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Not So Helpless: Application of the U.S. Constitution Property Clause to Protect Federal Parklands from External Threats

ABSTRACT

Many conservationists worry that national parklands may be threatened by development activities occurring outside established park boundaries, thereby threatening preservation objectives. Some legal commentators argue for federal legislation creating buffers around sensitive parks. Within these buffers, additional federal regulatory controls would be promulgated to protect park values. Such statutes are both unnecessary and unwise. Currently, the extra-territorial reach of the federal constitution's property clause enables park managers to address external threats to park integrity. The Property Clause is available, and has been successfully relied upon, to control activities adjacent to, or within the perimeter area of, a federal conservation unit which significantly interferes with the primary purposes for which the federal land is designated. Buffer legislation also poses a number of technical and predictive difficulties that may precipitate numerous legal challenges to management proscriptions under such statutes. Case specific regulatory remedies avoid many of these pitfalls. Reliance upon existing legal mechanisms remains the most effective means for protecting national parks from external threats.

I. INTRODUCTION

A recent Comment in Ecology Law Quarterly made an interesting and informative argument supporting the need for legislation creating buffer strips around national parklands. Such buffer zones would protect sensitive environmental resources from threats posed by activities occurring on adjacent private land.[1] In justifying a statutory buffer strip approach, the author, Peter Dykstra, asserts that the National Park Service

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1. *See* Peter Dykstra, *Defining the Motherlode: Yellowstone National Park v. the New World Mine*, 24 ECOLOGY L.Q. 299 (1997).

is unable to ensure protection of parklands from external threats because the authority of the federal government to regulate private lands is questionable.[2] If such authority does exist, the Comment maintains, "the power to regulate lands outside of the national park has not yet been granted to the National Park Service."[3] This argument discounts the use of general agency regulations pursuant to the Constitution's Property Clause,[4] the National Park Service Organic Act,[5] and the specific statutes creating each park unit. In so doing, Dykstra neglects significant case law developments concerning the extra-territorial application of the Constitution's property clause that have taken place during the past twenty years.

The purpose of this article is to advance the position that current Park Service regulation pursuant to the Property Clause, under contemporary constitutional interpretation, may obviate the need for statutory buffers around the nation's parklands. Buffer strip legislation for each park unit would prove an extraordinarily difficult task. Such legislation necessarily involves complex language, ambiguous definitions, difficult boundary designations, and contentious public policy balancing that is inherent in the type of congressional statute discussed in the Comment.[6]

Section II of this article describes the pertinent case law applying the Property Clause. Section III attempts to divine a cohesive and consistent theory under the Property Clause for the protection of parklands from external threats. Section IV applies the rules developed in Section III to the fact pattern presented in Mr. Dykstra's Comment.

II. EXTRA-TERRITORIAL APPLICATION OF THE PROPERTY CLAUSE

Over the past two decades, federal agencies have, under the power of the property clause, exercised authority to control insecticide spraying,[7] hunting,[8] mining,[9] snow machining,[10] camping,[11] and boating[12] on state and

2. *See id.* at 304-05.
3. *Id.* at 322, 315.
4. U.S. CONST. art. IV, § 3, cl. 2.
5. 16 U.S.C. § 1 (1994).
6. The Comment acknowledges these difficulties with statutory drafting for buffer strips. *See* Dykstra, *supra* note 1, at 305-07, 313.
7. *See* United States v. Moore, 640 F. Supp. 164, 165 (S.D.W. Va. 1986).
8. *See* United States v. Brown, 552 F.2d 817, 817 (8th Cir. 1977).
9. *See* United States v. Vogler, 859 F.2d 638, 638 (9th Cir. 1988); United States v. Arbo, 691 F.2d 862, 862 (9th Cir. 1982).
10. *See* Minnesota v. Block, 660 F.2d 1240, 1240 (8th Cir. 1981).
11. *See* United States v. Lindsey, 595 F.2d 5, 5 (9th Cir. 1979).
12. *See* Stupack-Thrall v. United States, 70 F.3d 881, 881 (6th Cir. 1995); Free Enterprise Canoe Renters Association v. United States, 711 F.2d 852 (8th Cir. 1983).

private property to prevent interference with federal land management objectives. In each of these cases, no special authorizing legislation was necessary from Congress to validate the extra-territorial application of agency regulations.[13]

