard D. Mace & John S. Waller, *Demography and Population Trend of Grizzly Bears in the Swan Mountains, Montana*, 12 CONSERVATION BIOLOGY 1005 (1998); Richard D. Mace et al., *Relationships Among Grizzly Bears, Roads, and Habitat in the Swan Mountains Montana*, 22 J. APPLIED ECOLOGY 1395 (1996); KATHERINE C. KENDALL, U.S. DEP'T OF INTERIOR, A STUDY TO ESTIMATE THE GRIZZLY BEAR POPULATION SIZE IN THE NORTHERN CONTINENTAL DIVIDE ECOSYSTEM (2005), available at http://www.nrmssc.usgs.gov/news/NCDE_overview.pdf.

71. See 50 C.F.R. § 17.11 at 18 (Canadian lynx), 46 (bull trout) (2005). The lynx is particularly dependent on intact and undisturbed forest conditions, see Proposal to List the Contiguous United States Distinct Population Segment of the Canada Lynx as a Threatened Species, 63 Fed. Reg. 36,994 (July 8, 1998), while the bull trout serves as a barometer of water quality in the region's rivers and streams, see Determination of Threatened Status for the Klamath River and Columbia River Distinct Population Segments of Bull Trout, 63 Fed. Reg. 31,647 (June 10, 1998).

72. See Natalie M. Henry, *Enviros Say Bush's ESA Record Means More Litigation, Less Protection*, LAND LETTER, Feb. 20, 2003.

73. See, e.g., *Or. Natural Res. Council v. Forsgren*, 252 F. Supp. 2d 1088 (D. Or. 2003). See *supra* notes 32–34 and accompanying text on the potential impact of the Bush administration's NFMA planning rule revisions, particularly its elimination of the viability regulation (including the indicator species requirements).

74. Sax & Keiter, *supra* note 1, at 234.

that paving would threaten both the grizzly bear and gray wolf,⁷⁵ which seemed to end the matter.

The North Fork paving proposal has not gone away, however, and the current park superintendent told us that local sentiment might be shifting toward paving the road.⁷⁶ Casting about for alternative economic opportunities in the wake of local timber reductions, the Columbia Falls business community concluded that it might capture some of the summer tourist traffic to Glacier if Route 486 were paved to offer a loop road driving experience. A few years ago, as the county prepared to allocate its federal highway funds to local road projects, the issue came up again. Although Glacier's revised General Management Plan plainly stated that the North Fork area "will be managed to preserve [its] wild character"⁷⁷ and visitation numbers had already exceeded the plan's projections,⁷⁸ the park curiously chose not to express itself to the Flathead County Commission when the paving proposal resurfaced, apparently because it was not asked for its views.⁷⁹ The Flathead National Forest, a previous supporter of the paving proposal, also chose to remain silent. But with only limited funds then available, the county allocated its resources elsewhere and again mooted the matter, at least temporarily.

C. *Energy, Wilderness, and the North Fork*

The situation as to oil and gas leasing has also changed significantly over the past two decades. Twenty years ago, only a federal court injunction requiring preparation of a comprehensive environmental impact statement (EIS) deterred the Forest Service from opening the Flathead to leasing and exploration.⁸⁰ The injunction, however, did not

75. *Id.* at 235.

76. Interview with Mick Holm. When asked, however, a Flathead County Commissioner took the opposite view, stating that he perceived local opposition to the paving proposal was growing stronger. Interview with Joe Brenneman.

77. GLACIER GENERAL MANAGEMENT PLAN, *supra* note 25, at 34. While the General Management Plan calls for the area to remain wild, it makes no mention of the ongoing North Fork road paving controversy.

78. Interview with Jack Potter.

79. Interview with Mick Holm. The ambiguity of the park's public position on paving the North Fork road has not gone unnoticed; during our interview, the Flathead forest planner observed: "I don't know where the Glacier park would stand on it." Interview with Rob Carlin. Yet we also were told that the park's concerns are the same today as they were before, and that these concerns are well known locally. Interview with Brace Hayden. *See also* Letter from Brace Hayden, Glacier Nat'l Park Reg'l Issues Specialist, to Kristi Swisher, Fed. Highway Admin. (May 4, 2000) (stating that "[t]he NPS will not take a position on paving the [North Fork] road until a draft environmental impact statement has been prepared and alternatives are provided for public and agency consideration.") (on file with authors).

80. *Conner v. Burford*, 605 F. Supp. 107 (D. Mont. 1985), *aff'd*, 848 F.2d 1441 (9th Cir. 1988); *see also* *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9th Cir. 1988) (requiring EIS for leases allowing any surface disturbance and a biological opinion under the ESA as to post-leasing impact on listed species).

stop the drilling of the controversial Cenex exploratory well (despite Glacier's objections) on private lands in the North Fork.⁸¹ Disappointing results from that well and a declining energy market reduced pressure to explore further in the Flathead, and the Forest Service has not done either the NEPA analysis or the ESA consultation necessary to move forward with a large-scale leasing program. Several existing North Fork oil and gas leases are still in a state of suspension, however, so Flathead Forest officials could at some point confront a renewed push for development.

The Flathead was in the process of revising its 1985 forest plan in early 2006, and draft revisions indicate that forest officials continue to share Glacier's view about preserving the North Fork's wild and undeveloped character. In the 1985 forest plan, the Flathead set aside—as a discretionary decision—the northern third of the North Fork region as the Trail Creek Grizzly Bear Management Area, disallowing oil and gas leasing as well as timber harvesting in the area.⁸² The designation was sensitive to Glacier's needs, but was also a direct response to ESA legal

81. The result was a dry hole. See Don Schwennesen, *Cenex Strikes Out: Company Abandons 9,000-foot North Fork Well*, MISSOULIAN, Nov. 1, 1989; Interview with Brace Hayden. Cenex originally sought to drill a North Fork exploratory well in the Coal Creek State Forest, but a state court injunction (later reversed by the Montana Supreme Court) prevented the project. *N. Fork Pres. Ass'n v. Dep't of State Lands*, 778 P.2d 862 (Mont. 1989). Cenex then proposed drilling on nearby leased private lands. Glacier park officials, the Flathead Basin Commission, and local environmental groups objected to this proposal before the Montana Oil and Gas Conservation Board; the park did not oppose all drilling, but argued for stringent mitigation measures to prevent resource damage and expressed its opposition to full field development were there to be a strike. Further, both the park and Montana officials raised a "symmetry" issue, arguing that it would be inconsistent for the state to approve industrial development in the U.S. North Fork area immediately after the International Joint Commission had recommended against British Columbia's Cabin Creek coal mine proposal just across the border based largely on the U.S.'s extraordinary commitment to protecting the North Fork Flathead drainage. See *infra* Part V(D) for further discussion of the Cabin Creek controversy and IJC recommendation. The Board, however, rejected this argument (asserting that there was no comparison between the size and scope of the two projects) and granted the drilling permit. Bd. of Oil & Gas Conservation, State of Mont., Order No. 47-87, *In re Application of Farmers Union Central Exchange, Inc. for a Permit to Drill a Well* (Sept. 16, 1989). The decision prompted a letter from the International Joint Commission to the U.S. Secretary of State complaining that the drilling approval

would appear to be inconsistent with the assurances of representatives of the State of Montana during the Commission's consideration of the effects of a proposed coal mine in British Columbia, that the United States was taking every possible step to protect and restore the pristine nature of this area, and consequently inconsistent with one of the premises underlying the Commission's conclusions in that report.

Letter from David A. LaRoche, U.S. Section Sec'y, Int'l Joint Comm'n, to James A. Baker III, U.S. Sec'y of State (Nov. 6, 1989) (on file with authors).

82. Sax & Keiter, *supra* note 1, at 228–29. Besides helping to protect the grizzly bear, this Trail Creek management designation also helped protect the Magic Pack wolves that were just beginning to disperse back into the U.S. from Canada and that enjoyed an "endangered" ESA listing status.

pressures and local economic forces.⁸³ In the new forest plan, Flathead officials are preparing to recommend official wilderness designation for the extreme northern portion of the North Fork region.⁸⁴ For the rest of the region, the draft forest plan proposes low impact management designations that should preclude most commercial logging or energy development.⁸⁵ Though the wilderness area proposal is not as large as some environmental advocates would like (due in part to a recent compromise agreement over snowmobiling access),⁸⁶ the fact that the Forest Service is recommending protective designations for the area is a significant step toward managing the region as an ecological entity. It also enables the United States, as we shall see, to present a consistent regional no-development position when negotiating with the Canadians over mineral and energy exploration proposals across the border.⁸⁷

D. Roads and Motorized Recreation

The more pressing issue in the Flathead today arises from a new development: the tremendous upsurge in recreational activity, particularly the use of ORVs. In both the Flathead and Lewis & Clark Forests, the Forest Service has confronted acrimonious conflict over motorized access to once-remote areas, including the North Fork and Badger-Two Medicine regions. The controversy is focused on roads, leading one veteran advocate to observe, "We argue more about closing rather than building roads now; timber is nearly done."⁸⁸ The presence of roads and ORV users can imperil wildlife,⁸⁹ create erosion problems,⁹⁰ and preclude wilderness designation. A protracted standoff between wilderness advocates and snowmobile proponents over winter recreational access recently resulted in a compromise zoning agreement that permits snowmobiles in a narrow east-west corridor that will likely

83. Legal protection for the area was also partly attributable to the aforementioned *Resources Limited* litigation; the resulting timber harvest reductions and road closures extended to the North Fork region. See *supra* notes 61–63 and accompanying text. In fact, we were told that Flathead officials asked the Park Service to close its interior North Fork road to help achieve the area's ESA-driven road density levels, but the park refused. Interview with Jack Potter.

84. Interviews with Jimmy DeHerrera and Rob Carlin.

85. *Id.*

86. See *infra* notes 88–95 and accompanying text for further discussion of ORV access conflicts in the North Fork region.

87. See *infra* notes 249–72 and accompanying text for a discussion of Canadian mineral development proposals in the North Fork watershed.

88. Interview with Tom France.

89. See FLATHEAD FOREST PLAN AMENDMENT 19, *supra* note 63, at 8–12.

90. See *id.*; see also *Special Section: Ecological Effects of Roads*, 14 CONSERVATION BIOLOGY 16–94 (2000). See generally DAVID G. HAVLICK, NO PLACE DISTANT: ROADS AND MOTORIZED RECREATION ON AMERICA'S PUBLIC LANDS (2002).

be excluded from any eventual wilderness recommendation.⁹¹ But even when it closes roads, the Forest Service faces difficult enforcement problems. ORV riders take down gates and other barriers, and routinely ignore closure signs, confident that their incursions will go unpunished due to a chronic lack of field personnel.

More road closures and reduced timber harvest in the forest provide Glacier with a buffer-like zone in the North Fork that secures important wildlife migration corridors. Conversely, more ORV use and recreational activity in the North Fork and elsewhere on the park's perimeter would reduce wildlife security and intensify commercial development pressures. It also could generate additional pressures to permit snowmobiling inside the park, which Glacier—unlike Yellowstone—has thus far successfully resisted.⁹² And it could prompt more in-holder winter access claims similar to one Glacier is currently defending against in federal court.⁹³ But as the Forest Service has moved to limit motorized access on the Flathead, ORV enthusiasts from the Flathead Valley have been crossing the continental divide on Highway 2 to ride in the Lewis & Clark Forest, including the sensitive Badger-Two Medicine area.⁹⁴ Thus, while Glacier's North Fork perimeter may become more secure, the park could lose some protection on its southeastern flank, depending on how the Lewis & Clark handles ORV access in its current travel planning effort.⁹⁵ This gives these ORV controversies a doughboy-like quality: Access limitations in one location generate pressure for access in another, perhaps equally problematic, area.

E. Relations Between Forest and Park Managers

Twenty years ago we noted that relations were generally good between Glacier and the Flathead. Besides sharing a lengthy common border and joint responsibility for two Wild and Scenic Rivers, managerial-level employees regularly met to address common concerns,

91. See *Mont. Wilderness Ass'n v. U.S. Forest Serv.*, 146 F. Supp. 2d 1118 (D. Mont. 2001), *aff'd in part*, 314 F.3d 1146 (9th Cir. 2003). Interviews with Jimmy DeHerrera, Rob Carlin, and Michael Jamison.

92. Interviews with Jack Potter and Brace Hayden. See Michael J. Yochim, *Snow Machines in the Gardens: The History of Snowmobiles in Glacier and Yellowstone National Parks*, MONT. W. HIST. MAG. 2 (Autumn 2003).

93. See *McFarland v. Norton*, 425 F.3d 724 (9th Cir. 2005). In this litigation, a Glacier park inholder sued the Park Service for denying him a special use permit for winter snowmobile access to his property. A Montana federal district court initially denied McFarland's preliminary injunctive relief request and then dismissed his suit for failing to meet the federal Quiet Title Act's twelve-year statute of limitations period. On appeal, the Ninth Circuit ruled that McFarland brought his action well within the statutory limitations period, and remanded the case for consideration of McFarland's various easement claims. *Id.* at 729.

94. Interviews with Tom Kotynski and Gary Moseman.

95. See *infra* Part IV(D) for a discussion of the Lewis & Clark's Badger-Two Medicine travel planning process.

while the Park Superintendent and Forest Supervisor seemed to enjoy an open and respectful working relationship.⁹⁶ Both then and now, a common concern over the need to coordinate fire management has strengthened the bond between the agencies.⁹⁷ They also share a common obligation to protect the grizzly bear,⁹⁸ and they operate under the same Northern Continental Divide grizzly bear management guidelines.⁹⁹ Officials from both agencies report that there are presently few serious conflicts between them. The Flathead's local district ranger, noting that he could not recall when Glacier had last commented on one of his projects, told us "we have tremendous relations with the park."¹⁰⁰ Glacier officials were similarly upbeat. They view the draft revised forest plan as "pretty compatible with the park's borders," and are optimistic about the Flathead's interest in protecting the North Fork area, though concerned about its ability to control ORV use.¹⁰¹

With timber harvest levels down and energy exploration quiescent, the Glacier-Flathead relationship has not been seriously tested in recent years. Yet both agencies are still quite conscious of their individual legal mandates, which means they also interact formally by soliciting comments from one another under NEPA for specific projects or proposals. When the Forest Service released its revised NFMA planning rules, which categorically excluded its forest plans from NEPA compliance,¹⁰² Glacier officials objected to this revision, noting "the controversial nature of resource allocation use and the need for a comprehensive cumulative effects analysis."¹⁰³ As a result, Glacier has not yet commented formally on the Flathead's draft forest plan.

Though the agencies view their current relationship in positive terms, they do not consistently reinforce one another on important regional issues. For example, while Glacier has opposed energy development in the Canadian Flathead, the Forest Service, which could

96. Sax & Keiter, *supra* note 1, at 220–21, 227–29.

97. Not only do the Park Service and Forest Service coordinate fire planning efforts, but they regularly work together to contain wildfires that spill across shared boundary lines. Interviews with Jimmy DeHerrera, Mick Holm, Michael Jamison, and Jack Potter.

98. 16 U.S.C. § 1536(a)(1) (2000); *Sierra Club v. Glickman*, 156 F.3d 606 (5th Cir. 1998); see J.B. Ruhl, *Section 7(a)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 ENVTL. L. 1107 (1995).

99. See U.S. FISH & WILDLIFE SERV. ET AL., INTERAGENCY GRIZZLY BEAR GUIDELINES (1986).

100. Interview with Jimmy DeHerrera.

101. Interviews with Mick Holm and Brace Hayden.

102. See *supra* notes 32–34 and accompanying text for further discussion of the Forest Service's revised NFMA planning regulations and their NEPA analysis implications.

103. Email from Mary Riddle, Env'tl. Prot. Specialist & Compliance Coordinator, Glacier Nat'l Park, to Cheryl Eckhardt, NEPA/106 Specialist, Nat'l Park Serv. (Feb. 9, 2005) (on file with authors). Glacier has not yet commented on the Flathead's proposed forest plan revisions because park officials say they no longer understand the forest planning process or their role in it. Interview with Jack Potter.

also be impacted by increased sedimentation and wildlife displacement in the North Fork, has taken no position on the pending proposals. Moreover, the Flathead supervisor refused to endorse a proposed regional cumulative effects model when Glacier urged it in the Crown Managers Group.¹⁰⁴ Nor does the Forest Service engage with private land development in the Flathead Valley except when wildfire-related issues arise.

F. *Railroad Grain Spills and Habitat Conservation Planning*

The one setting in which Glacier and Flathead officials are engaged in a formal multi-partner management effort involves an ESA-based obligation to safeguard the region's grizzly bears from railroad accidents in the narrow Highway 2 corridor. Situated on national forest lands, the Burlington Northern tracks parallel the Middle Fork of the Flathead River and Glacier's southern boundary, separating the park from the Bob Marshall Wilderness Area and cutting across a grizzly bear and wildlife migration corridor. During the early 1990s, numerous train accidents and resultant grain spills attracted grizzlies onto the tracks where they were killed by oncoming trains. Environmental groups sued under the ESA, alleging an illegal taking of the protected bears.¹⁰⁵ "Nothing," one Glacier official observed, "focuses the issue like a lawsuit."¹⁰⁶ Burlington Northern, Glacier, the Flathead, and others responded by forming the Great Northern Environmental Stewardship Area (GNESA) partnership in an effort to convert this "grizzly bear population sink" into an environmentally sound and operationally safe transportation corridor.¹⁰⁷ The effort has helped speed accident response times and improved clean-up protocols.¹⁰⁸

104. See *infra* Part VI(B) for a discussion of the Crown of the Continent Managers Group.

105. See *Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508 (9th Cir. 1994) (finding that bear fatalities caused by the railroad constituted a prohibited "taking" under the ESA, but denying preliminary injunctive relief to slow the trains or to require new safety equipment). The court dealt summarily with the plaintiff's request that Burlington Northern be ordered to obtain an incidental take permit, refusing to consider such relief in light of its other findings. See *id.* at 1513.

106. Interview with Brace Hayden.

107. Besides the railroad, Glacier, and the Flathead, the GNESA membership includes other government agencies, private businesses, and nonprofit groups, including Montana Fish, Wildlife and Parks, Montana Department of Transportation, Blackfeet Indian Nation, Flathead County, the Nature Conservancy, and National Parks Conservation Association. The GNESA partnership is designed to promote cooperation between industry, government, and conservation groups in order to create an operationally and environmentally safe and compatible rail system given the important commercial interests and national conservation values attached to the Highway 2 corridor. See Great N. Env'tl. Stewardship Area, About GNESA, <http://www.gnsa.org> (last visited Feb. 24, 2006).

108. Debate persists, though, over the practice of just pushing derailed cars off the tracks to maintain the traffic flow. Interviews with Jack Potter and Brace Hayden.

The litigation also spurred Burlington Northern to initiate an ESA-based Habitat Conservation Planning (HCP) process for its railroad tracks in order to secure an “incidental take permit” insulating it from potential section 9 “take” liability for future bear deaths.¹⁰⁹ The recently issued draft HCP environmental assessment and permit application would permit up to sixteen train-caused bear fatalities over a six year period; commit Burlington Northern to improve its accident response, grain clean up, and track surveillance protocols; and provide annual funds through GNESEA for bear habitat improvement projects.¹¹⁰ Burlington Northern, however, was not amenable to modifying the frequency or speed of its trains or to installing new safety equipment on them.¹¹¹ Nonetheless, park officials speak enthusiastically about the GNESEA experiment in collaborative management, describing it as an “outstanding partnership” and extolling their working relationship with railroad officials and others.¹¹²

The full nature of the GNESEA partnership, however, may be tested in a related Avalanche Control project. On occasion, railroad accidents result from winter avalanches that cascade down the park’s steep mountainsides, spilling across the train tracks and highway. In January 2004, one such avalanche derailed fifteen Burlington Northern railroad cars and brought commercial traffic to a costly standstill. As a result, Glacier initiated an EIS process to analyze the alternatives that might be used to minimize the avalanche danger.¹¹³ Burlington Northern officials are promoting the use of explosives fired by howitzers onto park mountainsides to dislodge heavy snow concentrations before an avalanche can occur.¹¹⁴ But Glacier officials view powerful explosives as inconsistent with park values and appear to favor building more

109. See 16 U.S.C. § 1539(a) (2000). See generally Karin P. Sheldon, *Habitat Conservation Planning: Addressing the Achilles Heel of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 279 (1998).

110. See ECOLOGICAL SERVS., U.S. FISH & WILDLIFE SERV., PROPOSED HABITAT CONSERVATION PLAN AND ENVIRONMENTAL ASSESSMENT FOR THE BNSF RAILWAY’S HCP CORRIDOR 49–59, 71–78 (2005). Commenting on the proposed HCP, Glacier noted that Burlington Northern’s proposed conservation funding commitment to GNESEA would not support many habitat acquisition projects, which it regarded as an important strategy for mitigating grizzly bear losses on private lands. Glacier Nat’l Park, Comments on BNSF’s Draft Proposed Habitat Conservation Plan Environmental Assessment (Aug. 30, 2005) (on file with authors).

111. See U.S. FISH & WILDLIFE SERV., *supra* note 110, at 59–61. The draft HCP EA explains that Burlington Northern cannot locally modify its train schedules or speeds without triggering major disruptions in its national railway system, and that bear-related train safety devices were not proven effective and would be too costly to install on all the railroad’s equipment. *Id.*

112. Interviews with Jack Potter and Brace Hayden.

113. See Nat’l Park Serv., Avalanche Hazard Reduction Program, <http://parkplanning.nps.gov/projectHome.cfm?projectID=12355> (last visited Feb. 24, 2006).

114. Interviews with Jack Potter, Mick Holm, and Brace Hayden.

expensive snow sheds to protect the railroad tracks from avalanches.¹¹⁵ Despite these legitimate concerns, the park is encountering resistance from the state of Montana and the Secretary of the Interior, who, presumably at the railroad's behest, cite the corridor's commercial importance and the need to facilitate traffic flow through the area. With the EIS process in its early stages, it remains to be seen whether the GNESEA partnership can produce an agreement that adequately meets the park's concerns.

III. PRIVATE LANDS IN THE FLATHEAD VALLEY

Management of the Flathead National Forest has evolved favorably to the preservation mission of Glacier National Park, in significant part because federal law imposes mandates that promote regional consistency, and because the community has become less economically dependent upon commodity production for its sustenance than it was previously. But this transformation of the local economy has also generated changes that increase perils to the park and its resources. Rapid population growth has meant development pressure on private lands near the park that in the past were open and provided winter range for park wildlife. But new residents resist zoning that might restrain them from using their property as they wish. In this section we explore the implications for Glacier of private land development in the Flathead Valley. This includes the issue of noise from helicopter overflights originating on private lands, and how congressional action on this issue—as contrasted with the approach of the Endangered Species Act or the Wilderness Act—has failed to contribute to regional harmony.

A. *Population Growth and Land Use*

Like many of the older western national parks, Glacier is mostly, but not entirely, surrounded by other public lands. Until quite recently, to the extent there were private lands on its borders, they were of only minor consequence to the park and its mission.¹¹⁶ Such lands were mostly undeveloped, in very low-density agricultural use, or had only a little widely scattered housing. As a result, the only private land issue discussed in our previous Article was the proposal to pave the North Fork road.¹¹⁷

A quite different situation is presented today. Flathead County has seen an extraordinary rate of growth. Its population increased 26 percent between 1990 and 2000, and another 9 percent from 2000 to 2004.

115. *Id.*

116. There are some minor inholdings with residences near the western border of Glacier, and the park does monitor them rather assiduously. For a discussion of a winter road-closing, challenged by an inholder, see *supra* note 93 and accompanying text.

117. See Sax & Keiter, *supra* note 1, at 234–35.

Although the majority of that increase has taken place farther out in the Flathead Valley, there is residential development close to the western border of the park, along the North and Middle Forks of the Flathead River, and in the corridor between West Glacier and Columbia Falls. Some of that development has occurred in prime winter range just beyond the park's border, underlining the fact that such artificial boundaries do not mark the actual habitat upon which Glacier's wildlife is dependent. As one local observer put it, "It used to be when the huckleberry crop in Glacier went bad, the bears would head into the relatively undeveloped valleys for food. Now they end up in someone's backyard or porch."¹¹⁸

For many decades Glacier was insulated from the common problems of urbanization by its isolation and by the region's sparse population. No longer. From the perspective of the park and its resources, the new residents and improved roadways¹¹⁹ are a mixed blessing. Overwhelmingly, those who move to the area these days do so because of the aesthetic and recreational benefits that Glacier and its surroundings provide. These newcomers, as noted earlier, generally do not depend on the traditional commodity uses of the region's public lands, which makes them compatible neighbors for the park. At the same time, they resist having anyone tell them what they can or cannot do with their land.¹²⁰

The political situation in the Flathead Valley is in flux, and the local public's willingness to accept managed growth remains uncertain. The county has been a cauldron of heated conflict over land use controls for more than a dozen years. As early as 1994, following the first spurt of population growth, a diverse group of citizens, including real estate agents, ranchers, environmentalists, and even a local timber company, formed a coalition to write a new county master plan.¹²¹ The plan included protection of agricultural lands and open space, review of

118. Chris Peterson, *Glacier Feels the Squeeze*, HUNGRY HORSE NEWS, Oct. 27, 2005.

119. Highway 2 was expanded from a two- to a four-lane road between Kalispell and Glacier since our prior study, making the park more readily accessible.

120. There is thus a notable difference between public attitudes one encounters on the eastern Rocky Mountain Front side of the park (discussed *infra* Part IV(C)), and on the west side. There is no reason to think the people are any different, or have come to Montana for different reasons. But their circumstances are in sharp contrast. The resource-rich and resource-sensitive land on the Front is almost entirely in public ownership, or consists of large ranches abutting public land. Substantial populations and growth pressures are in towns some miles away such as Missoula, Great Falls, and Helena. Even Choteau (perhaps the most commodity-dependent and development-oriented community along the Front) is some thirty miles to the east of the Front's prime habitat areas.

121. See Letter from Canyon Citizen Initiated Zoning Group to Edrie Vinson, Mont. Dep't of Transp. (Nov. 4, 1992) (on file with authors). The letter described the group's concern about development in the rapidly-developing area along route 2 from Columbia Falls to the park entrance at West Glacier and proposed zoning, or less controversial options such as conservation easements, land exchanges, and transfer of development rights.

subdivisions, and impact fees to fund needed new infrastructure.¹²² At the time, a poll showed that more than 90 percent of county residents supported controlling or directing growth and development. One element of the plan, however, was a building permit regulation that ignited local opposition, and became a focal point for anti-government and anti-regulatory sentiment.¹²³ The situation was inflamed by an outspoken property-rights advocate named Stokes who had just moved to Montana from Washington State, where he had led a secessionist campaign. A referendum campaign against the permit requirement obtained 10,000 signatures, the permit regulations were overturned by a six-to-one margin, and growth management went into hibernation.

Press reports at the time gave some sense of the polarization in the community.¹²⁴ “People came here to get away from zoning . . . [W]ho has the right to tell somebody who pays taxes what they can and can’t do with their lands?,” according to the newly created Montanans for Property Rights group that lobbied to reject the plan. An anti-planning county commissioner characterized environmentalists as “green Nazis” on Stokes’ call-in radio program, and Stokes himself was quoted as calling environmentalists “a bunch of vile vomit.” During the 1990s things degenerated. There was vandalism to environmentalists’ cars and even death threats, perhaps in response to contentious actions such as a lawsuit that forced logging reductions and road closures in the Flathead Forest.¹²⁵ Even as late as 2002, the author of a confidential focus group survey done for an environmental group reported that “the Flathead is as hostile a political environment for conservation that he [had] ever encountered. . . . [Survey participants] see environmentalists as . . . wrongheaded, overzealous and destructive.”¹²⁶ An observer at the University of Montana put it in a more measured way: “There is a self-selection process that brings many people to the non-urban West. These are people with an ideological predisposition who are most vulnerable to independence, anti-government, and property rights slogans.”¹²⁷

122. Mont. Planning Consultants, *The Canyon Plan: An Amendment to the Flathead County Master Plan*, Flathead County Res. No. 1009A (1994).

123. The permit required a small fee and a permit for new structures or significant additions to commercial and residential lots. See Canyon Area Land use Regulatory System, Flathead County Res. No. 1049A, at 6–7 (1994).

124. See, e.g., Florence Williams, *Land-Use Plan Is Disembowled*, HIGH COUNTRY NEWS (Dec. 26, 1994); Ray Ring, *The West’s Biggest Bully*, HIGH COUNTRY NEWS (Sept. 15, 2003).

125. Res. Ltd., Inc. v. Robertson, 35 F.3d 1300, 1304 (9th Cir. 1994); see *supra* notes 59–62 and accompanying text.

126. Ben Long, *Freedom, Nature, Family and Community: Defending Flathead County Values in a Changing World* (June 2002) (unpublished summary of survey and report by John Russonello, on file with authors).

127. Interview with Professor Len Broberg.

While the situation is still uncertain, the extreme tensions of the past decade have begun to give way to a more conciliatory approach and to increased public willingness to address the problems presented by growth. Organizations such as the Flathead Land Trust, Montana Land Reliance, and the Nature Conservancy offer conservation easements to landowners.¹²⁸ The tone of environmental rhetoric tends to be quite soft, put primarily in terms of preserving the rural, uncrowded life style that brings people to the Flathead, and emphasizing that the economic well-being of the region depends on protecting the recreational and aesthetic values that generate tourism and encourage new residents to settle in the area.

Words like “zoning” and “regulation” are virtually absent from newer publications, such as a 2003 report issued by the National Parks Conservation Association. Though NPCA is unambiguous in its conclusion that the Flathead communities are “‘ground zero’ in the struggle between haphazard development and planned growth,” it uses the report to emphasize that “unplanned growth could one day act as a drag on the region’s economy,”¹²⁹ rather than focusing on environmental hazards.¹³⁰ It describes the situation this way:

In the Flathead Valley, no clear picture has yet emerged of what action would best help the valley get a handle on growth and encourage the kinds of recreational, residential, and commercial development that enhance the lives of area residents. Indeed, views diverge significantly on this question, and the local political climate may stand in the way of achieving consensus. More than half of the business leaders interviewed for this report believe that the tone of public debate in the Flathead Valley is harsh, dominated by parties with extreme viewpoints. Between the extremes is a vast middle ground and ample room for compromise and action.¹³¹

128. See Flathead Conservation Roundtable, Key Indicators of Change in the Flathead River Basin Ecosystem 31 (Sept. 2002) (unpublished pamphlet, on file with authors).

129. NAT’L PARKS CONSERVATION ASS’N, GATEWAY TO GLACIER: THE EMERGING ECONOMY OF FLATHEAD COUNTY 28 (2003).

130. That is not to say that the organization fails to emphasize resource issues in its other literature, which is directed more to park managers and to its own constituency than to the local community. See, e.g., NAT’L PARKS CONSERVATION ASS’N, STATE OF THE PARKS: A RESOURCE ASSESSMENT, WATERTON-GLACIER INTERNATIONAL PEACE PARK 9 (2002) (“Throughout the Waterton-Glacier area, use of private lands for commercial, residential, and recreational purposes is rapidly increasing. . . . These types of land uses in the lower elevations surrounding the park destroy and fragment wildlife habitat, particularly the corridors that top predators use.”); see also *id.* at 2 (“Residential, commercial, and resort developments on ranch, farm, and forest lands have encroached on important seasonal range for elk, mule deer, bears, lions, and other wildlife species. Rapid population growth and poorly planned development may result in even more adverse impacts on wildlife.”).

131. NAT’L PARKS CONSERVATION ASS’N, *supra* note 129, at 28.

As one longtime observer put it, “The environmental community has proved it can win in the court of law, now it must prove it can win in the court of public opinion.”¹³²

There have also been some significant political developments. In 2004, two Democratic state legislators were elected from the Whitefish/Columbia Falls area, both of whom advocate “appropriate growth.”¹³³ At least one Flathead County Commissioner—Democrat Joe Brenneman—who is considered “progressive” holds office. Moreover, and perhaps most important, pursuant to state law the county was obliged to revise its master plan and adopt a growth policy by October 2006.¹³⁴ While that policy had not yet been completed at the time of this writing, it had identified its “vision,” which included both to “properly manage and protect the natural and human environment” and to “preserve the rights of private property owners.”¹³⁵ According to one observer, the growth policy is likely to advocate transferable development rights (TDRs) and the use of conservation easements (both compatible with full protection of property values), but not to favor zoning. To what extent the growth policy will lead to significant growth management remains to be seen. Since most of the land in the county is not zoned, it is unclear what value TDRs (which allow exceeding zoning on one site in exchange for limiting it on another site) would have. And the availability of funding for conservation easements, and their acceptability to the community, is still untested.

Moreover, while Flathead County is beginning to accept the idea that some sort of regulation is needed to cope with an explosive growth rate, initiatives have thus far been limited. They have involved issues like traffic congestion and drinking water quality—matters that directly affect the residents’ lifestyle and convenience—as contrasted with land-use controls designed to accommodate wildlife needs. One county commissioner told us that he had been trying, without any success until quite recently, to get some sort of growth policy on the agenda for ten years.¹³⁶ When we asked what sort of developmental issues the county was now ready to deal with, he described a subdivision proposed in the headwaters of a creek that could lead to aquifer contamination. That, he said, “is an example of when you do say no.” The biggest issue for him

132. Interview with Ben Long.

133. The two legislators are Senator Dan Weinberg, who represents the “North Valley” area that includes Whitefish, Columbia Falls, the North Fork, and West Glacier, and Representative Mike Jopek, who represents the Whitefish area.

134. MONT. CODE ANN. § 76-1-601(2) (describing requirements for growth policy); *see also id.* § 76-1-106 (describing the role of planning boards). The county has now hired three new planners to work on the preparation of an updated plan.

135. *See* Flathead County Planning & Zoning Office, Growth Policy Documents, <http://www.co.flathead.mt.us/fcpz/growthpolicy.html> (last visited Mar. 1, 2006).

136. Interview with Joe Brennemann.

was water quality planning so that growth does not destroy the quality of life in the Valley. And, he said, “we don’t want to have development that costs the public more than it provides in taxes.” But when we asked about impacts on wildlife, he said, “we probably can’t reject a subdivision based on concerns about wildlife.”

We asked the commissioner whether, or how, the park engaged with the developmental and land use issues that came before the County Commission. He replied that all the public agencies in the region get notice of the commission proceedings, but that it never got any comments from the park.¹³⁷ When we expressed some surprise, in light of the concerns about impacts on wildlife from residential growth that had been detailed to us by some park officials, he said, “the park is huge; how much can development impact it? If private development is negatively impacting them, why don’t they buy it?” When we asked whether people in the community were concerned about the park, which was in a sense the source of the amenities that had brought them to the Flathead, he replied, “Some would say, ‘the hell with the park.’” And when we inquired about non-regulatory techniques like acquisition of conservation easements, he spoke about the anti-governmental attitudes that one found among a number of people in the community, and told us that some people see conservation easements as a plot to return the land to the animals and to de-populate the community.

These observations suggest that the park has been prudent not to intrude itself officially and vocally into county land use planning.¹³⁸ Our interviews with park officials confirmed that sense.¹³⁹ “Park values have not been in the debate as to people moving into the area,” and as to things like zoning, “it is difficult to get someone whose property [value]

137. There is scant mention of these private land issues in the park’s General Management Plan or its associated Environmental Impact Statement. *See, e.g.*, NAT’L PARK SERV., U.S. DEP’T OF INTERIOR, GLACIER NATIONAL PARK: FINAL GENERAL MANAGEMENT PLAN, ENVIRONMENTAL IMPACT STATEMENT, VOL. 1, at 111 (1999) [hereinafter GLACIER EIS] (“To the south of the park is the Flathead Valley, an area that is dominated by agricultural production and by small, rapidly growing communities.”); *id.* at 219–20 (“[A]ctions outside the boundary such as . . . increasing private development in the North and Middle Fork Valleys and in the corridor between West Glacier and Columbia Falls . . . could cumulatively affect wildlife populations and habitat.”). By contrast, a 2002 *State of the Parks* report on Glacier quite strongly emphasizes the adverse consequences of private land development outside the park’s borders. NAT’L PARKS CONSERVATION ASS’N, *supra* note 130, at 2, 9.

138. In our previous Article, we discussed proposed oil development on private land in the North Fork area, and criticized the park for taking no position on such development on its flank. Sax & Keiter, *supra* note 1, at 231–32. Following publication of our Article, the then-Superintendent took a strong and open position against the Cenex drilling proposal, and was criticized for doing so by the Montana congressional delegation and others. Interview with Brace Hayden. *See infra* note 179. *See also supra* note 81 and accompanying text (describing the controversy).

139. Interviews with Jack Potter, Mick Holm, and Brace Hayden.

has increased ten-fold to take the hit.”¹⁴⁰ They reiterated, “in Montana there is opposition even to voluntary easements” and noted that the Nature Conservancy (which buys land and conservation easements) had shut down its local office. They added, “the press vilifies people who talk about smart growth,” and said, “the biggest undercurrent is property rights.” These interviews confirmed what the county commissioner had told us, that while there is some agreement in the community about too-rapid growth, and while there is a local citizen organization concerned about better planning,¹⁴¹ so far all it has generated is a focus on issues like traffic and water quality. And though there is a Flathead Basin Commission with both state and federal officials as commissioners that is well-regarded, it has no enforcement powers and its primary concern has been water quality.¹⁴²

When we asked Glacier officials how or whether the park engages with private land development, we were told: “We don’t show up at planning meetings and say, for example, ‘you should zone the North Fork.’ For us to show up at planning meetings would be very difficult. And we don’t have the empirical and scientific studies to make the case. It is difficult for us to make the case that ‘it’s your house that will make the difference,’ and we don’t have huge developments, it’s mostly one house at a time. What we do is education, to alert the public. We are in an organization known as Leadership Flathead, which is an organization to build coalitions and to educate.”¹⁴³ Nonetheless, Glacier officials have

140. Interview with Jack Potter. In the North Fork Polebridge community, there has been some zoning passed, but we were told (by Jack Potter), “it didn’t have a lot of teeth and all existing uses were grandfathered in.” Apparently its primary purpose is to prevent commercial development from coming in. Another interviewee told us that the Polebridge zoning “was just to benefit their own interest” in keeping unwanted development out. Interview with Michael Jamison. In 1986, an unofficial North Fork Land Use Planning Committee issued a land use plan for the North Fork Flathead River Valley, with the hope that it would be adopted as part of the Flathead County Comprehensive Land Use Plan. It was essentially a proposal for large-lot (one unit per five acres) development and for the adoption of transferable development rights. *See* N. Fork Land Use Planning Comm., North Fork Flathead River Valley Land Use Plan (1986) (unpublished pamphlet, on file with authors). A North Fork Land Development Code, approved by the Flathead County Planning Board (Aug. 12, 1998), was intended to “give guidance to the area we call ‘the North Fork.’” It provides for twenty-acre minimum lot size, road and river setbacks, sign controls, and grandfathering of non-conforming uses.

141. The organization is Citizens For A Better Flathead. *See* <http://www.flatheadcitizens.org> (last visited May 10, 2006).

142. The Commission offers this description of itself:

The Flathead Basin Commission was created in 1983 by the Montana Legislature to monitor and protect water quality . . . The FBC is a . . . non-regulatory organization that works to accomplish its important mandate in a consensus-building manner, stressing education, cooperation, . . . and the voluntary participation of basin residents.

FLATHEAD BASIN COMM’N, BIENNIAL REPORT 2003–2004, inside front cover. *See also infra* note 288.

143. Interview with Jack Potter.

been active behind the scenes.¹⁴⁴ They helped to hire a planner for the Middle Fork land planning effort and have supplied technical assistance to communities near the park.

It is still too early to say whether success will reward the efforts of moderate national environmental groups such as the NPCA and the Nature Conservancy or of local coalitions like the Flathead Conservation Roundtable, which describes its mission as promoting dialogue on conservation issues and increasing understanding of the interdependent relationship between the environment, people, and the economy.¹⁴⁵ While there have been a number of positive developments in the last several years, the critical and unresolved question is whether the “soft” approach, without the iron fist of legal coercion in the background, can do the job.¹⁴⁶

B. Scenic Overflights

Our previous Article briefly mentioned Glacier’s efforts to control noise from overflights, and its success in persuading the local congressional representative to introduce legislation designed to control those flights.¹⁴⁷ Though a bill was enacted in 1987 calling for a study of noise at Glacier and several other parks,¹⁴⁸ its substantive provisions were focused on overflights at Grand Canyon National Park, where noise intrusion on river-running trips through the Canyon had become a matter of national attention.¹⁴⁹

Twenty years later helicopter noise from scenic flyovers is still a troublesome, unresolved issue at Glacier, and the number one complaint of visitors.¹⁵⁰ Although helicopter (and some fixed wing) services are based on private land outside the park, unlike other external threats they

144. One interviewee, who sits on the Flathead Basin Commission, made this comment about the park’s resource issues specialist, Brace Hayden: “Hayden is absolutely excellent, but he can’t do anything out of the political framework, and the political framework comes higher up, at the highest political levels. I think there is a lot of pressure on the park not to do anything, not to oppose. I don’t know that, but there’s no leadership in the National Park Service or the Department of the Interior” Interview with Richard Moy.

145. Flathead Conservation Roundtable, *supra* note 128, at 1.

146. One issue no one seems to have raised is whether section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(B), might be applied to private land developments in habitat of listed species (the same provision that is being applied to the Great Northern derailments described *supra* note 109). Is it simply too hot to handle in the disputatious context of the Flathead Valley? Is the presence of numerous small individually-owned tracts too difficult a challenge for an effective Habitat Conservation Plan? Whatever the explanation, it was never mentioned in any of our interviews.

147. See Sax & Keiter, *supra* note 1, at 222.

148. Pub. L. No. 100-91, 101 Stat. 674 (1987).

149. See *id.* § 3.

150. Interview with Mick Holm.

operate within the park or just above it.¹⁵¹ But Glacier officials are no more empowered to deal with such intrusions than they are with other external activities. Air traffic is governed by the Federal Aviation Agency, whose mandate was never to protect natural resources or to concern itself with the experience of national park visitors.

In response to widespread concern about noise from scenic overflights at a number of parks, in 2000 Congress enacted the National Parks Air Tour Management Act.¹⁵² In effect, the law provides for licensing of tour operators and for the development of Air Tour Management Plans (ATMPs) for the national parks, "to mitigate or prevent the significant adverse impacts, if any, of commercial tour operations upon the natural and cultural resources, visitor experiences, and tribal lands."¹⁵³ However, the law has not been as helpful for the park as it might have been. For one thing, it vests sole authority to control airspace in the FAA,¹⁵⁴ which is to adopt the ATMPs "in cooperation with the Director [of the Park Service]."¹⁵⁵ In addition, the law grants an entitlement to all existing tour operators, at their previous levels of operation, to continue their operations until a plan has been adopted. As explained in a Government Accountability Office (GAO) study of the law, progress toward adopting such plans has been unduly slow for a variety of reasons.¹⁵⁶ And Glacier has not yet even begun to find common ground with the FAA looking toward the development of an ATMP.

On this issue, the park has taken a very strong position: It wants to ban commercial overflights.¹⁵⁷ This is perhaps indicative of the difference between threats seen by park officials as internal rather than external. Here is how one veteran Glacier official described the situation to us:

We went through the process and the park wanted to ban overflights. The FAA supports the industry, so anything they can do to slow the process [leading to a ban], or avoid loss of autonomy . . . they do. They don't want "islands of loss of control." . . . We want solitude.

151. "There have been as many as five or six vendors, primarily on the west side, that . . . have offered to fly visitors over the park. There are at least two vendors who presently provide such services on the outskirts of the park." GLACIER EIS, *supra* note 137, at 63.

152. Pub. L. No. 106-181, tit. VIII, 114 Stat. 61, 185 (2000) (codified at 49 U.S.C. § 40128).

153. 49 U.S.C. § 40128(b)(1)(B).

154. Pub. L. No. 106-181, § 802.

155. 49 U.S.C. § 40128(b)(1)(A).

156. U.S. GOV'T ACCOUNTABILITY OFFICE, NATIONAL PARKS AIR TOUR MANAGEMENT ACT: MORE FLEXIBILITY AND BETTER ENFORCEMENT NEEDED 12 (2006).

157. The Glacier GMP EIS describes scenic air tours as one of the park's "critical issues," *see supra* note 137, at 44, and describes a ban as its preferred alternative, *id.* at 63-64. Interestingly, though no park official mentioned it, a local journalist told us that one of the tour operators in West Glacier also does rescue operations for the park, and said, "so maybe the park isn't so eager to put him out of business." Interview with Michael Jamison.

There is no interest [in that] in the FAA. They didn't even want to include banning as an alternative [to consider].¹⁵⁸

The FAA originally opened discussions with Glacier as one of the first parks for which an ATMP would be developed, but once the park insisted on consideration of a total ban as an alternative, the FAA decided to go elsewhere.¹⁵⁹ And while there were some additional contacts in 2004, for the present, nothing is happening, and overflights are legally entitled to continue at their historic levels.

IV. THE LEWIS & CLARK NATIONAL FOREST

While the Lewis & Clark National Forest is, like the Flathead, adjacent to Glacier, it has a strikingly different story to tell about its relations to the park. The Lewis & Clark, as we shall see, was also long devoted to exploitation of its commodity resources, primarily oil and gas rather than timber. And it has also turned away from that emphasis, partly because of legal constraints, but even more significantly because of organized opposition from its neighboring communities. One of those communities is the Blackfeet Tribe, whose reservation borders both the park and the Lewis & Clark Forest. Once the tribe's traditional cultural interests were threatened, they became formidable opponents of energy development. Moreover, a powerful coalition of citizens joined together as a regional constituency to protect the whole swath of land along the east side of the mountains known as The Rocky Mountain Front.¹⁶⁰ That effort was enhanced by a remarkable individual who served as Forest Supervisor of the Lewis & Clark during a critical period, and who was an unusually proactive exemplar of the "new" Forest Service culture. The story told in this section is essentially one of emergent regionalism through constituency-building, and how the powerful oil and gas industry was defeated by that effort.

158. Interview with Jack Potter.

159. The history of the park's dealings with the FAA is set out in its response to a survey done for the GAO report, *supra* note 156:

We have begun discussions with FAA about developing an air tour management plan. . . . [B]ut FAA did not want to do one that would result in prohibiting scenic air tours right after the act was passed. . . . It became obvious that FAA's interpretation of the Act meant that any Air Tour Management Plan had to include alternatives that allowed scenic air tours. . . . We have not heard from them since [August 2004].

Response to U.S. Gov't Accountability Office Survey of National Park Service on Air Tour Management 7-8 (July 2005) (unpublished document, on file with authors).

160. The Rocky Mountain Front is not a formal legal designation. In the U.S., it is usually described as extending south from the U.S. border to just south of Montana Highway 200, and east from the crest of the continental divide and Great Bear-Bob Marshall wilderness complex to U.S. Highways 287 and 89. It extends from north to south some 150 miles, and is effectively the intersection where the Great Plains meet the Rocky Mountains. It is characterized by its rapid transition from mountains to plains, and its value as habitat for diverse wildlife including gray wolves, grizzly bears, lynx, eagles, and big horn sheep.

A. *The Oil and Gas Threat*

Twenty years ago oil and gas development in the Badger-Two Medicine area of the Lewis & Clark National Forest appeared as the most immediate and most potentially damaging domestic external threat Glacier faced.¹⁶¹ Compared with the situation on the Flathead side of Glacier, where we found “circumstances have pretty much favored the park,” we concluded, “almost the opposite situation prevails” on the Lewis & Clark side.¹⁶² There we saw Forest Service personnel committed to permitting oil and gas exploration; silent and passive park officials; a cowed FWS that had reportedly felt political pressure to withdraw a jeopardy opinion;¹⁶³ a struggling environmental community using legal tools like NEPA that seemed to offer only temporary procedural stopgaps; ambivalence about hydrocarbon development on the adjacent Blackfeet Reservation; and a local economy still dependent on commodity production from the federal lands. We said that “[p]ark officials now are reconciled . . . to . . . exploratory drilling . . . [and] rest their hope on the chance that commercial quantities of oil and gas will not be discovered in environmentally critical areas”¹⁶⁴

Two decades later things could hardly look more different. There has still been no exploratory drilling in the Badger-Two Medicine area, and no one we interviewed thought such development was likely to occur anytime soon. The major oil companies that held the leases at that time have effectively left the area. Chevron supported legislation to allow a trade-out of its leases to a different area, and when that legislation failed, it relinquished its Goat Mountain and other leases to smaller less publicly visible companies, such as Devon Energy Corporation of Oklahoma City.¹⁶⁵ In 2000, American Petrofina (“FINA”), the lessee of the Hall Creek well that was the subject of so much dispute and litigation in the mid-1980s, turned its lease back to Sidney Longwell, the individual from

161. The Badger-Two Medicine area comprises 130,000 acres within the Lewis & Clark National Forest bounded by Glacier National Park, the Blackfeet Reservation and the Great Bear/Bob Marshall wildernesses.

We previously discussed two leases in the area, one at Hall Creek about two miles south of the park border held by American Petrofina (FINA), and another at Goat Mountain, about ten miles south of the park held by Chevron. Both are in the area known as Badger-Two Medicine, technically the RM-1 Geographic Unit of the Lewis & Clark Forest. There are actually more than forty existing leases in the Badger-Two Medicine that could lawfully be drilled if permission were given. See Sonja Lee, *Battle for Hall Creek: Is it Government at its Worst or its Best?*, GREAT FALLS TRIB., June 13, 2004, at 1A.

162. Sax & Keiter, *supra* note 1, at 240.

163. *Id.* at 242–46.

164. *Id.* at 244.

165. Interviews with Donato Judice and Gloria Flora. See <http://www.s-o-solutions.org/projects/coalition.html> (last visited June 8, 2006).

whom it had originally purchased it.¹⁶⁶ Longwell has restarted the process for obtaining a drilling permit, but his chances of success seem slight. The Blackfeet “strongly object to any development in . . . the Rocky Mountain Front as a violation of the Tribe’s right of ownership, and as a violation of the religious and cultural rights of the Tribe and its right of access for those purposes. Until the Tribe’s claims are resolved, it is the Tribe’s position that no development in this area can go forward.”¹⁶⁷

Meanwhile, the Bush Administration has suspended drilling along the entire Rocky Mountain Front pending preparation of a regional environmental assessment.¹⁶⁸ And the Forest Service has been engaged with two very different issues in the Badger-Two Medicine area: determining whether the land including the Hall Creek site should be recommended for designation as a Traditional Cultural District under the National Historic Preservation Act in order to facilitate ritual uses by the Blackfeet Indians;¹⁶⁹ and a Travel Plan designed to regulate motorized recreational use in the forest. Nonetheless, the leases (issued in 1981 and 1982) are legally in a state of suspension (as are forty other outstanding leases), which legally keeps them from expiring as they ordinarily would after ten years without production.

How did this astonishing transformation come about? A combination of influences all impelled events away from oil and gas development. Which were dominant, whether all were essential, and precisely how they have interacted, is very difficult to determine. It is quite clear, however, that the major oil companies finally decided it was not in their interest to make a strong push for development permission at this time.

Unlike the situation twenty years ago, it is generally understood today that the Rocky Mountain Front is unlikely to be richly rewarding for hydrocarbon production. A few dry hole exploration wells have been drilled, and there are several modest operating wells here and there on the Front. But no one thinks the area has potential even remotely like the prodigious developments in Alberta across the border to the north. The most optimistic valuation we heard came from the BLM oil and gas geologist who deals with Lewis & Clark petroleum leasing issues, and who estimated a value of twelve billion dollars for Chevron’s Goat

166. Longwell, economic development director for the City of Baton Rouge, Louisiana, had purchased the 6,200-acre Hall Creek lease for \$1 per acre per year in 1982. See Lee, *supra* note 161.

167. Letter from Jay St. Goddard, Chairman, Blackfeet Tribal Bus. Council, to Rolando Ortegon, Forest Supervisor 1–2 (Jan. 8, 2004) (on file with authors).

168. See *infra* notes 234–38 and accompanying text. For a description of the area embraced by the Front, see *supra* note 160.

169. 16 U.S.C. §§ 470–470w-6. The National Register Bulletin Guidelines for Evaluating and Documenting Traditional Cultural Properties are found at <http://www.cr.nps.gov/nr/publications/bulletins/nrb38/> (last visited June 8, 2005).

Mountain lease alone.¹⁷⁰ The far more common view was expressed by an industry petroleum geologist: "While the gas in the Front may be a small amount, it may be distributed in a manner that makes it an important resource You really don't want to take anything off the table that might prove to be useful."¹⁷¹ A 1997 Environmental Impact Statement on oil and gas leasing in the Lewis & Clark said:

[T]he Rocky Mountain Division [of the Forest] has high potential for the occurrence of hydrocarbons, even though there are differing opinions on specific estimates of the amount of hydrocarbon resources. Development of these resources could provide economic benefits to local economies as well as the State of Montana and Federal Government. . . . It could also be argued that non-monetary or other use values are higher, however¹⁷²

As one long-time environmental advocate put it, "I've never felt the industry was really serious about this area. If you get into a fight with [big oil], you know you're in a fight. I've never felt that here."¹⁷³

On the other hand, there is no doubt that the industry was sufficiently interested in the area to pursue the leases and to seek permission to drill. Indeed, when the leases were first issued, and for more than ten years, industry filed and diligently pursued the opportunity to drill exploratory wells. Their first Hall Creek application was approved by the Forest Service in 1985. Appeals were taken and sustained,¹⁷⁴ after which some modifications were made and new proposals advanced. In 1989, environmentalists protested the prospect of drilling in the Badger-Two Medicine area, presenting petitions and organizing protest meetings, but they had little apparent impact on the Forest Service, which approved drilling plans in 1991 and again in 1993.¹⁷⁵ The industry fought administrative appeals taken by both the environmental community and the Blackfeet. Efforts to secure congressional support for a wilderness designation proved unavailing.¹⁷⁶

170. Interview with Donato Judice.

171. See Sonja Lee, *Front Drilling Battleground: Choteau Feels Heat of National Debate*, GREAT FALLS TRIB., Sept. 7, 2003, at 1A, 6A (quoting Dave Morehouse, Energy Information Administration). A federal report estimated that of the 139 trillion cubic feet of gas in the Rocky Mountain Region, there is only an estimated 8.6 trillion cubic feet on all federal land in this area. *Id.* The Wilderness Society has issued a fact sheet based on U.S. Geological Survey data, *GIS Analysis of Economically Recoverable Gas and Oil in the Rocky Mountain Front of Montana* (May 4, 2004), available at <http://www.wilderness.org/Library/Documents/> (scroll down and follow link to document).

172. U.S. DEP'T OF AGRIC. & U.S. DEP'T OF INTERIOR, LEWIS & CLARK NATIONAL FOREST, OIL AND GAS LEASING: FINAL ENVIRONMENTAL IMPACT STATEMENT, RECORD OF DECISION 5 (Sept. 1997) [hereinafter 1997 ROD].

173. Interview with Tom France.

174. See Sax & Keiter, *supra* note 1, at 241-44, for a description of these appeals.

175. See Lee, *supra* note 161.

176. Senator Max Baucus introduced S. 853, a bill mandating wilderness review for the Badger-Two Medicine area in April, 1993, but it never even had a hearing.

Until the mid-1990s, the Forest Service (and the BLM, which administers oil and gas development on federal lands) was highly supportive of the lessees. According to the then-Forest Supervisor, the law encouraged agencies to make land available for energy development. He said, "I am bound to permit activity unless it can be proven that such activity is detrimental to others' use of the land."¹⁷⁷ In 1991, John Mumma, who had been the Regional Forester, testified that pressures from Washington to expedite oil leasing and drilling in the Badger-Two Medicine area led to his forced retirement.¹⁷⁸ As noted above, the FWS's original jeopardy opinion had been withdrawn, which opened the door for drilling. However, the Superintendent of Glacier at that time, Gil Lusk, took a different position than his predecessors had. Lusk was quite outspoken in making clear the park's concerns about oil and gas development in the Badger-Two Medicine area.¹⁷⁹ Besides submitting candid and critical comments on the Forest's Draft Environmental Impact Statement,¹⁸⁰ he announced,

[w]e are . . . being more proactive in our involvement in the decision making processes of those who manage lands that surround the park. This means letting agencies such as the Forest Service know of the park values at risk . . . We intend to stay involved in these processes.¹⁸¹

B. *The Blackfeet and the Traditional Cultural District*

Environmental opposition was persistent and determined, but it did not seem sufficient to turn things around. The Blackfeet, however, were a different matter. If they were unhappy enough, they could make a kind of trouble that the oil companies did not need. At first, the tribe's position was ambiguous, perhaps because there were some wells on the Reservation itself. As we reported at the time, tribal "members have

177. Dan Baum, *Blackfeet Fight Oil Exploration on Sacred Land*, DENVER POST, Dec. 16, 1990.

178. See BOB YETTER, *BADGER-TWO MEDICINE: THE LAST STRONGHOLD, SACRED LAND OF THE GRIZZLY, WOLF, AND BLACKFEET INDIAN* 24 (1992).

179. According to Brace Hayden, "Lusk took a strong anti [drilling] position and was criticized for it by the Montana congressional delegation."

180. See Letter from H. Gilbert Lusk, Superintendent, Glacier Nat'l Park, to Dale Gorman, Supervisor, Lewis & Clark Nat'l Forest (Nov. 22, 1989) (on file with authors); see also Letter from Robert F. Stewart, Reg'l Envtl. Officer, U.S. Dep't of Interior, Denver, to John D. Gorman, Supervisor, Lewis & Clark Nat'l Forest (Jan. 31, 1990) (on file with authors).

181. Letter from H. Gilbert Lusk, Superintendent, Glacier Nat'l Park, to Becky Hansen (May 4, 1990) (on file with authors). See generally U.S. DEP'T OF INTERIOR, *FUTURE FOCUS*, *supra* note 42. Current park management takes a much more guarded approach. When asked about oil and gas development on adjacent national forest lands, the current Superintendent blandly replied, "we have the opportunity to comment and we do that." Asked to comment on the prospect of mineral development in the North Fork basin in Canada, he said, "[i]t's a concern to Glacier." Interview with Mick Holm.

been ambivalent about nearby oil and gas development."¹⁸² However, the environmentalist appeal of the drilling permit claiming jeopardy to the grizzly bear generated a response that put the Blackfeet squarely in the center of the controversy. In exchange for withdrawing its jeopardy opinion, the FWS imposed a stipulation that the access road necessary to support well drilling must be closed to motorized traffic, including exclusion of the Blackfeet.¹⁸³

That requirement incited opposition by the tribe which had long claimed entitlement to the Badger-Two Medicine area under an 1895 treaty with federal government. The road closure requirement effectively subordinated traditional tribal uses to the demands of the oil industry. The 1993 drilling approval document, after noting the noise and activity that would be present at the drill site said:

In case traditional practitioners choose to use the area around the wellsite regardless of the disturbance, notice will be made in local newspapers of planned drilling activity. This will enable religious practitioners to plan their activities so they can be conducted at locations and during time periods when the effects of the project are not evident.¹⁸⁴

Though oil and gas development itself was not necessarily offensive to the tribe, the notion that they would be excluded from an area to which they claimed inalienable rights of access, and which continued to have importance to them for ritual purposes, significantly raised the stakes for the lessees.¹⁸⁵

At about the same time, public opinion along the Rocky Mountain Front was beginning to shift in favor of maintaining wildlife and outdoor values, even at the expense of some potential energy development. To what extent this may have been influenced by a sense that the oil industry was weakening in its resolve, or was due to a growing appreciation of the

182. Sax & Keiter, *supra* note 1, at 241.

183. The "no jeopardy" opinion, with the stipulation, was issued on January 14, 1985. Concerned about their ability to prosecute Blackfeet who might violate the road closure, the Forest Service obtained, through the BLM, a solicitor's legal opinion stating that they could restrict motorized access by the Blackfeet where necessary for the protection of endangered or threatened species, notwithstanding the access rights reserved in the 1895 agreement establishing the tribe's Reservation rights, Act of June 10, 1896, ch. 398, 29 Stat. 321, 353-54. See Letter from Richard K. Aldrich, Field Solicitor, Rocky Mountain Region, U.S. Dep't of Interior, to State Dir., Bureau of Land Mgmt., Billings, Mont. (Mar. 24, 1987) (on file with authors).

184. BUREAU OF LAND MGMT., U.S. DEP'T OF INTERIOR, RECORD OF DECISION, FINA OIL AND CHEMICAL COMPANY EXPLORATORY OIL/GAS WELL FEDERAL SOUTH GLACIER NO. 1-26, at 15 (Jan. 1993).

185. A 1990 *Denver Post* story, see *supra* note 177, and a widely circulated 1992 pamphlet gave a sense of the direction the development controversy was taking. The pamphlet, *Badger-Two Medicine: The Last Stronghold, Sacred Land of the Grizzly, Wolf, and Blackfeet Indian*, was published by the Badger Chapter of the Glacier-Two Medicine Alliance in Missoula. See *supra* note 178.

grizzly and the wolf generated by the environmental community, is difficult to document. Some changes were already occurring in the population demographics near the Front. More people were coming to nearby places like Missoula and Great Falls for the recreational values Montana offered, and many of them were less dependent for their sustenance on the traditional commodity-based economy.

Plainly something was changing for, in 1992, both Montana Senators, the Democrat Max Baucus and the quite conservative Republican Conrad Burns, introduced a Montana Wilderness Bill in Congress that would have forbidden surface disturbance in the Badger-Two Medicine area until Congress said otherwise.¹⁸⁶ The bill would also have forbidden new mining or mineral leasing in the area. While the bill never got out of committee,¹⁸⁷ it was an early indicator that popular opinion about the future of the Front was in transition.

The third Hall Creek well approval in January 1993 seems to have been the last stand of pro-development forces in the Badger-Two Medicine area.¹⁸⁸ The previous Environmental Impact Statement had been found inadequate for failing to sufficiently study the cultural significance of the Badger-Two Medicine area to the Blackfeet, and that concern opened a new chapter in the saga. A cultural area study was begun and the Clinton Administration, which had just taken office, suspended well approvals until 1996, presumably until the question of the Blackfeet's cultural claims could be resolved.¹⁸⁹ The original study recommended setting aside a significant portion of the Badger-Two Medicine area as a Traditional Cultural District (TCD).

A TCD is a designation permitted under the National Historic Preservation Act.¹⁹⁰ Effectively, a study is first made of the historical and cultural justification for memorializing a specific site, and a recommendation is made to a federal official known as the Keeper of the Historic Register. If the Keeper accepts the recommendation, the site is designated. Once designated under the Act, any federally assisted undertaking, including federal licensing, must take into account the effect of the proposed activity on the site. If the agency proposing action (in this case the Forest Service) determines the activity will have an impact, the Act requires the agency to consult with the federal Advisory Council on

186. S. 1696, 102d Cong. (1991). It would have prevented exploratory drilling under the leases, in effect reversing the permits that the Forest Service had twice granted, and would grant again the next year.

187. The bill was part of a larger wilderness bill that in general was strongly opposed by environmental community. See Kathy Cobb, *Montana Wilderness Bill Finds Reluctant Support, Presents Bittersweet Solution*, FED. GAZETTE (Fed. Reserve Bank of Minneapolis), July 1992.

188. See Lee, *supra* note 161.

189. See *id.*

190. 16 U.S.C. §§ 470–470w-6 (2000).

Historic Preservation. That consultation in turn begins a process of negotiation among the proposing agency, the Council, and the state Historic Preservation Office.¹⁹¹ The assessment process to make that determination is complex, usually protracted, and includes the collection of information from a variety of sources. A determination by the State Historic Preservation Office that a proposed action will adversely affect the site does not legally prohibit the action, but it usually imposes a powerful public constraint on the proposing agency. Where, as in the case of the Badger-Two Medicine area, any such determination would be seen as harmful to traditional Blackfeet uses, and for the enrichment of an oil company, no doubt the designation would be a powerful (though not formally coercive) tool operating to restrain harmful development.

In January 2002, the Keeper of the National Historic Register determined the Badger-Two Medicine area was eligible for designation on the National Register as a TCD.¹⁹² But the Keeper's recommendation excluded the immediate well-site area under the Hall Creek lease. After originally acceding to that smaller TCD, the tribe later insisted that the proposed TCD boundaries be enlarged to include the entire Hall Creek lease area.¹⁹³ That objection generated a new cultural area study process, and kept any drilling permit proposals in limbo. Since then, the designation process has continued, stimulated in part by an ethnographic study that had previously been done by experts at Glacier in response to more general concerns about protecting Indian sacred sites on federal lands.¹⁹⁴ Glacier staff is cooperating with the Lewis & Clark Forest in the preparation of a revised TCD proposal. Most observers believe that eventually an expanded TCD designation will be made, and will incorporate the Hall Creek site, which will in practice doom oil and gas operations there. At the time of this writing, the designation process was still ongoing.

191. Regulations governing the assessment process are at 36 C.F.R. § 800.4 (2005). See also Nat'l Park Serv., National Register Bulletin, Guidelines for Evaluating and Documenting Traditional Cultural Properties (1998), available at <http://www.cr.nps.gov/nr/publications/bulletins/nrb38/>.

192. See Carol Bradley, *Badger-Two Medicine Land Declared Eligible For Historic Designation*, GREAT FALLS TRIB., Feb. 12, 2002, at 1A.

193. The history and an updated report on the TCD issue is contained in a letter from Jay St. Goddard, Chairman, Blackfeet Tribal Bus. Council, to Rolando Ortegón, Forest Supervisor (Jan. 8, 2004), and attachments (including a letter from Gloria Flora explaining why she and the Tribe originally agreed to a TCD that excluded the Hall Creek lease area) (on file with authors). A detailed study of the cultural significance of the area to the Blackfeet is Jay Hansford C. Vest, *Traditional Blackfeet Religion and the Sacred Badger-Two Medicine Wildlands*, 6 J.L. & RELIGION 455 (1988).

194. BRIAN REEVES & SANDY PEACOCK, *OUR MOUNTAINS ARE OUR PILLOWS: AN ETHNOGRAPHIC OVERVIEW OF GLACIER NATIONAL PARK* (2001). See also Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 29, 1996).

*C. The Arrival of Gloria Flora and
the Protection of the Rocky Mountain Front*

As these new concerns with the Badger-Two Medicine area were gaining momentum in the mid-1990s, a new Forest Supervisor named Gloria Flora was named to head the Lewis & Clark Forest. Flora was the very embodiment of the “new” Forest Service. Unlike the old commodity-oriented officials who had preceded her, Flora was trained as a landscape architect, with a minor in recreation.¹⁹⁵ With the Badger-Two Medicine leases suspended, and the cultural area study underway, she shifted her attention away from individual lease sites to the broader landscape of the Rocky Mountain Division of the forest that was within the Rocky Mountain Front.

The oil and gas situation was in turmoil. The 1986 Forest Plan had made initial oil and gas leasing decisions opening the forest broadly to leasing, but without specifying the lands to be auctioned. At the time, the Lewis & Clark was engaged in litigation over its earlier decision to open to leasing the unroaded Deep Creek area (a “further planning area” for wilderness designation purposes), and the neighboring Flathead National Forest faced similar litigation over its oil and gas leasing program. The Ninth Circuit Court of Appeals ultimately found both forests had violated NEPA and the ESA. The court concluded that, before leasing, the Forest Service must prepare a full EIS, consider a no action alternative, and consult with the FWS.¹⁹⁶ Moreover, the court noted that under the Mineral Leasing Act the agency “has discretion to refuse to issue any lease at all on a given tract.”¹⁹⁷

These judicially-imposed constraints provided an opportunity that Flora seized. She signed a Final Environmental Impact Statement and

195. Flora came in June, 1995 and remained as Forest Supervisor until 1998. Flora now heads a public lands non-profit in Helena: Sustainable Obtainable Solutions. See <http://www.s-o-solutions.org/> (last visited May 1, 2006).

196. See *Conner v. Burford*, 836 F.2d 1521 (9th Cir. 1988) (Flathead litigation); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9th Cir. 1988) (Lewis & Clark litigation). On the NEPA claim, the *Conner* court ruled that, absent a no-surface occupancy stipulation in the lease, the Forest Service must prepare a full EIS rather than a less comprehensive environmental assessment before leasing national forest lands, because this was the critical point at which the agency lost the right to say “no” to drilling in the segmented oil and gas development process. 836 F.2d at 1530–31. For the same reason, the ESA mandated a comprehensive biological opinion assessing not only the impact of leasing but also development on any “listed” species. *Id.* at 1538. The *Bob Marshall* court added that under NEPA the agency must also consider the “no action” alternative even for no-surface occupancy leases, because “unresolved conflicts” over potential land uses may be present. 852 F.2d at 1228–30. In short, the *Conner* and *Bob Marshall* decisions imposed significant NEPA and ESA compliance requirements on any oil and gas leasing decision—requirements that plainly would not be met by the Lewis & Clark’s earlier forest plan EIS.

197. *Bob Marshall Alliance*, 852 F.2d at 1229–30 (quoting *Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1975)).

Record of Decision determining “which lands [in the Lewis & Clark] will be administratively available for oil and gas leasing . . . and which lands specifically the Forest Service is authorizing the BLM to offer for lease”¹⁹⁸ Effectively, she reversed the forest’s existing oil and gas policy. Under the 1986 Forest Plan virtually all the land in the Lewis & Clark—including the Rocky Mountain Front—was available for leasing with the exception of those tracts that were legally barred from development, such as recommended wilderness, wilderness study areas, and lands eligible for inclusion in the Wild and Scenic Rivers Act. Some land was already leased, including not only the Hall Creek and Goat Mountain sites in the Badger-Two Medicine area, but also land further south along the Front. This was in accord with the previous supervisor’s view that all land capable of leasing without impairing other rights should be made available for leasing. Flora reversed this decision and placed the entire Front out of bounds for further leasing.¹⁹⁹

Flora adopted a rather subtle distinction, seemingly to soften the significance of what was in reality a drastic reversal of long-standing policy on the Lewis & Clark. She determined that while technically the lands would still be “available” for leasing, “no lands [on the Rocky Mountain Division] would be *offered* for lease” for about ten to fifteen years.²⁰⁰ Presumably, the idea was that she was not saying “never” and that her decision thus was not really at odds with the industry’s own assessment that this was not a high priority place economically *at this time*.

198. 1997 ROD, *supra* note 172, at 1.

199. *See id.* at 6, 15. Originally, she had suggested that leasing was acceptable for areas along existing roads, and along a narrow strip on the eastern edge of the Front if they could be accessed by directional drilling from outside the Forest. But in her final decision, she excluded even these lands and totally removed the Front lands within the Lewis & Clark, some 356,000 acres, from leasing. *See id.* at 6.

The original preferred alternative was Alternative 7, which Flora eventually adopted for the Jefferson Division. *See id.* at 2, 15. The Park commented on the EIS only as to the Badger-Two Medicine area. No further leasing would occur there even under Alternative 7, which the park supported. *See* U.S. DEP’T OF AGRIC. & U.S. DEP’T OF INTERIOR, LEWIS & CLARK NATIONAL FOREST, OIL AND GAS LEASING: FINAL ENVIRONMENTAL IMPACT STATEMENT ch. IX, at 33 (Sept. 1997). It did not comment on other areas of the forest, and thus did not speak of the more far-reaching Alternative 1(a), which Flora ultimately adopted for the Rocky Mountain Division. 1997 ROD, *supra* note 172, at 2–7. Interestingly, a staff comment from the Park’s Geologic Resources Division observed that the least harmful position “would be to disallow any additional hydrocarbon exploration or development in the Badger-Two Med area,” though it acknowledged that the prospect of getting rid of existing leases “involves actions well beyond the scope of this document.” Memorandum from Bruce Heise, Nat’l Park Serv., *in* FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra*, at 30. No such expression of concern about development appears in the formal comment sent under the superintendent’s signature.

200. *See* 1997 ROD, *supra* note 172, at 2, 14 (describing Alternative 1(a)).

The result nonetheless was a bombshell.²⁰¹ For the first time, an official governmental decision had been made to the effect that the Rocky Mountain Front was more valuable for its wildlife, recreational, and scenic resources than for its minerals. In her decision document, she said:

The vast majority of those responding to the Draft EIS were strongly against any development for the purposes of oil and gas exploration in the . . . Forest, particularly on the Rocky Mountain Front A majority of the concerns . . . were expressed regarding the “value of place,” speaking in particular to social and personal values attributed to the Front. It is clear that this is a very unique and special place to many people; both those who live here in Montana as well as those who have visited or only heard about the area.²⁰²

Her action, as one observer noted, “changed the course of history here.”²⁰³ However much the reality might have been moving in this direction for all the other reasons noted above, the Flora decision established a sort of official legitimacy for non-development advocates that was unprecedented. It did not, however, cancel the forty-odd existing leases in the Badger-Two Medicine area whose original ten-year terms have been repeatedly tolled through government-imposed suspensions.²⁰⁴ Eventually, the leases will either have to be granted permits for drilling, be finally and lawfully denied, bought back, or exchanged out for federal leases elsewhere.²⁰⁵

201. Describing the decision some years later Flora said:

The decision process was left up to me . . . Jack Ward Thomas, the Chief of the Forest Service, told me he had gotten a lot of pressure to direct the decision, but told folks he was letting it up to me. Likewise with the Regional Foresters I believe that they also thought it was a tar-baby and were quite content to leave it to me and my team.

See <http://www.s-o-solutions.org/readingroom/rockymtnfront.decision.html> (last visited May 31, 2006). A Blackfeet interviewee, Jeanne Whiteing, suggested another interesting way of looking at the Flora decision. “The local Forest Service,” we were told, “uses tribal issues to achieve goals they want, free of Washington, and can use tribal issues to advance their own (non-developmental) desires.”

202. 1997 ROD, *supra* note 172, at 4–5.

203. Interview with Tom Kotynski.

204. 1997 ROD, *supra* note 172, at 4 (originally issued in 1981, the Badger-Two Medicine leases had between three and seven years remaining as of 1997).

205. Even before Flora issued the no-new-lease decision, existing lessees obviously knew which way the wind was blowing. As she noted in her decision,

[t]wo leaseholders have [already] entered into discussions with the Department of Interior in regards to the possibility of trading out of lease rights in the Badger-Two Medicine. Chevron [Goat Mountain] and FINA [Hall Creek] have indicated that they would be willing to consider accepting bidding credits on offshore leases in exchange for their lease rights in the Badger-Two Medicine. . . . [D]iscussions involving such possibilities are by no means close to being final

1997 ROD, *supra* note 172, at 4. A fascinating question will be how to appraise the value of these leases if and when the time comes to buy or exchange them.

While Flora's decision galvanized local public opinion, as the excerpt quoted above makes clear, it did not create it. There has long been recognition in Montana that the Rocky Mountain Front is a special place. By the mid-70s, Congress had established several nearby wilderness areas, including the iconic Bob Marshall. The State of Montana had created the Sun River Game Range, one of its first game preserves, on the Front nearly a century earlier.²⁰⁶ During the mid 1980s, the Boone and Crockett Club acquired the Theodore Roosevelt Ranch on the Front, which it has managed for educational purposes, to show how ranching can be done to accommodate the presence of native wildlife. More recently, in 1996, the State imposed rigorous no-surface-occupancy stipulations on some of its own most sensitive lands in the area.²⁰⁷ And the Nature Conservancy has had a major presence on the Front for some years; its Pine Butte Ranch provides grizzly bears and other species critical transitional zone habitat.²⁰⁸

All these elements have coalesced in recent years, and led to widespread public support for officially and systematically protecting the Front. As Flora's decision notes,²⁰⁹ 80 percent of those who submitted comments on the draft EIS opposed leasing on the Front.²¹⁰ But the oil and gas industry, which challenged Flora's decision in federal court, argued that it was unlawful for the Forest Service to allow public sentiment to override scientific approval of leasing. The court rejected this claim, saying that it "would be an odd rule of law to ascribe to

206. See MONT. CODE ANN. § 87-5-403 (2005).

207. Gloria Flora, *The Rocky Mountain Front's Century of Wildlife Protection a Proving Ground for Montana Conservation Initiatives* (Feb. 6, 2004) (unpublished document, on file with authors).

208. See Nature Conservancy, *The Future Looks Bright on the Front*, <http://nature.org/wherewework/northamerica/states/montana/news/news1792.html> (last visited Mar. 22, 2006).

209. See *supra* note 202 and accompanying text.

210. See Kathie Durbin, *Drawing the Line in Montana*, INNER VOICE (Forest Serv. Employees for Envtl. Ethics), May/June 1999, at 11. Flora herself, in an interview in 2005, explained, however, that while there is a "sense of pride" in the Rocky Mountain Front, and an evolving feeling that it was being trashed by development, in some towns on the Front like Choteau, which haven't experienced the influx of new, richer, more financially independent people, opinion is still probably still split fifty-fifty on issues like drilling. "A survey in Teton County showed a near split down the middle between those who support 'environmental quality' and those who support 'development of natural resources.'" Lee, *supra* note 171. Some newcomers to Choteau are relocating from the Flathead Valley where they see too much development, and want to be in a smaller, quieter town. Another interesting factor is the position of private landowners in the area who have land with potential for oil and gas development; some of them fear that if federal land is kept out of development, that will take so much potential away that it will discourage industry from coming into the area at all, to the detriment of private landowners who might otherwise benefit from leasing and exploration of their lands.

NEPA, which has the goal of providing notice to the public of proposed agency action and an opportunity for public input.”²¹¹ It further noted,

From the beginning of the scoping process in 1994, the public has been overwhelmingly concerned with the value of the place As Plaintiffs themselves point out, the majority of people commenting upon the DEIS did not want even the possibility of oil and gas technology spoiling the pristine scenery and diverse resources of the Rocky Mountain Division.²¹²

The Court of Appeals affirmed, finding that “[t]he Forest Supervisor acted within her authority and in a non-arbitrary manner: the psychological effects of an agency’s decision may be considered under NEPA.”²¹³

Whatever its precursors, Flora’s decision seems clearly to have had a sort of catalytic effect. No doubt it helped attract the attention of private foundations, which subsequently made grants that have permitted several non-profit organizations to advance a pro-conservation agenda on the Front. With this support, organizations devoted to the Front’s preservation, such as the Montana Wilderness Association and the Montana Wildlife Federation, are, for the first time, able to maintain full-time staff in the area. The environmental community is able to organize local citizens, to produce detailed, technically-supported studies in support of its positions,²¹⁴ and thereby to assure public awareness of issues on the Front.

The contrast with public opinion on the west side of the park in the Flathead Valley is dramatic. But the circumstances are different as well. Fortunately, much of the private land just on the east of the Front consists of large ranches, some of which are being purchased by wealthy newcomers who want to protect the land for its aesthetic and recreational values (such as pheasant hunting).²¹⁵ As a result, there is little subdivision activity going on there at this time, and therefore little tension between protection of wildlife habitat and private property prerogatives. In addition, both the FWS and private organizations, like the Nature

211. Rocky Mountain Oil & Gas Ass’n v. U.S. Forest Serv., No. CV 98-22-H-CCL, slip op. at 4 (D. Mont. Mar. 7, 2000), *aff’d*, 12 Fed. App’x 498 (9th Cir. 2001), *cert. denied sub nom.* Indep. Petroleum Ass’n v. U.S. Forest Serv., 534 U.S. 1018 (2001).

212. *Id.* at 5–6.

213. *Rocky Mountain Oil & Gas Ass’n*, 12 Fed. App’x at 500.

214. *See, e.g.,* MICHELE R. CRIST ET AL., WILDERNESS SOC’Y, ROADLESS AREA CONSERVATION ALONG MONTANA’S ROCKY MOUNTAIN FRONT: ARE WE LOSING GROUND? (2004); BARRIE K. GILBERT, COALITION FOR THE PROT. OF THE ROCKY MOUNTAIN FRONT, MOTORIZED ACCESS ON MONTANA’S ROCKY MOUNTAIN FRONT: A SYNTHESIS OF SCIENTIFIC LITERATURE AND RECOMMENDATIONS FOR USE IN REVISION OF THE TRAVEL PLAN FOR THE ROCKY MOUNTAIN DIVISION (2003).

215. For the most part, this is a positive development. However, some such newcomers are said to deny traditional access across their land to hunters and fishers, which is creating some local tensions.

Conservancy and the Montana Land Reliance, have targeted the area for conservation easement acquisition on key ranches adjacent to the Front's public lands in order to keep them in compatible use.²¹⁶

D. Recreation and the Forest Travel Plan

Public concern about protecting the Front seems to have generated action on other national forest use issues as well. Timber harvesting had already been significantly reduced at the time of our previous Article, and those reductions have been maintained.²¹⁷ In 2000, another new supervisor on the Lewis & Clark initiated a revised travel plan study for that portion of the forest within the Front. In effect this was a reassessment of a 1988 plan that had essentially allowed ORV and other motorized uses on all roads and trails throughout the forest. The only exception was in congressionally designated wilderness areas, where the designation itself made such activity illegal.²¹⁸

Over the past fifteen years, ORV use had erupted along the Front, as it had on the west side of Glacier. According to one long time observer: "ATVs [all-terrain vehicles] run amok in the Badger-Two Medicine area. They are everywhere. Trails are now as wide as Central Avenue."²¹⁹ When the process was opened for comments the Forest Service received 37,000 responses, 98 percent favoring the most restrictive alternative.²²⁰ They overwhelmingly urged the Forest Service to adopt alternative three, which maintained traditional foot and horse travel and would eliminate all motorized travel on trails.²²¹ This tracks a May 2005 settlement

216. Interview with Steve Thompson.

217. Interviews with Tom France and Spike Thompson. Thompson told us that although the forest plan calls for fourteen million board-feet annually in timber harvest, the forest has not reached this level in ten years, and is mostly doing fuel reduction work around communities. He also noted that with declining budgets the forest cannot take on major timber sales, and mentioned a recent court decision as a deterrent to post-fire salvage harvesting. *See Ecology Ctr., Inc. v. Austin*, 430 F.3d 1057 (9th Cir. 2005).

218. *See* 16 U.S.C. § 1133(c) (2000).

219. Interview with Tom Kotynski.

220. While the great bulk of the comments—some 33,900—were form letters, the balance were specific comments from individuals, organizations and other public agencies. *See* Sonja Lee, *Rocky Mountain Front Travel Plan: Public Weighs in*, GREAT FALLS TRIB., Oct. 12, 2005, at 1A.

221. Under Alternative 3 only existing main access roads to trailheads, developed campgrounds and other such facilities would be open to vehicles:

Key features of this alternative are that all system trails would be closed year long to all motorized travel, all non-system trails would be closed to all motorized travel, and cross-country (off-trail) snowmobiling would be prohibited year long in all areas . . . [E]xisting main access roads to trailheads, developed campgrounds and other facilities, and recreational cabins would be kept open for wheeled motorized travel. . . . Alternative 3 features the least mileage of motorized travel of the four action alternatives.

agreement between the Montana Wilderness Association and the Montana Snowmobile Association that recommended closing the Rocky Mountain Front to snowmobiles so trails would be reserved solely for quiet activities such as skiing and snowshoeing.²²² The two organizations called the agreement a “win-win for all parties.” A representative of the Montana Snowmobile Association said, “the cooperative approach is the only sensible way to resolve land-use issues between motorized and non-motorized users. . . . After all, there is enough public land available to meet the needs of both interests.”²²³

To date, no final decision on a new travel plan has been made and “[t]he Lewis & Clark National Forest does not have a preferred alternative.”²²⁴ But we were regularly informed by interviewees that they expect the Forest Service to adopt Alternative 3,²²⁵ the plan that is most protective of the Front. It is possible, according to some observers, that even more restrictive provisions will be imposed on the Badger-Two Medicine area to meet the concerns of the Blackfeet for the protection of that area.²²⁶

The anticipated denouement of the travel plan controversy emphasizes the importance of developments such as the regional recognition of the Rocky Mountain Front as an area that should be generally managed for the protection of its resources. It would be unfortunate from an environmental perspective if the commodity-dependent status of a national forest were to yield to a focus on recreation, only to have its natural resources sacrificed to activities like unrestrained ORV use that could present an even greater peril to its natural values. In addition, since users in the Glacier area easily cross the

U.S. FOREST SERV., DEP'T OF AGRIC., ROCKY MOUNTAIN RANGER DISTRICT TRAVEL MANAGEMENT PLAN, SUMMARY DRAFT ENVIRONMENTAL IMPACT STATEMENT (June 2005), at vii, 15.

222. See Eryn Gable, *Opponents Agree on Rocky Mountain Front Snowmobile Plan*, LAND LETTER, May 12, 2005. Cf. Ray Ring, *Snowy Middle Ground: Wilderness Advocates and Snowmobilers Come to Terms in Montana*, HIGH COUNTRY NEWS, Mar. 6, 2006, at 4. See also *Mont. Wilderness Ass'n v. U.S. Forest Serv.*, 146 F. Supp. 2d 1118 (D. Mont. 2001), *aff'd in part*, 314 F.3d 1146 (9th Cir. 2003).

223. Gable, *supra* note 222.

224. FOREST SERV., SUMMARY DEIS, *supra* note 221, at viii.

225. The current forest supervisor, Spike Thompson, is very different in management style from Flora. When we asked him about the travel plan, he replied, “I don’t make policy; I just follow the processes.” When we asked about the Blackfeet position on travel planning, he said, “[t]he tribe doesn’t speak about it; some tribal members are ORV users themselves.” The Blackfeet have not submitted comments on the travel plan. We heard nothing in our interviews to suggest that there would be any significant tribal opposition to the adoption of Alternative 3. Nonetheless, Thompson is in sharp contrast to his predecessor of twenty years ago. “Boundary-less behavior is more prevalent today,” Thompson told us. “We no longer have the resources to be autonomous; there’s more understanding of interdependencies across forest boundaries.”

226. Interview with Steve Thompson.

continental divide on Highway 2 in pursuit of their recreation,²²⁷ from a regional perspective it is important to have compatible ORV policies in both the Flathead and the Lewis & Clark Forests.

E. Recent Protective Actions on the Rocky Mountain Front

In 2001, the Front was also withdrawn from hardrock mining activity, further protecting the area from industrial incursions. Though hardrock mining is of only minor importance there, the attention Flora's decision gave to the region generated an opportunity for the Clinton Administration, which was eager to reform the outdated 1872 Mining Law, to use the Front as a case in point. In 1997, an individual had filed more than 100 mining claims in Blackleaf Canyon, an important grizzly bear travel corridor on the Front.²²⁸ Not long thereafter, Forest Service Chief Mike Dombeck proposed a ban on hardrock mining along the Rocky Mountain Front, urging Secretary of the Interior Bruce Babbitt to impose a twenty-year suspension on new mining claims on the Front.²²⁹ In 2001, Babbitt did just that, withdrawing 405,000 acres of national forest land "to preserve the traditional cultural uses by Native Americans, threatened and endangered species, and the outstanding scenic values and roadless character."²³⁰

That some of these environmentally friendly steps would take place during the Clinton years is perhaps not very surprising, but what has occurred since can only be explained in terms of a fundamentally new perception of the Rocky Mountain Front and what it means to the people who live in the region. Along the southern part of the Front, in a place called Blackleaf Canyon, some twenty-five oil and gas leases had been let prior to Flora's 1997 moratorium decision. Though an EIS had been prepared on proposed Blackleaf exploration in 1992—recommending development of 18 wells, 12.5 miles of new roads, and 23.5 miles of new pipeline—the document had never obtained final approval, mainly because industry lacked interest at that time.²³¹ In 2000, the leaseholder, a Calgary-based company known as Startech, initiated a "notice of staking," the first step in obtaining an exploratory drilling permit. The proposed drill sites were in the administratively designated "Blindhorse

227. See *supra* note 94 and accompanying text.

228. See Durbin, *supra* note 210, at 12.

229. Larisa Epatko, *Administration to Release Interim Forest Roads Policy Today*, ENV'T & ENERGY DAILY, Feb. 11, 1999.

230. Pub. Land Order No. 7480, Withdrawal of National Forest System Lands in the Rocky Mountain Front, Montana, 66 Fed. Reg. 6657 (Jan. 22, 2001).

231. See Karl Puckett, *Prices Drive Interest in Natural Gas Exploration on Front*, GREAT FALLS TRIB., Oct. 31, 2000, at 1M.

Outstanding Natural Area,”²³² a transitional edge between grassland and mountain forests that is important habitat for grizzly bears, wolves, and raptors. The Blackleaf area is also home to bighorn sheep, elk, and mountain goats. It looked like Startech was about to replay the scenario Chevron and FINA had played fifteen years earlier in the Badger-Two Medicine area. In response to the notice of staking, the BLM set in motion its standard drilling application review process for these pre-moratorium leases.

This EIS process was moving along when, in early October 2004, the BLM surprised everyone by announcing that it was halting permit-related work on the Startech wells²³³ and that the stoppage was part of “a broader plan that will halt drilling on the Rocky Mountain Front for at least the next four years.”²³⁴ The reason, according to Rebecca Watson, the Bush Administration’s Assistant Secretary for Land and Minerals Management, was to enable the BLM to prepare a region-wide environmental assessment. Rather than taking a piecemeal look at individual leases, the BLM would do a thorough study of the entire Front, which would allow federal agencies to make long-term decisions about the future of the ecosystem. According to Watson, the study would begin in 2008 and take two years, so drilling on the Front would be put on hold until at least 2010.²³⁵ The announcement, as we shall see, also put the federal government in a position to urge a similar regional cumulative effects study on Canada for the Canadian Flathead, where a series of highly controversial energy development projects were pending.²³⁶

At the same time, the FWS announced a proposal to place conservation easement protection on about 170,000 acres along the Front. Located east of and outside the Lewis & Clark Forest,²³⁷ the easements would presumably add a buffer along the lower elevation edge of the Front. Of course, for the FWS to implement such a program would

232. Notice of Intent to Conduct Scoping and Prepare an Environmental Impact Statement (EIS) for the Blackleaf Project, 69 Fed. Reg. 20,029 (Apr. 15, 2004). The lease predated the outstanding natural area designation.

233. Press Release, U.S. Dep’t of Interior, Bureau of Land Management, U.S. Fish and Wildlife Service Move to Conserve Wildlife along Rocky Mountain Front (Oct. 5, 2004); Press Release, U.S. Fish & Wildlife Serv., U.S. Fish and Wildlife Service to Explore Cooperative Conservation Effort on the Rocky Mountain Front (Oct. 6, 2004).

234. See Sonja Lee, *Far-Reaching BLM Study Puts Front Drilling on Hold*, GREAT FALLS TRIB., Oct. 6, 2004, at 17A. This decision was in contrast to the Administration’s 2001 National Energy Plan, which called for the opening of additional western public land to oil and gas drilling and, under Executive Order 13,212, required federal land management agencies to expedite review of oil and gas drilling permits.

235. See Sonja Lee, *Drilling on Front Leases Still On Hold*, GREAT FALLS TRIB., Aug. 5, 2005, at 1M.

236. See *infra* Part V for a discussion of the Canadian Flathead controversy.

237. Press Release, U.S. Dep’t of Interior, *supra* note 233.

require substantial congressional appropriations, which did not (and do not) yet exist.²³⁸

What explains these extraordinary reversals by an administration not known for its warm embrace of environmental protection? It did not go without notice that these announcements were made almost exactly one month prior to the 2004 presidential election, and President Bush had just “met with hunters and anglers and told them there are some places that should not be developed in order to protect wildlife.”²³⁹ But why was this good Montana politics, if that is what it was? According to one account, “Watson said the BLM decided to halt work on . . . the wells in the Blindhorse for a number of reasons, including public comment and a need to look at the bigger picture.”²⁴⁰ The opinion to which Watson referred was the 49,000 public comments received on the BLM’s Startech EIS, where “more than 93 percent of Montanans and 99 percent nationwide urged the BLM to protect the Front and halt the drilling proposal.”²⁴¹ The likelihood of litigation if the project moved forward no doubt also influenced the decision.²⁴²

238. Senator Burns put \$1.5 million for such conservation easements in the Interior Appropriation Bill in June 2005, but the provision was removed from the final bill. See *Burns Adds Money for Rocky Mountain Front Easements*, HELENA INDEP. REC., June 10, 2005.

239. Press Release, U.S. Dep’t of Interior, *supra* note 233.

240. *Id.* Some months later Watson wrote an op-ed in the Great Falls Tribune criticizing “those who would like to keep all public lands locked away from energy development,” but concluded that

[e]nergy development is an important part of [the Department of Interior’s commitment to carefully manage public lands for multiple uses], but it is not done at the expense of other resources. Our recent decision to defer drilling in the Blackleaf area of Montana’s Rocky Mountain Front is testament to this.

Rebecca Watson, *American Has to Get Energy—Especially Gas—Somewhere*, GREAT FALLS TRIB., Dec. 5, 2004, at 9A.

241. Press Release, Wilderness Soc’y, Montanans to BLM: Protect the Rocky Mountain Front (Sept. 15, 2004), available at <http://www.wilderness.org/NewsRoom/Release/20040915.cfm>. Other polling data done in mid-2004 is not nearly as unanimous as the Wilderness Society statement indicates, though the poll did not ask specifically about the Blackleaf Canyon leases. It nonetheless shows powerful, if uncertainly mixed, support for protecting the Front. According to a survey done by a Washington, D.C. polling company on behalf of the Coalition to Protect the Rocky Mountain Front, which opposes energy development in the area,

[t]wenty percent of those questioned said they strongly support the idea of swapping leases in the Front for those held in other, less environmentally sensitive areas. Another 30 percent somewhat support the idea Nine percent of the voters surveyed strongly oppose the swap, 10 percent somewhat oppose it and 31 percent said they are undecided. The . . . poll separately asked voters whether they support or oppose allowing more oil and gas development in the Front. . . . [Fifty-two] percent said they supported more oil and gas development there, while 35 percent opposed and 13 percent said they were undecided.

Montanans Overwhelmingly Support Swapping of Leases, GREAT FALLS TRIB., June 3, 2004, at 3M.

242. Interview with Tom France; see also Letter from Timothy Preso, Attorney, Earthjustice, to Marty Ott, Mont. State BLM Dir. (July 22, 2003) (questioning legal validity of

The Bush Administration, as well as Montana's congressional delegation, now supports some version of the view that existing leases should be traded for lease properties elsewhere in less environmentally sensitive areas, bought out, or granted targeted tax relief. Watson explicitly urged those opposed to drilling "to work out options for buying or swapping existing leases."²⁴³ Senator Baucus had previously introduced legislation directing the Secretary of the Interior to exchange the Badger-Two Medicine and Blackleaf leases for other federal leases or to consider providing compensated cancellation.²⁴⁴ Although that bill saw no action, it offered a formula for valuing these non-producing leases.²⁴⁵ Senator Burns did not join in sponsorship of the bill. His position is that buyouts or swaps should be done only voluntarily by lessees, and that opponents of drilling, rather than taxpayers, should finance such efforts.²⁴⁶

The mineral development situation is likely to remain in a state of suspension, which means it could someday be revived if the economic situation warranted it. Permanent protection in the form of wilderness designation is unlikely for the foreseeable future.²⁴⁷ Nor is there much prospect of federal funds for a buyout. There may, however, be private philanthropic sources willing to fund acquisition of the leases if legislation were enacted to assure that no re-leasing could occur later. That would be the preferable outcome in terms of environmental protection.

For the present, however, the Front is protected, and environmental, recreational, and Indian interests are ascendant. Even without acquisition of the leases, any effort to renew development interests would face a steep uphill battle.

Blackleaf oil and gas leases), *available at* http://www.earthjustice.org/library/signon/preso_blm_7-03.pdf.

243. See Sonja Lee, *supra* note 235.

244. S. 984, 108th Cong. (2003).

245. The value would be the difference between (A) the amount paid by the lessee for the lease; (B) any direct expenditures by the lessee associated with exploration and development; (C) interest on the amount in (A) and (B) from the time expended until the time of exchange; and the sum of revenues from the lease (which presumably would be zero).

246. See Press Release, Senator Conrad Burns, Burns Calls for Private Enterprise Option to Front Leases (July 27, 2004), *available at* <http://burns.senate.gov/public/index.cfm?FuseAction=NewsCenter.PressReleases> (follow link to browse by month and year). See also Dan Berman, *OIL AND GAS: Questar Agrees to Donate Rocky Mountain Front Drilling Leases*, LAND LETTER, June 29, 2006 (noting that one oil company has agreed to donate its Front leases to a conservation organization and that Senator Burns is proposing to "prevent the Forest Service and Bureau of Land Management from offering new oil and gas drilling or hard rock mining leases along the Rocky Mountain Front").

247. On the Front, only the Bob Marshall wilderness complex and Glacier National Park are federally protected from development, while the Sun River and other state game ranges also enjoy legal protection. Most of the land is managed by the Forest Service, the Bureau of Land Management, and the State of Montana. There is a modest amount of private land within the Front's high-value habitat.

V. THE CANADIAN FLATHEAD

Glacier once again faces the prospect of extensive mineral development from across the international boundary in the Canadian Flathead region. During the mid-1980s, the Sage Creek Coal Company planned a large open pit coal mine in the pristine Cabin Creek drainage just eight miles north of the park. Glacier, joined by the state of Montana and an array of allies, vigorously resisted and ultimately secured a favorable ruling from the International Joint Commission that squelched the threat.²⁴⁸ Now the park faces multiple mining threats—two new coal mines, coal bed methane exploration, and a possible gold mine—within the same watershed and it may no longer be possible to employ the strategies that safeguarded it in the past. A combination of international market forces, bilateral U.S.-Canadian relations, and inherently weak Canadian environmental laws are paving the way for these industrial projects, while project opponents are searching for potential legal or political footholds they might use to slow the momentum.

Located in southeastern British Columbia, the Canadian Flathead country extends for roughly forty miles along the North Fork of the Flathead River, which also forms Glacier's western boundary. The North Fork watershed originates in tiny headwater creeks in the upper reaches of the drainage, flows southward across the international boundary at the park, and eventually terminates in Flathead Lake after merging with two other tributaries to form the main Flathead River. The remote Canadian Flathead has been described as "the last uninhabited major watershed in Canada,"²⁴⁹ with unsurpassed water and air quality. The river valley, alluvial plains, and surrounding mountains offer prime habitat and important migration corridors for the region's wildlife, including the grizzly bear, wolf, Canadian lynx, elk, mountain goat, and wolverine. The ESA-listed bull trout is doing better in the Flathead watershed than anywhere else in the region, and biologists believe the basin's tributary streams serve as crucial spawning grounds. One researcher asserts that the area is perhaps "the single most important basin for carnivores in the Rocky Mountains," and that the "landscape must be managed as one integrated ecological unit."²⁵⁰ In short, the Canadian Flathead constitutes a vital part of the larger Crown of the Continent Ecosystem.²⁵¹

248. See *infra* Part V(D) for a description of the earlier Cabin Creek mine controversy; see also Sax & Keiter, *supra* note 1, at 237–40.

249. Interview with Len Broberg.

250. JOHN L. WEAVER, *THE TRANSBOUNDARY FLATHEAD: A CRITICAL LANDSCAPE FOR CARNIVORES IN THE ROCKY MOUNTAINS*, at iii (2001).

251. See *infra* Part VI(B) for a discussion of the Crown of the Continent Ecosystem concept.

A. Looming Mining and Drilling Threats

Most of the Canadian Flathead is owned by the British Columbia (B.C.) provincial government, which is reportedly quite interested in developing it to help finance the upcoming winter Olympics and to garner additional revenues. The expansive Crowsnest coalfield underlies the headwaters of both the Elk and Flathead rivers, and mining has a long and productive history in the Elk River drainage. Most of the coal is metallurgical quality; it is transported to the coast and then shipped overseas to Asia. In addition, the Canadian government owns the nearby Dominion Coal Block lands, though the B.C. provincial government is reportedly anxious to acquire these lands as well.²⁵² With the conservative party in control of the province, B.C. has aggressively pursued economic development opportunities and shown very little interest in protecting the Canadian Flathead's environmental assets.²⁵³ It has repealed already-weak environmental protection standards, and reversed a protective wildlife management area designation in the Flathead region.²⁵⁴

Far removed from the coast, extreme southeastern B.C. remains sparsely populated with only a few towns of any size, most notably Sparwood, Elkford, and Fernie. The area has long been dependent on the cyclical resource extraction industries for its economic sustenance, particularly coal mining and logging.²⁵⁵ Most of the local populace resides in the upper Elk River valley, which lies just west of the Flathead drainage. The town of Sparwood, located at the northern end of the Elk River valley, houses the miners employed in the region's coal mines as well as the businesses that support these mines. Recent years, however, have witnessed changes in the region's socio-economic character.²⁵⁶ Following a pattern similar to what is occurring on the U.S. side of the border, the town of Fernie—situated south of Sparwood in the same Elk River drainage—has embraced recreation and tourism as its economic future, and it recently expanded the local ski area. Fernie town officials have thus voiced strong opposition to the pending development

252. One third or approximately 15,000 acres of the Dominion coal lands lie in the Flathead drainage. With the federal government shifting to the Conservative Party in the January 2006 Canadian election, it becomes more likely that the federal government will transfer ownership of these coal lands to B.C. See Michael Jamison, *Canadian Election Results Seen as Setback for Flathead*, MISSOULIAN, Feb. 2, 2006; Interview with Steve Thompson.

253. See *infra* notes 305–14 and accompanying text (discussing the B.C. government's reluctance to engage in any dialogue regarding the future of the Canadian Flathead following the 1988 International Joint Commission ruling on the Cabin Creek mine project proposal).

254. Interviews with Brace Hayden, David Thomas, and Rich Moy. See also Canadian Parks & Wilderness Soc'y, *Creating a Better Peace Park: Wildlife Conservation in British Columbia's Southern Rocky Mountains* (n.d.) (unpublished pamphlet, on file with authors).

255. See JIM JOHNSON, *WATERTON-GLACIER INTERNATIONAL PEACE PARK: THE ECONOMIC IMPLICATIONS OF EXPANDING INTO THE FLATHEAD REGION OF B.C.* 9 (2005).

256. *Id.* at 8–15.

proposals.²⁵⁷ Even in communities like Sparwood that have long supported coal mining, there appears to be some gathering opposition to coal bed methane development.²⁵⁸

With two major mineral development proposals on the drawing board, the upper Canadian Flathead faces an uncertain future that could transform this remote, wildlife-rich area into an industrial zone. First and most imminent is the Cline Mining Company's proposal to construct an open pit coal mine on Foisey Creek to extract high metallurgical content coal for shipment to fuel China's ravenous steel industry.²⁵⁹ Cline initially sought fast track approval from the B.C. government for a small mine permit that would have enabled it to dig 250,000 tons of coal annually without undertaking any environmental analysis.²⁶⁰ But Cline planned to quickly increase production to two to three million tons per year,²⁶¹ which suggests it was segmenting its true development plans to avoid environmental review of the project. Cline has since acknowledged the true scale of its plans, and agreed with B.C. provincial authorities to prepare an environmental assessment before moving forward.²⁶²

A second potential project involves coalbed methane, which is believed to be trapped in the area's coal seams and potentially recoverable. Early coalbed methane exploration efforts have raised serious environmental concerns. In 2001–04, the international Canadian energy firm EnCana drilled a series of exploratory wells in the upper Elk River valley without prior environmental review and little wastewater disposal oversight.²⁶³ More recently, Chevron Texaco drilled several controversial test wells on the divide between the Elk and Flathead valleys that were abandoned without reclamation. Following a strong public outcry, the company eventually did rehabilitate the site.²⁶⁴ In early 2005, the B.C. government then auctioned coalbed methane leases in the

257. Interviews with David Thomas and Erin Sexton.

258. *Id.*

259. Cline Mining Company is the successor-in-interest to Sage Creek Coal Company, which had pursued the Cabin Creek mine proposal during the 1980s. *See supra* note 248 and accompanying text. It is worth noting that Cline put forth its Foisey Creek mine proposal less than six months after B.C. rejected its proposal to reopen the Cabin Creek mine.

260. *See* EBA ENG'G CONSULTANTS, PROJECT DESCRIPTION: LODGEPOLE COAL MINE PROJECT FOR A B.C. ENVIRONMENTAL ASSESSMENT CERTIFICATE 25 (Dec. 2005), available at http://www.eao.gov.bc.ca/epic/output/html/deploy/epic_project_home_272.html (follow link under "Proponent Comments/Correspondence"); Michael Jamison, *Concerns Voiced over "Fast Track" Proposal*, MISSOULIAN, June 19, 2005; Jim Mann, *Firm Pushes Ahead for B.C. Coal Mining*, DAILY INTER LAKE, Oct. 26, 2005; Interviews with Rich Moy, David Thomas, and Erin Sexton.

261. Jamison, *supra* note 260; Interviews with Rich Moy, Erin Sexton, and David Thomas.

262. Michael Jamison, *Cline Agrees Full Environmental Review Needed*, MISSOULIAN, Dec. 8, 2005.

263. *See* Documentation Supporting Montana's Request for an IJC Referral for the Flathead Watershed 3–4 (May 17, 2005) (on file with authors).

264. Interviews with Rich Moy, Jack Potter, Erin Sexton, and David Thomas.

upper Flathead, without any preliminary environmental analysis.²⁶⁵ But no companies bid on the leases, likely deterred by outspoken opponents who threatened adverse publicity and the possibility of international legal intervention under the Boundary Waters Treaty.²⁶⁶ Whether the B.C. government will continue coalbed methane leasing in the upper Flathead and whether it will analyze environmental impacts before leasing remains to be seen. It is still offering coalbed methane leases without such review in the adjacent Elk River drainage.

Moreover, at least three other mineral development projects lurk in the background. First, it is widely believed that recoverable gold deposits are located in the Howell Creek drainage, a Flathead tributary that lies just a few miles north of Glacier Park near the site of the original Cabin Creek coal mine proposal. Prospectors have been active in the area, and most observers agree that, were gold to be discovered, the mining companies would utilize cyanide heap leach technology to recover the mineral.²⁶⁷ Second, within the past several years, the Cline Mining Company filed an application with B.C. officials to reopen the earlier Cabin Creek coal mine proposal. But the province, well aware of the furor that accompanied the last proposal, has placed the lease application on hold while indicating to Cline that it would enjoy preference rights were mining to be approved in that location. Third, Canadian and Australian mining firms have formed a joint venture to undertake a feasibility study for a new open pit coal mine at Lillyburt, which is located twenty miles north of the border in the North Fork flood plain.²⁶⁸ That study is now underway.

The environmental impacts associated with this massive industrial incursion into the Canadian Flathead would be significant by any measure. Mining projects of this magnitude will require an expansive infrastructure of new roads and pipelines that will have to be constructed on unstable mountainous terrain. Water quality degradation is also a major concern. The proposed Cline coal mine could dramatically increase

265. Jennifer McKee, *CBM Study Request Turned Down by B.C.*, BILLINGS GAZETTE, July 15, 2004; Interviews with Rich Moy, Brace Hayden, David Thomas, and Erin Sexton.

266. Eryn Gable, *Controversial B.C. Leases Fail to Attract Any Bidders*, LAND LETTER, Sept. 2, 2004. Interviews with Rich Moy, David Thomas, Steve Thompson, and Erin Sexton.

267. Heap leach mining involves applying a cyanide solution to extracted ores in order to separate out low grade gold particles that often were missed when an area was mined previously with more primitive technologies. Major environmental concerns include the potential for nearby surface and groundwater contamination as well as deadly impacts on birds and other wildlife that come in contact with holding ponds. Significantly, the state of Montana, which would bear the downstream impacts of such a development, has banned heap leach mining through a high profile citizens' initiative that has survived legal challenge. MONT. CODE ANN. § 82-4-390 (2005); see *Seven Up Pete Venture v. State*, 114 P.3d 1009 (Mont. 2005), cert. denied, 126 S. Ct. 1332 (2006).

268. See *Wasabi and WCC to Assess Lillyburt Potential*, INT'L LONGWALL NEWS, Nov. 30, 2005.

sedimentation levels and toxic pollutants in North Fork tributary streams and destroy bull trout spawning grounds. Coalbed methane development, based on experience elsewhere, involves extracting massive amounts of alkaline wastewater that must be disposed of somewhere.²⁶⁹ Wildlife would also be put at risk. New roads and drilling rigs will mean habitat loss and fragmentation, increased poaching opportunities, and the severance of key migratory routes. Finally, industrialization would hurt local guides and outfitters as well as other tourism-related businesses that depend on these lands.

These impacts are not confined to the Canadian side. Sedimentation and toxic pollutants will disperse throughout the entire Flathead drainage, threatening the river's aquatic ecology and its fisheries. Wildlife displacement, habitat losses, and migration blockages will create stresses across the regional ecosystem. Of particular concern is the "threatened" grizzly bear, which is unusually abundant throughout the North Fork Flathead region due to the security and forage available in the undeveloped river valley.²⁷⁰

B. *The Limits of Canadian Law*

Were these development proposals pending in the United States, several strong environmental laws would come into play, but that may not be the case on the Canadian side. Indeed, despite B.C. legal provisions requiring public consultation, neither the state of Montana nor local B.C. residents were aware that Cline was moving forward with its mining project. "We only learned of the Cline coal mine permit application from the newspapers," several concerned officials reported to us.²⁷¹ Under U.S. law, mining or drilling projects of this magnitude slated for publicly owned lands would trigger a preliminary NEPA environmental analysis (including public notice and participation requirements),²⁷² interagency consultation under the ESA,²⁷³ and a state

269. See Gary Bryner, *Coalbed Methane Development in the Intermountain West: Producing Energy and Protecting Water*, 4 WYO. L. REV. 541 (2004).

270. WEAVER, *supra* note 250, at 23–24.

271. Interviews with Hal Harper, Brace Hayden, Rich Moy, and David Thomas.

272. See 42 U.S.C. § 4332(2)(C) (2000); 40 C.F.R. pts. 1500–1508 (2005).

273. See 16 U.S.C. § 1536(a)(2) (2000); *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985).

water quality permit review process,²⁷⁴ with the final decision then subject to judicial review.²⁷⁵

Under Canadian and B.C. law, however, it is unclear whether these projects will undergo meaningful environmental analysis or other serious scrutiny. For the pending Cline coal mine proposal, project opponents have sought both federal and provincial environmental review, which means both governments would ultimately have to approve the project.²⁷⁶ At the federal level, the critical question is whether the Canadian Environmental Assessment Act will apply, a matter that will likely turn on whether “the project may cause significant adverse environmental effects occurring both outside Canada and outside those federal lands.”²⁷⁷ At the provincial level, B.C.’s recently streamlined Environmental Assessment Act vests responsibility for preparing the environmental assessment on the project proponent,²⁷⁸ with the province then

274. See Federal Water Pollution Control Act § 401, 33 U.S.C. § 1341 (2000). However, a recent Ninth Circuit ruling suggests CERCLA liability could attach to Canadian mining activities that pollute transboundary waters with toxic substances. *Pakootas v. Teck Cominco Metals, Ltd.*, No. 05-35153, 2006 WL 1821197 (9th Cir. July 3, 2006); see also Michael J. Robinson-Dorn, *The Trail Smelter: Is What’s Past Prologue? EPA Blazes a New Trail for CERCLA*, 14 N.Y.U. ENVTL. L. J. 233 (2006).

275. In similar cases, the federal courts have not hesitated to overturn agency decisions that ignore either substantive or procedural mandates. See, e.g., *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300 (9th Cir. 1994); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9th Cir. 1988).

276. Thus far only the B.C. government is involved in the coal mine project environmental review process, see *infra* notes 308–14 and accompanying text, but Montana is trying to engage the Canadian federal government in the process too. Letter from Brian Schweitzer, Governor of Mont., to Stephen Harper, Prime Minister of Can., (Mar. 3, 2006) (citing section 47 of the Canadian Environmental Assessment Act and then stating, “it seems probable that the province and federal government will conduct a cooperative environmental assessment”) (on file with authors).

277. Canadian Env’tl. Assessment Act, R.S.C. ch. 37, § 47 (2005). Other possible bases for invoking the CEAA include impacts on navigable waters, disruption of fish habitat, or the use of explosives on site. See EBA ENG’G CONSULTANTS, *supra* note 260, at 37–38. Another potential CEAA argument is that “public concerns warrant” referral of the project for a federal mediator or review. R.S.C. ch. 37, § 20(1)(c)(iii).

278. Env’tl. Assessment Act, R.S.B.C., ch. 43, §§ 1–43 (2005). The B.C. Environmental Assessment Act (EAA) makes the province’s Environmental Assessment Office (EAO) responsible for overseeing this process and for making final recommendations to the three provincial ministers who have final project approval decision authority. In brief, the process is as follows: The EAO initially determines whether the EAA applies, prepares a “procedural order” identifying the scope of the assessment, and solicits public input. Next, the EAO and project proponent jointly agree on “terms of reference” for the project, which outline informational requirements for the project application and subsequent public involvement opportunities. The final project application is then prepared by the proponent including an environmental assessment of possible impacts. Finally, the EAO reviews the project application and makes recommendations to the responsible cabinet ministers. All of this must occur in a relatively short time frame: the EAO has 180 days to review the project application and the ministers have just 45 days to reach their decision. The process is described at the EAO’s website, <http://www.eao.gov.bc.ca> (last visited Mar. 25, 2006). For an analysis and critique of the revised EAA process, see West Coast Environmental Law, *Deregulation Backgrounder*, Bill 38: The

responsible for reviewing the project application and issuing a final decision.²⁷⁹ Although public involvement is required,²⁸⁰ there are no cumulative effects analysis requirements, which is a major concern with the multiple mining proposals in the Canadian Flathead.²⁸¹ And there is little likelihood that a court would overturn a federal or provincial government decision approving the environmental assessment document.²⁸² Further, neither the federal nor the provincial governments have meaningful endangered species legislation, leaving the grizzly bear and its habitat without significant protection on the northern side of the international boundary.²⁸³ How rigorous these federal and provincial environmental analysis processes really are will be tested in the Cline mine project review that is only just beginning.

C. U.S. and Canadian Preservation Efforts

The prospect of industrial development in the Canadian Flathead is particularly troublesome given the effort that has gone into protecting the adjoining landscape on the U.S. side of the border. Glacier National Park, first established in 1910, was the first step in a regional preservation process that has only strengthened over the years. Glacier (along with Canada's Waterton Lakes National Park) was designated the world's first international peace park in 1932, and then subsequently designated an international biosphere reserve and a world heritage site. Congress has also created the extensive Bob Marshall wilderness complex south of Glacier and protected the Flathead River under the Wild and Scenic Rivers Act. The Flathead National Forest is poised to recommend additional wilderness acreage in the upper reaches of the U.S. North Fork, which it already protects as a special Grizzly Bear Management

New Environmental Assessment Act (2004), available at <http://www.wcel.org/deregulation/bill38.pdf>.

279. According to one knowledgeable B.C. environmental lawyer, the province has never in recent years refused to permit a mine or similar industrial project after completing the EAA review process. Interview with Karen Campbell.

280. The EAO's public involvement requirements are defined by the province's general Public Consultation Policy Regulation. See Environmental Assessment Office, Guide to the British Columbia Environmental Assessment Process 24-26, app. 5 (Mar. 2003), available at <http://www.eao.gov.bc.ca/publicat/guide-2003/guide-home.htm>.

281. As we shall see, in the case of the Cline mine proposal, project opponents are seeking a comprehensive regional environmental analysis of the potential cumulative impacts from the multiple mining projects slated for the Canadian Flathead. See *infra* notes 319-24 and accompanying text.

282. Interviews with Karen Campbell and David Thomas.

283. See KATE SMALLWOOD, SIERRA LEGAL DEFENCE FUND, A GUIDE TO CANADA'S SPECIES AT RISK ACT 5, 8 (2003); Robert B. Keiter & Harvey Locke, *Law and Large Carnivore Conservation in the Rocky Mountains of the U.S. and Canada*, 10(4) CONSERVATION BIOLOGY 1003 (1996).

Area.²⁸⁴ In 1983, the State of Montana created the multi-agency Flathead Basin Commission in an effort to protect the watershed,²⁸⁵ and it earlier established state game ranges along the Rocky Mountain Front.²⁸⁶ Moreover, the Bush Administration recently suspended oil and gas leasing along the Front in order to prepare a region-wide environmental assessment before allowing further energy exploration on these sensitive lands—the same type of analysis that Montana officials and others have been urging on the B.C. government.

There is less evidence of a broad-scale commitment to preservation on the Canadian side, particularly in British Columbia. In 1885, the Canadian government established Waterton Lakes National Park in Alberta province as the nation's fourth national park; it lies adjacent to Glacier with its western boundary at the continental divide or B.C. border. Like Glacier, Waterton has since been designated an international peace park, an international biosphere reserve, and a world heritage site.²⁸⁷ Waterton is flanked on the west by Akamina-Kishinena Provincial Park, which extends into the lower Canadian Flathead drainage but not as far as Glacier's westernmost boundary.²⁸⁸ The Nature Conservancy of Canada, with considerable local support, has acquired nearly 25,000 acres of private land in southern Alberta adjacent to Waterton's eastern border, through either outright purchases or conservation easements.

A federal proposal to expand Waterton National Park into the Canadian Flathead—thus adding “the missing piece of Waterton-Glacier International Peace Park”—has been pending without action for several

284. See *supra* notes 82, 84 and accompanying text; see also Sax & Keiter, *supra* note 1, at 228 (noting establishment of the Trail Creek Grizzly Bear Management Area).

285. See MONT. CODE ANN. §§ 75-7-301 to 308, § 2-15-3330 (2005). The twenty-three member Flathead Basin Commission consists of representatives from federal, state, local, and tribal government as well as public interest groups. *Id.* § 2-15-3330(2). Although the Commission's purpose is “to protect the existing high quality of the Flathead Lake aquatic environment; the waters that flow into, out of, or are tributary to the lake; and the natural resources and environment of the Flathead basin,” *id.* § 75-7-301, the legislature did not give it any regulatory authority. Rather, it is charged with monitoring basin resource conditions, fostering cooperation between the responsible agencies and resource managers, and promoting international cooperation with British Columbia. *Id.* § 75-7-304.

286. See *supra* note 206 and accompanying text (describing the state's Sun River and other Rocky Mountain Front Game Ranges); see also MONT. CODE ANN. § 87-5-403 (2005).

287. BILL DOLAN, THE WATERTON BIOSPHERE RESERVE—FACT OR FICTION? 9 (2003) (paper presented at the SAMPAA Conference), available at [http://www.biosphere-canada.ca/publications/reports/SAMPAA_WB A_Paper_May_2003.pdf](http://www.biosphere-canada.ca/publications/reports/SAMPAA_WB_A_Paper_May_2003.pdf).

288. The Akamina-Kishinena Provincial Park is owned by British Columbia and managed under the province's Parks Act, primarily as a wilderness area. For additional information on the park, see B.C. PARKS DIV., MANAGEMENT DIRECTION STATEMENT (May 1999), available at <http://www.env.gov.bc.ca/bcparks/planning/mgmtplns/akamina/akamina.pdf>.

years.²⁸⁹ At 100,000 acres, the Waterton expansion proposal would cover one-third of the Flathead River Valley by extending the park's boundaries westward into B.C. just north of the U.S. border.²⁹⁰ The expansion proposal, however, is subject to approval by the B.C. government,²⁹¹ which has shown no inclination to assent despite a projected positive impact on the local economy.²⁹² Moreover, the proposal only covers lands east of the Flathead River, which leaves the west side of the river valley and more northern lands untouched, and thus would have no effect on the Cline mine proposal or coalbed methane exploration. For their part, Glacier officials have taken no position on the Waterton expansion proposal, but they fear that B.C. might trade a park expansion for permission for the Cline coal mine and other development to proceed in areas outside the expansion. That, in their view, would be too high a price.²⁹³

D. The International Joint Commission Option

One potential solution—and the one that succeeded twenty years ago—would be a referral to the International Joint Commission (IJC). During the mid-1980s, when confronted with the proposed Cabin Creek mine just north of Glacier's border, Glacier National Park and Montana

289. See Joel Connelly, *Time Is at Hand to Expand Canada's Park System*, SEATTLE POST-INTELLIGENCER, July 11, 2003, at A2; Env't News Serv., *Canada Creates 10 New Parks, Five Marine Reserves* (Oct. 15, 2002), <http://www.ens-newswire.com/ens/oct2002/2002-10-15-04.asp>. In deference to its Canadian neighbors, Glacier has taken no formal position on the Waterton expansion proposal, though the park clearly supports greater protection for the area and has made scientific information available to provincial and other officials. Interview with Brace Hayden.

290. To facilitate this expansion, the Canadian Parks and Wilderness Society has already reached an agreement in principle with Tembec, Inc., which holds timber permits in the area, whereby Tembec will relinquish its logging rights in exchange for \$15 million in private and public funding to upgrade its nearby Elko mill. See JOHNSON, *supra* note 255, at 4; see also *Creating a Better Peace Park*, <http://www.peaceparkplus.net/about.htm> (last visited Jan. 27, 2006). Other potential conflicts involve four mineral claims that could require compensation, a ninety-two acre private parcel that adjoins other privately owned lands on the U.S. side of the border, two hunting outfitters, and three trapper permittees. In addition, an expanded park would eliminate hunting and backcountry ORV use, which has kindled opposition among these groups. Bob Jamieson, *Background Information on the Natural Resources and Compensation Issues in the Area of Interest for a National Biosphere Reserve in the Southeast Portion of the Flathead Drainage in B.C.* (2002) (unpublished document prepared for Parks Canada, on file with authors).

291. Even if the expansion were to proceed, Waterton's chief ranger told us that he did not see it as basis for resisting the Cline coal mine proposal, though he was concerned about the wildlife impacts that would be felt throughout the region. Interview with Bill Dolan.

292. See JOHNSON, *supra* note 255, at 4 (concluding that "from a regional perspective, the park expansion is a win-win solution resulting in increased economic activity particularly in the Elk Valley, and increased wildlife habitat protection associated with reduced resource development and other human use impacts.").

293. Interviews with Jack Potter, Brace Hayden, and Mick Holm.

officials convinced the State Department to invoke the International Boundary Waters Treaty of 1909.²⁹⁴ The treaty contains a mechanism for referring U.S.-Canadian transboundary environmental disputes to the IJC for resolution, so long as both nations agree to the referral.²⁹⁵ Somewhat surprisingly, Canada agreed to the Cabin Creek referral, which set off a multi-year study by a joint international scientific committee to determine the scope and nature of potential water quality problems associated with the mine proposal.²⁹⁶ Those scientific findings then became the basis for the IJC's final recommendations.

The IJC's Cabin Creek mine decision amounted to a complete victory for Montana and Glacier National Park. Noting the lack of critical scientific data,²⁹⁷ the IJC recommended against approving the mine proposal until "potential transboundary impacts . . . have been determined with reasonable certainty and would constitute a level of risk acceptable to both Governments."²⁹⁸ The Commission found a potential

294. Boundary Waters Treaty of 1909, Jan. 11, 1909, U.S.-Can., 36 Stat. 2448 [hereinafter Boundary Waters Treaty]. The treaty provides that "waters flowing across the boundary shall not be polluted on either side to the injury of health or property of the other," *id.* art. IV, and entitles a downstream user injured by an upstream user to the same rights and remedies as if the injury had occurred in the source nation, *id.* art. II.

295. The treaty provides:

The High Contracting Parties further agree that any questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

The International Joint Commission is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

Such reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the laws, and shall in no way have the character of an arbitral award.

The Commission shall make a joint report to both Governments in all cases in which all or a majority of the Commissioners agree, and in case of disagreement the minority may make a joint report to both Governments, or separate reports to their respective Governments.

In case the Commission is evenly divided upon any question or matter referred to it for report, separate reports shall be made by the Commissioners on each side to their own Government.

Boundary Waters Treaty, *supra* note 294, art. IX.

296. E.M. CLARK ET AL., REPORT OF THE FLATHEAD RIVER INTERNATIONAL STUDY BOARD (1988).

297. *Id.* at 7.

298. INT'L JOINT COMM'N, IMPACTS OF A PROPOSED COAL MINE IN THE FLATHEAD RIVER BASIN 11 (1988).

violation of the Boundary Waters Treaty's pollution provision²⁹⁹ due to possible sedimentation and toxic impacts on the spawning habitat of bull trout and other migratory fish that could damage this important fishery on the U.S. side of the border.³⁰⁰ Taking note of the United State's efforts to protect the Flathead basin, it explained, "where one country has adopted uses with particularly stringent environmental requirements in a boundary region on a unilateral basis that could preclude the otherwise legitimate development opportunities in the other," the parties should seek "alternative-development opportunities that are both sustainable and consistent with maintaining [treaty requirements], while paying due regard to the legitimate goals of the other country."³⁰¹

Moreover, the IJC recommended that "the Governments consider, with the appropriate jurisdictions, opportunities for defining and implementing compatible, equitable and sustainable development activities and management strategies in the upper Flathead River basin."³⁰² This recommendation—an explicit invitation to engage in a meaningful multi-jurisdictional dialogue over the future of the Canadian Flathead and its relationship to the larger regional landscape—has unfortunately never been implemented. Nor has the related suggestion to create an International Conservation Reserve gone any further.³⁰³ Canada never formally accepted the IJC's recommendations, fearing the precedential implications of the transboundary fisheries conclusions, which could undermine the Canadian position on Great Lakes fishery issues.³⁰⁴ And British Columbia, we were told, was not prepared to forego lucrative resource development opportunities on its own lands. The Cabin Creek mine proposal, however, dropped from sight, victim of a changing international energy market.

Notwithstanding the earlier IJC decision, the B.C. government appears intent on forging ahead with the Cline coal mine and coal bed

299. The pollution provision is in article IV, which provides that "waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other." Boundary Waters Treaty, *supra* note 294, art. IV. Although article II of the treaty states that nations have exclusive jurisdiction and control over the use of all waters within their boundaries, other language of the article provides that a downstream user injured by an upstream user is entitled to the same rights and remedies he would have if the injury had occurred in the source nation.

300. For a detailed description of the Cabin Creek mine's potential pollution impacts on fisheries, see INT'L JOINT COMM'N, *supra* note 298, at 6–8.

301. *Id.* at 9.

302. *Id.* at 11.

303. *See id.* at 10. The International Conservation Reserve proposal actually originated with Montana and focused on "the upper portion of the Flathead River basin [that] is well suited for research and the development of applied technologies which could lead to the identification of opportunities in resource management and conservation in such areas as migratory fisheries, endangered species, wildlife management programs, timber utilization, and oil and gas potential." *Id.*

304. Interview with Brace Hayden.

methane exploration projects. The 1988 IJC recommendations set the stage for a serious dialogue concerning regional management in the Flathead drainage,³⁰⁵ but B.C. has not responded to regular queries from every Montana governor since then who has attempted to start that dialogue. Further, the province has thus far ignored repeated requests from Montana and environmental groups to prepare a comprehensive environmental assessment before opening the Canadian Flathead to industrial development.³⁰⁶ For its part, Glacier has endorsed the comprehensive environmental assessment request, supported additional scientific research efforts, and sought secretarial level support for an IJC referral.³⁰⁷

Another IJC referral, however, seems quite unlikely at this time. In fact, Montana has already contacted the U.S. State Department with a formal IJC referral request.³⁰⁸ But the State Department deferred the governor's request, explaining that it will continue to monitor the matter while Montana and B.C. seek a local resolution.³⁰⁹ There is little present likelihood that Canada would agree to another IJC referral. The Canadian and B.C. governments are still unhappy over losing the earlier Cabin Creek mine referral, and Canada believes the United States wrongly rejected its recent IJC referral request over the irksome Devil's Lake water allocation controversy involving North Dakota and

305. Sax & Keiter, *supra* note 1, at 239-40.

306. See S.J. Res. 7, 59th Leg. (Mont. 2005); Letter from Brian Schweitzer, Governor of Mont., to Gordon Campbell, B.C. Premier (Feb. 7, 2005) (on file with authors); see also Michael Jamison, *Schweitzer Asks B.C. for Cooperation on Environment*, MISSOULIAN, Feb. 13, 2005.

307. The Flathead Basin Commission, which includes Glacier's superintendent as a member, has requested a comprehensive environmental assessment before B.C. allows these proposed projects to go forward. Flathead Basin Comm'n, Resolution: Support International Joint Commission (IJC) Assessment of Potential Impacts of Proposed Developments in the Flathead River Basin (May 3, 2004), available at <http://www.flatheadbasincommission.org/recentfbcreolutions.html>; Memorandum from Superintendent, Glacier Nat'l Park, to Acting Dir., Intermountain Region, U.S. Dep't of Interior (May 31, 2005) (urging "the Secretary of Interior [to] write the Secretary of State in support of current efforts to have the IJC to [sic] assess the impacts of coal and coal bed methane development in the Flathead River drainage.") (on file with authors). In addition, the park not only participated in the recent Transboundary Flathead Scientific Research Conference, but also houses the Crown of the Continent Science Center and has committed its financial support for further scientific research efforts. Interviews with Steve Thompson, Jack Potter, and Brace Hayden. Further, Glacier officials have promoted the Crown of the Continent partnership, with the underlying goal of better coordinating resource management decisions that have regional implications. See *infra* Part VI(B).

308. Citing the B.C. government's failure to undertake a baseline environmental assessment or to engage in any meaningful dialogue, Montana's governor sought the IJC referral "[t]o ensure the long term integrity of this international treasure [the transboundary Flathead region], and to work toward dispute prevention." Letter from Brian Schweitzer, Governor of Mont., to Condoleezza Rice, U.S. Sec'y of State 2 (May 24, 2005) (on file with authors).

309. See Letter from Charles S. Shapiro, Acting Assistant Sec'y of State, to Brian Schweitzer, Governor of Mont. (June 6, 2005) (on file with authors); Michael Jamison, *Canada Wants Negotiations on State Level*, MISSOULIAN, July 7, 2005.

Manitoba.³¹⁰ Moreover, current relations between the United States and Canada are at a low ebb owing to other high profile issues: the United States's embargo of Canadian cattle due to mad cow disease concerns; the United States's embargo of softwood lumber (which has a particular impact on B.C.); Canada's refusal to support the Iraq War with troops; proposed oil drilling in the Arctic National Wildlife Refuge (which Canada opposes); tightening U.S. border control policies in the wake of the 9/11 terrorist attacks; and continuing disagreements over Pacific Ocean salmon harvest levels.³¹¹ The result is that current mineral development issues are being addressed at the state-provincial level and not at the national level.

E. Local Negotiations for a Regional Environmental Study

Negotiations between Montana and B.C. officials have thus far yielded little. In 2003, the state and province signed an Environmental Cooperation Arrangement "to identify, coordinate and promote mutual efforts to ensure the protection, conservation and enhancement of our shared environment for the benefit of current and future generations."³¹² But they have yet to translate that modest agreement into a detailed Memorandum of Understanding with specific commitments.³¹³ Nonetheless, after an unusual September 2005 personal meeting between Montana's governor and the B.C. premier (no such high-level meeting had occurred during the eighteen years since the IJC's Cabin Creek decision), Governor Schweitzer reported that the province was sensitive to his state's environmental concerns.³¹⁴ Shortly afterwards, B.C. officials attended a Flathead Basin Commission meeting where they announced that the Cline coal mine proposal would undergo an environmental assessment and not proceed under the province's small mine permit process.³¹⁵ The province has also agreed to include the state as a cooperating partner. Exactly what this environmental review will entail

310. See Jim Snyder, *Canada Lobbies Against Flood Plan for Devil's Lake*, THE HILL, May 25, 2005, at 10.

311. See Doug Strock, *U.S.-Canada Relations Seen Growing Chilly*, WASH. POST, Mar. 4, 2005, at A17; *Canadian-American Relations: Ready for a Thaw*, ECONOMIST, Feb. 25, 2006.

312. Province of B.C. & State of Mont., Environmental Cooperation Arrangement (Sept. 2003) (signed by Premier Gordon Campbell and Governor Judy Martz) (on file with authors).

313. See State of Mont. & Province of B.C., Memorandum of Understanding (July 29, 2005 draft) (on file with authors).

314. See Jim Mann, *Governor Confers with B.C. Premier*, DAILY INTER LAKE, Sept. 7, 2005.

315. See Jamison, *supra* note 306. The same meeting was attended by Dennis Schornack, the U.S. Co-Chair of the International Joint Commission, who commented that the IJC has been paying attention to this brewing controversy and then explained that the IJC has recently focused on preventing disputes rather than resolving them after positions had hardened by facilitating locally negotiated resolutions. *Id.*

remains to be seen, particularly whether the province will ultimately agree to a comprehensive examination of potential mineral development in the basin as advocated by Montana and environmental groups on both sides of the border.³¹⁶ With obvious frustration in his voice, the state's principal negotiator observed to us: "I've been working on this issue since 1985, but we've not succeeded in achieving any lasting success."³¹⁷ Glacier officials express similar sentiments.³¹⁸

Montana, Glacier, and their environmental allies have continued pressing B.C. to do a comprehensive regional environmental study before permitting any mineral development activities to occur within the Flathead drainage. It is, they are quick to note, what the Bush Administration has committed to doing before allowing further leasing or development along the Rocky Mountain Front.³¹⁹ Borrowing from the prior IJC process, their strategy is to acquire and develop scientific data on the current state of the Flathead drainage and the potential cumulative impacts from these new project proposals.³²⁰ To spur that baseline study process, they have already convened a scientific forum that has documented the need for extensive additional information on terrestrial and aquatic systems, including species population inventories, vegetation mapping, and water quality monitoring data.³²¹ Armed with additional scientific information, they would be able to document the important resource values in the Canadian Flathead that are at serious risk if the area is opened to industrial development.³²² Our informants believe there is real power in scientific data, which can provide

316. See Letter from Brian Schweitzer, Governor of Mont., to Gordon Campbell, B.C. Premier (Jan. 20, 2006) (on file with authors). The governor's letter also commends the province on deciding to do an environmental assessment on the Cline coal mine proposal, urges the premier to help finalize the yet-unsigned draft MOU, and promotes the need to "explore potential win-win solutions that focus on protecting the ecological integrity of the transboundary Flathead, while at the same time exploring economic development opportunities beneficial to British Columbia."

317. Interview with Rich Moy.

318. Interviews with Jack Potter and Brace Hayden.

319. See *supra* Part IV(E) for further discussion of the Rocky Mountain Front mineral development controversy.

320. This data would include water quality levels, wildlife and fish population numbers, terrestrial and aquatic habitat quality, human use figures, road densities, and the general ecological health of the area. See FLATHEAD TRANSBOUNDARY NETWORK, STATE OF THE CROWN OF THE CONTINENT ECOSYSTEM: FLATHEAD/CASTLE TRANSBOUNDARY BIOREGION (Jan. 1999), available at <http://www.rockies.ca/downloads/StateCofCE.pdf>.

321. See Transboundary Flathead Research Needs Workshop, Executive Summary 2-3 (Nov. 3, 2005) (on file with authors). Moreover, the Crown Managers group is poised to undertake its own landscape-scale assessment that will help define regional trends. See *infra* note 339 and accompanying text. While the group's original regional cumulative effects model project may have yielded useful environmental information, how helpful such a regional trends study will be to this issue is open to question.

322. Injecting the alluring Crown of the Continent ecosystem concept into the discussion could also help trigger that broader public awareness and concern. Interview with Rich Moy.

government officials with political cover when they must make potentially unpopular decisions.³²³ At the very least, the hope is that study results might persuade B.C. authorities to require a state-of-the-art project with sufficient mitigation and monitoring measures to blunt the most serious environmental impacts.

Given the current unsettled situation, the mine opponents are also seeking to generate enough political pressure to force Canadian federal involvement in the matter or an IJC referral, and to forestall corporate interest in the region. Mineral development opponents had some success in early 2005 when they dissuaded Shell Canada and other firms from bidding at the B.C. province's coalbed methane lease auction.³²⁴ The recent announcement by B.C. officials that they will subject the Cline coal mine proposal to an environmental assessment with Montana as a cooperating party is further progress, though the scope of that assessment has yet to be determined. But these victories may prove short-lived if international energy prices remain at high levels, or if the Conservative Party's recent federal election victory results in accelerated development pressures and greater deference to the provinces. Moreover, no one we spoke with could identify a potential "carrot" that the United States might be willing to offer Canada to secure B.C.'s cooperation or forbearance. In sum, the Canadian Flathead portion of the regional ecosystem is not secure and faces real and immediate development pressures.

VI. TOWARD REGIONALISM AND COORDINATED MANAGEMENT

As we have seen, the significant changes that have taken place within the Glacier region have come about without any formal changes in the structure of management or any revision of formal boundaries. Much of the change has been generated by the enforcement of a few powerful federal statutes, and by changes in both agency mission and public attitudes, along with a favorable economic situation. The preceding section reveals that few of those elements are yet evident across the border. In light of this, several efforts are ongoing to create regional organizations, both governmental and private, to promote regional cooperation across national as well as enclave boundaries. We now describe some of those efforts and their rather modest accomplishments.

A. *The Allure of Regionalism*

Glacier managers continue to embrace regionalism as the primary long-term strategy for protecting the park's ecological integrity. The

323. Interview with Gloria Flora.

324. See *supra* note 266 and accompanying text.

overall goal is to knit the entire Glacier region together as an entity with the park at the core of the larger ecosystem, primarily by creating transboundary management forums, institutions, or incentives consistent with the park's conservation objectives. In our earlier study, noting this budding commitment to regionalism, we explained that Glacier officials were relying heavily on the park's international biosphere reserve designation to provide it with meaningful protection and to foster restraint from its national forest neighbors. We noted, though, that "Glacier's enthusiasm is unfortunately a little premature," explaining that the biosphere reserve designation did not create or demand any formal legal commitments on the part of neighboring landowners.³²⁵ The biosphere reserve concept has not had any measurable direct effect, but may have helped lay the groundwork for other conservation measures that have helped protect the park beyond its boundaries. In any event, during our interviews this time, Glacier's biosphere reserve designation was barely mentioned, leading us to conclude that the park is looking to other mechanisms to achieve a regional conservation strategy.

In recent years, an array of other trans-boundary initiatives have surfaced in the Glacier area that offer fora where external threat issues can be addressed. These efforts include the Flathead Basin Commission, a Yellowstone to Yukon initiative (Y2Y), the Northern Rockies Ecosystem Protection Act bill, the Crown of the Continent Managers Group, and the GNESEA partnership.³²⁶ Each of these initiatives is designed to break down the traditional jurisdictional boundaries that impede rational management of wildlife and water systems. None has yet produced a major breakthrough, and it is doubtful that such organizational efforts will be central to the search for regional managerial integration.

The state-inspired, multi-agency Flathead Basin Commission, which came into being in response to the Cabin Creek mine proposal, is still a functioning entity and formally engaged in responding to the present B.C. energy development threats. But the commission is purely an advisory body; it has no management responsibilities or regulatory authority.³²⁷ As we have seen, it has gotten little traction in convincing B.C. to forebear

325. See Sax & Keiter, *supra* note 1, at 255. However, both designations were cited by the IJC in 1988 (along with other U.S. preservation efforts in the Flathead River drainage) as a reason for urging forbearance on B.C.'s part before proceeding with the Cabin Creek mine. See INT'L JOINT COMM'N, *supra* note 298, at 11.

326. Notably, the GNESEA habitat conservation plan is law-driven, rather than a genuinely voluntary effort. See *supra* notes 107–12 and accompanying text; see also *infra* note 342 and accompanying text.

327. See *supra* notes 142 and 285 for descriptions of the Commission's purpose and authority.

authorizing mineral development until a regional environmental analysis is done.

Nor have the other large-scale regional initiatives proven effective in grappling with regional problems. The Y2Y concept, which has been advanced by environmental organizations on both sides of the border, seeks to create a linear network of interconnected nature reserves extending from the Yukon Territory to Yellowstone National Park to protect the grizzly bear, wolf, and other wide ranging wildlife species.³²⁸ Situated in the middle of this corridor, the Glacier-Waterton park complex would provide key habitat and be connected to other preserves through secure wildlife corridors. Although Y2Y proponents have also sought to promote compatible local economic activities, the expansive international scope of the proposal, including the fact that it includes some areas that already have significant mineral development, seems to have denied it community support on both sides of the international boundary.

The Northern Rockies Ecosystem Protection Act bill, which has been regularly introduced in Congress since 1993, seeks to establish a sixteen million acre network of ecosystem-level wilderness areas (including the Greater Glacier Ecosystem) extending across five states.³²⁹ It has generated no significant support from either the region's congressional delegations or the federal land management agencies. Though the proposal makes some inherent ecological sense, like Y2Y, it simply may be too sweeping in scope to obtain a serious constituency.³³⁰

B. The Crown of the Continent Partnership

The somewhat less sweeping Crown of the Continent initiative, which is led by Glacier and other governmental entities, narrows the regional focus to the Glacier area while extending outward from the continental divide and across the international boundary. Indeed, this is the first real effort to institutionalize management relations at a regional scale. The Crown of the Continent phrase—first coined by William Bird Grinnell in the 1890s to describe Glacier National Park—is now being used to describe an international ecosystem that extends along the Rocky

328. See DOUGLAS H. CHADWICK, *YELLOWSTONE TO YUKON* (2000); KEITER, *supra* note 30, at 191–92.

329. See, e.g., H.R. 1204, 109th Cong. (2005) (renamed the Rockies Prosperity Act); H.R. 1105, 108th Cong. (2003); H.R. 852, 104th Cong. (1995); see also Mike Bader, *The Need for an Ecosystem Approach for Endangered Species Protection*, 13 *PUB. LAND & RESOURCES L. REV.* 137 (1992); Tara K. Weinman, *The Northern Rockies Ecosystem Protection Act: In Support of Enactment*, 5 *B.U. PUB. INT. L.J.* 287 (1995).

330. That has certainly been the case elsewhere, as evidenced by the ambitious but short-lived federal Interior Columbia Basin Ecosystem Management Project that collapsed from its own weight. See KEITER, *supra* note 30, at 162–69.

Mountain spine from the Bob Marshall wilderness complex in Montana to the Elk Valley in B.C., with the two parks as its core.³³¹ In spring 2001, Glacier and Waterton park managers seized the initiative and convened an initial Crown Managers Forum, drawing over twenty agencies together to explore how to improve regional management for this expansive landscape. The group established a Crown of the Continent Ecosystem Managers Partnership,³³² endorsed the concept of collaborative ecosystem management, and adopted “an ecologically healthy Crown of the Continent ecosystem” as its vision.³³³ It also identified five key issues requiring region-wide attention, including the need for a regional cumulative effects model.³³⁴ Since then, the Crown Managers group has met annually and established a formal institutional structure with federal, state, provincial, and tribal members.³³⁵

The idea of identifying the region as an integral ecological entity and implementing some form of regional management is important. The jury is still out, however, as to whether this formal but voluntary arrangement will have any noticeable on-the-ground impact. The group has disavowed any intent to involve itself in management decisions or processes.³³⁶ Its

331. The Crown of the Continent ecosystem, as defined by the Crown Managers Group, also extends into Alberta to the Highwood River. On the origins and geography of the Crown of the Continent concept, see Miistakis Institute for the Rockies, <http://www.rockies.ca> (last visited Jan. 19, 2006).

332. Although both the Flathead and Lewis & Clark forests are listed as members of the Crown Managers Group, we were surprised during our interview with the Lewis & Clark supervisor, Spike Thompson, when he stated he was not familiar with the group, even after eighteen months on the job.

333. See CROWN MANAGERS PARTNERSHIP, STRATEGIC PLAN 2005–2009 (DRAFT), at 3–5 (Jan. 5, 2006), available at http://www.rockies.ca/cmp/documents/CMP_strat_plan_WebDraft.pdf.

334. The other issues focused on the increased public interest in management decisions, increased recreational and visitation pressures, shared data and monitoring opportunities, and maintenance of shared wildlife populations. See *id.* at 3–4.

335. National members include Parks Canada, National Park Service, Forest Service, Bureau of Indian Affairs, U.S. Fish and Wildlife Service, and U.S. Geological Survey; provincial members include Alberta Sustainable Resource Development, Alberta Environment, Alberta Parks and Protected Areas, B.C. Ministry of Sustainable Resource Management, B.C. Ministry of Water, Land and Air Protection, and the B.C. Ministry of Forests; the Montana members are the Department of Fish, Wildlife and Parks, the Department of Natural Resources and Conservation, and the Flathead Basin Commission; the tribal or first member nations are the Ktunaxa Kinbasket Treaty Council, Blood Tribe, Blackfeet Tribe, and Confederated Salish and Kootenai Tribes. See <http://www.rockies.ca/cmp/about/support.htm> (last visited Jan. 19, 2006). In addition, the Partnership includes members from the University of Montana and University of Calgary who are providing research assistance and other support services. *Id.* An eleven-person steering committee, including representatives from Glacier and the Flathead National Forest, meets regularly to organize the annual forum and oversee the group’s projects.

336. See CROWN MANAGERS PARTNERSHIP, *supra* note 333, at 5 (reciting that “[r]esponsibility for direct management of the public land and natural resources lies with the individual agencies.”). At the 2004 Forum, the partnership did involve local governmental representatives, reflecting the group’s sense that it should move toward broadening its membership and perhaps eventually open it to the public, industry, and nonprofit groups. Interviews with Len Broberg and Brace Hayden.

initial project—development of a joint cumulative effects model—shows how sensitive even the most basic efforts can be. After everyone initially agreed on the value of such a model, the Flathead Forest supervisor opted out of the project, explaining that the Forest Service must utilize its own model to comply with federal laws and court decisions establishing specific cumulative effects analysis protocols.³³⁷ Some observers speculate the supervisor feared a new region-wide model could be used against the agency in domestic NEPA litigation over its timber and other forest management practices.³³⁸ Whatever the Flathead supervisor's concerns were, the incident illustrates the substantial obstacles that formal efforts at regional management face, particularly given the inconsistent legal mandates and obligations governing the agencies, both domestically and internationally. While the group is moving forward with a related regional landscape assessment designed to discern trends and offer projections on roads, recreational pressures, and the like,³³⁹ the prospects for such an organization to grapple with any of the hard questions facing the region seem dim.³⁴⁰ The fact that it has so far ignored the region's most pressing transboundary resource management problem—energy development in the Canadian Flathead—is not a promising sign.³⁴¹

C. *Putting Regionalism in Perspective*

At a much smaller scale, regionalism has borne some fruit in the Glacier area. The formal GNESEA partnership that is addressing rail-grizzly conflicts in the Highway 2 corridor seems to be working as a modest, multi-party transboundary initiative focused on a discrete conservation objective. But GNESEA is driven by the powerful ESA, is the product of an initial lawsuit to bring the GNESEA parties to the table in the first instance, and has a narrow focus. It may ultimately be

337. See CROWN MANAGERS PARTNERSHIP, 2005 FORUM SUMMARY 25–28 (2005). However, we were told that the Flathead forest's cumulative effects model does not extend north of the international boundary, which means it does not address the state of grizzly bear habitat in the Canadian Flathead—an important part of the grizzly bear ecosystem and one that faces serious energy development proposals. Interview with Bill Dolan.

338. Interviews with Len Broberg, Brace Hayden, and Jack Potter.

339. See CROWN MANAGERS PARTNERSHIP, *supra* note 337, at 7, 22–28; Interviews with Brace Hayden and Len Broberg; see also FLATHEAD TRANSBOUNDARY NETWORK, *supra* note 320.

340. See CROWN MANAGERS PARTNERSHIP, *supra* note 333, at 5 (stating as guiding principle that “[t]he Partnership will not take a stand or position on resource-management issues, but rather will seek to inform and raise agency capacity to address those issues.”).

341. *But see id.* at 8–9 (statement of Mark Holston, Flathead Basin Commission, reporting on Montana's concerns and efforts to secure an analysis of the cumulative effects linked to the B.C. mining and coal bed methane projects). It is worth noting that the cumulative effects modeling proposal could have provided the Crown Partnership with data similar to that being sought by Montana and other opponents of the B.C. projects. See *supra* notes 320–26 and accompanying text for further discussion of this issue.

contingent on the grizzly bear's continued listing under the ESA. And though GNEA is framed as a partnership arrangement, Burlington Northern railroad is plainly the driving force behind the HCP effort, and the railroad has strictly limited the conservation alternatives it is willing to consider.³⁴² Nonetheless, the HCP provides a model for habitat-based, rather than boundary-based, management that might be useful elsewhere, particularly as a possible means of mitigating the impacts of private land development on the park's flanks.

The hard fact seems to be that regionalism does not happen merely because it is a good idea or through creation of a formal group. Indeed, the most significant progress toward regional identity and management—the conception of the Rocky Mountain Front—has come about without any formal organizational changes or boundary revisions. The emergence of the Front as a discernible regional entity has instead occurred informally and *de facto*, and it stands in stark contrast to the limited achievements of the formal regionalism efforts noted above. As a practical matter, this development can be traced directly to background coercive legal forces. Were it not for environmental advocates willing to invoke NEPA and the ESA, thereby derailing exploratory drilling permits, to say nothing of the Blackfeet treaty claims and the National Historic Preservation Act, the community consensus in favor of protecting the Front would probably never have coalesced.

No such success is yet discernible on either side of the border on the Flathead side of the park. There the problems are admittedly more formidable: an international boundary, highly valuable mineral resources, and critical wildlife habitat located on private lands ripe for development. The concept of a region, even one as visible as the watershed of the Flathead River, does not yet have a cohesive local constituency committed to its protection. The available legal tools are more limited too. While there is room for some optimism—the state and environmental organizations have been able to hold off Canadian mineral development so far and county planning efforts may bear fruit—there is not yet a critical mass that can be called a Flathead regional community. Nor does anyone think that the day will be saved by such formal regional organizations as the Crown of the Continent managers' group or the Flathead Basin Commission, despite their good works and noble intentions.

CONCLUSION: A TWENTY-YEAR ASSESSMENT

Glacier has so far been spared each of the major threats we identified two decades ago. At that time, we were moderately pessimistic

342. See *supra* Part II(F) for a discussion of the HCP effort.

about the park's prospects. Though we recognized the power of Glacier's status as a "sacred cow" and the vigorous efforts of private environmental advocates on its behalf, we were troubled by the inconsistent missions of the park and its adjacent neighbors, and by the reluctance of Glacier's management to speak out or to take action on threats emanating from outside. In short, we saw a potentially destructive disconnect between the ecological realities of habitat protection and the political and managerial realities then at work.

While Glacier is still at risk, things are not nearly as bleak as we would have anticipated from the perspective of the mid-1980s. This is especially true on the adjoining national forests where we have seen the emergence of what amounts to a *de facto* buffer on their lands that border the park. It also holds true for private lands on the east side, where a sense of regional identity is taking hold. Such positive developments are less in evidence on the private lands in the Flathead Valley and across the border in the Canadian Flathead.

What explains the striking differences in park protection and environmental sensitivity that we have observed over the past twenty years? Significantly, neither a formal realignment of boundary lines to create habitat-determined federal enclaves, nor establishment of regionally based managerial systems account for the progress toward greater regional management. A quite different constellation of changes explains the real dynamics of environmental protection.

The key is a pronounced shift in thinking and management away from formal enclaves (such as the park and the forest) and toward the region seen as an integral ecological unit, in particular as the habitat needs of target wildlife populations. We see the decline in threats to the park from its neighboring national forests as illustrative of the way in which regionalization actually happens on the American landscape. This seems to be the product of a variety of interlocking and mutually reinforcing changes in the way business is really done. These changes in combination have brought about remarkable advances in the direction of meaningful regionalism.

One important element in this shift toward regionalism has been a reduction in conflict between the missions of neighboring federal land managers. As the Forest Service's user constituency has become increasingly one of recreationists, and as local communities have become less economically dependent on commodity production, forest managers are under less pressure to permit oil exploration projects or to construct logging roads that create conflict with nearby parks. They are instead more willing to protect the wildlife and natural settings that recreational users value. And they become more amenable to wilderness designations, as we have seen in the Flathead. These changes all benefit the park. But they have not been sufficient in themselves to diminish all conflict, a fact

reflected in ongoing ORV recreational access controversies that both the Flathead and Lewis & Clark Forests face.

Another indispensable factor is the law and its enforcement, which has played a pivotal role in promoting management across formal boundaries.³⁴³ While traditional federal land laws give each type of federal enclave its own distinct mandate, a few modern statutes—most importantly the ESA, the Wilderness Act, and NEPA—impose managerial consistency across boundaries where their mandates apply. This is particularly true in terms of what has transpired on the Flathead and Lewis & Clark National Forests, where the ESA, aided by information-forcing litigation under NEPA, virtually dictates forest priorities and procedures. As we have seen, the ESA and the “threatened” grizzly bear account for a major reduction in timber harvesting on the Flathead, just as NEPA is the vehicle that opened the door for a far-reaching oil and gas leasing moratorium on the Lewis & Clark, and for a pending regional environmental assessment. Both laws are also at play in the new GNESEA initiative to protect grizzly bears in the Highway 2 railway corridor. In a related development, the National Historic Preservation Act’s TCD provisions may effectively block the Hall Creek drilling proposal. In short, where strong laws apply, as on the two national forests adjoining Glacier, developments have been positive and incompatible uses are being channeled into environmentally benign locations.³⁴⁴

Conversely, where the law is weak or where there is a reluctance to invoke it, the perils of environmentally harmful activity remain high, as on private lands in the Flathead Valley and in British Columbia. On private lands, state rather than federal law generally prevails, and it has had little evident impact in generating environmentally sensitive development. This is plainly illustrated by the failure during the 1980s of

343. In our earlier Article, we were critical of the role managerial discretion played in the agencies. See Sax & Keiter, *supra* note 1, at 229–30. Glacier officials, we reported, tended to rely upon the park’s various designations—International Peace Park, International Biosphere Reserve, and now World Heritage Site—as the basis for park protection, but none of these designations have real legal teeth beyond the boundary line. They were otherwise quite reluctant to invoke the law to protect the park. Similarly, their neighboring Forest Service managers were intent on maintaining their own discretionary authority. They seemed to fear only the NEPA injunction or the ESA jeopardy opinion. Such legal discretion, we observed, seemed to place the park at peril, and we suggested the park would be well advised to seek more permanent legal protections, including adjacent wilderness designations, as a way to safeguard itself. Although change has come to the Glacier area over the intervening twenty years, these hard-edged legal realities are still very much at work.

344. Of course, if the ESA is weakened by some of amendments now being proposed, or if the grizzly bear is delisted, the current protective legal situation could change dramatically. See, e.g., Threatened and Endangered Species Recovery Act of 2005, H.R. 3824, 109th Cong. (2005) (sponsored by Rep. Pombo). See generally Letter from the Keystone Ctr. to Sen. Lincoln Chafee et al., Keystone Center Reports Findings of Endangered Species Act Dialogue (Feb. 17, 2006) (on file with authors).

opponents to prevent exploratory drilling of the Cenex oil well on private lands in the sensitive North Fork region.³⁴⁵ It remains to be seen whether Flathead County's current master planning effort will generate any new legal standards or protections that will constrain development on habitat important to the region's wildlife. Though section 9 of the powerful ESA applies to private lands, there has been no move to invoke it in the fast growing Flathead Valley. In British Columbia, law has not slowed the momentum that is building for mining and drilling in the Canadian Flathead. Helpful as the Boundary Waters Treaty was in the earlier Cabin Creek mine controversy, it will have no impact this time unless it is invoked by both nations, and that seems unlikely. Moreover, nothing in Canadian national legislation or in B.C. law seems sufficient to mandate the comprehensive environmental assessment that Montana and environmental advocates are seeking.

A third important element promoting environmental protection has been the evolution of a local public that conceives its surroundings in regional terms. That has been the case on the east side of the park, where the ecologically defined image of a Rocky Mountain Front has come to be a central reality. Plainly, the presence of a supportive constituency creates an atmosphere that stimulates various forms of protective action. Gloria Flora almost certainly could not have taken the bold action she did as a Forest Supervisor had there not been a local community committed to protection of the Front. Nor would the Bush Administration have put a moratorium on oil and gas activity on the Front if doing so had not been in tune with the wishes of the people there, and seen as politically advantageous. And without a regional sensitivity, it is unlikely the Front's private lands would remain as open and undeveloped as they are. The absence of any such cohesive community concept undoubtedly helps explain why no analogous progress has occurred in the Flathead Valley on either side of the border.

The last, but by no means least, important factor in the fate of the region is the market. If the Rocky Mountain Front had been seen by the oil and gas industry as a prime development target, perhaps not even the combination of all the positive factors noted above would have been enough to save it.³⁴⁶ One test of market forces against environmental protection is playing out on private lands in the Flathead Valley, where the burgeoning population and home building pressures have created a race against time to protect sensitive lands. But the real test will most likely be posed in the Canadian Flathead region. There the economic

345. See *supra* note 81 and accompanying text.

346. The lesson to be drawn, however, is not that it might have been lost despite every effort to save it, but that—despite its relative low value to the industry—it surely would not have been saved from widespread exploratory activity without the extraordinary efforts that were expended to protect it.

stakes and the environmental perils are equally intense, and so far there is little prospect that either international law will be invoked or that some sort of state-province agreement will be reached to accommodate the conflict.

In our earlier Article our focus was primarily on the degree to which federal land managers worked collaboratively across their formal boundary lines, on the willingness of park officials to speak out about threats emanating from outside those boundaries, and about the prospects for creating formal regional entities. We see now that those factors, while significant, are not nearly as outcome-determinative as the four elements noted above: reduced mission conflict among land management agencies; powerful laws and constituencies willing to enforce them; a community that cares about its environment and that sees itself as inhabiting a region; and the absence of overwhelming economic pressures for industrialization.

When these elements are in harmony, the prospects for ecologically rational management are good. Neither national park nor national forest managers can control these matters, and perhaps they can only marginally influence them. Yet it would seem vital for park managers to know that these are the primary forces that will determine their park's destiny, and to work as best they can with that reality.

APPENDIX

*List of Individuals Interviewed*³⁴⁷

Joe Brenemann, Flathead County Commissioner.

Len Broberg, Professor and Environmental Studies Program Director, University of Montana; Crown Managers Partnership Steering Committee.

Karen Campbell, former attorney, West Coast Environmental Law, Vancouver, B.C. (telephone interview, Mar. 28, 2006).

Rob Carlin, Flathead National Forest Planner, U.S. Forest Service.

Doug Chadwick, Montana author and environmental activist.

Jimmy DeHerrera, Hungry Horse District Ranger, Flathead National Forest, U.S. Forest Service.

Bill Dolan, Chief Ranger, Waterton Lakes National Park.

Gloria Flora, Director, Sustainable Obtainable Solutions; former Forest Supervisor, Lewis & Clark National Forest, 1996–98.

Tom France, attorney, National Wildlife Federation.

Sandy French, Lewis & Clark National Forest Archaeologist, U.S. Forest Service.

Keith Hammer, Chair, Swan View Coalition.

Hal Harper, Chief Policy Advisor/Legislative Liaison, Office of the Governor, State of Montana.

Brace Hayden, Glacier National Park Regional Issues Specialist, National Park Service.

Michael (Mick) Holm, Superintendent, Glacier National Park.

Michael Jamison, Staff Writer, *Missoulian*.

Donato Judice, Great Falls Field Station Supervisor, Bureau of Land Management.

Tom Kotynski, local author and environmental activist; retired *Great Falls Tribune* Assistant Editor.

Sonja Lee, staff writer, *Great Falls Tribune*.

347. Unless otherwise indicated, the authors jointly interviewed these individuals in person on interviewing trips to the region that occurred on September 6–9 and November 8–11, 2005. Additional or follow-up interviews were conducted by telephone as indicated.

Ben Long, Director, Resource Media Montana; former *Daily Inter Lake* environmental reporter.

Gary Moseman, Editor, *Great Falls Tribune*.

Richard (Rich) Moy, Water Management Bureau Chief, Montana Department of Natural Resources and Conservation; Chair, Flathead Basin Commission.

Jack Potter, Chief, Division of Science and Resources Management, Glacier National Park.

Mary Riddle, Environmental Protection and Compliance Specialist, Glacier National Park.

Erin Sexton, Transboundary Science Coordinator, National Parks Conservation Association, Glacier Field Office.

David Thomas, Fernie (B.C.) City Councilmember; Communications Director, Wildsight Canada.

Lesley (Spike) Thompson, Lewis & Clark National Forest Supervisor, U.S. Forest Service.

Steve Thompson, Glacier Field Office Program Manager, National Parks Conservation Association (telephone interview, Mar. 1, 2006).

Jeanne Whiteing, private attorney; Blackfeet Tribal member (telephone interview, Dec. 8, 2005).

Marilyn Wood, Stewardship Director, Flathead Land Trust.