The U.S. Supreme Court laid the foundation for modern Property Clause case law in *Kleppe v. New Mexico*, in which the Court ruled that Congress held plenary authority over federal lands.[14] At issue was whether Congress possessed the authority to pass a statute that protected wild horses and burros on federal lands in contravention of state estray laws. In the Wild Horses and Burros Act[15] Congress declared that free roaming wild horses and burros were an integral part of the natural ecosystem of public lands in the United States.[16] Congress directed the Bureau of Land Management and the Forest Service to administer public lands in their respective jurisdictions in a manner that protected wild horses and burros and prevented their cruel capture, slaughter, and removal from federal land. New Mexico challenged the legitimacy of the statute, asserting that only the state Board of Livestock had authority to regulate strays and promptly removed 19 unbranded, unclaimed burros from federal property.

Upholding the statute, the U.S. Supreme Court ruled that the federal government

> has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case....[T]he property clause gives Congress the power over the public lands...to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them....In short, Congress exercises the powers both of a proprietor and of a legislature over the public domain.[17]

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13. *See also* Ronald F. Frank & John H. Eckhard, *Power of Congress Under the Property Clause to Give Extra-territorial Effect to Federal Lands Law: Will "Respecting Property" Go The Way Of "Affecting Commerce"?*, 15 NAT. RESOURCES L. 663 (1983); Louis Touton, Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817 (1980); G. Coggins, *Protecting the Wildlife Resources of National Parks from External Threats*, 22 LAND AND WATER L. REV. 1 (1987); and J. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239 (1976).

14. Kleppe v. New Mexico, 426 U.S. 529 (1976).

15. 16 U.S.C. §§1331-40 (1976).

16. The idea that exotic, feral animals could ever be considered a natural part of any North American ecosystem is an idea rejected by most professional wildlife biologists, but as we shall see, Congress can do no wrong respecting the federal lands. *See generally* Kenneth P. Kitt, *Wild Horses and Burros Protection Act: A Western Melodrama*, 15 ENVIRONMENTAL L. 503 (1985).

17. *Kleppe*, 426 U.S. at 540.

It is important to note that the federal interest under the Property Clause was not in the horses and burros themselves, but rather, in the lands on which the animals were found. The federal government possessed a public interest in owning lands upon which wild horses and burros grazed unmolested.[18]

Since *Kleppe*, other states, particularly Nevada, have clashed with the federal government concerning the full consequences of the decision.[19] In *Nevada v. Watkins*,[20] Nevada challenged a federal decision to place a nuclear waste disposal facility on federal land in contravention of state regulatory requirements; while in *U.S. v. Nye County*,[21] the issue was federal prohibitions against local road construction on federal land. The courts ruled against Nevada each time, concluding that under the Property Clause, Congress' power over the public lands is without limitation. Consequently, Congress may control the use of federal lands, protect the public from hazards on federal land, and regulate wildlife on public lands.[22]

These cases only address threats to federal land management objectives resulting from state and private conduct occurring upon the federal lands. The issue soon arose, however, as to whether federal agencies may use the Property Clause, and their enabling statutes, to protect public lands from extra-territorial threats. A federal court first addressed this issue in *U.S. v. Brown*, just one year after *Kleppe*.[23]

Brown was an enterprising Minnesotan hunter who possessed all lawful hunting permits and stamps for the taking of waterfowl under state and federal law. Taking care not to make landfall upon the shores of Voyagers National Park, Mr. Brown skillfully navigated state waters until he eventually arrived upon a state lake, surrounded by the National Park, and in the midst of many a duck; much to his pleasure, the chagrin of the National Park Service, and the surprise of the ducks.[24]

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18. This is an important point because states have primary legal interests in wildlife management under public trust doctrine unless otherwise pre-empted by federal law. *See* Hughes v. Oklahoma, 441 U.S. 322, 335-38 (1979).

19. *See, e.g.*, United States v. Nye County, Nev., 920 F. Supp 1108 (D. Nev. 1996); Esmerelda v. Dep't of Energy, 925 F.2d 1216 (9th Cir. 1991); Nevada v. Watkins, 914 F.2d 1545 (D. Nev. 1990).

20. *See Watkins*, 914 F.2d at 1549 (9th Cir 1990).

21. *See Nye County, Nev.*, 920 F. Supp. at 1109.

22. *See Watkins*, 914 F.2d at 1553.

23. United States v. Brown, 552 F.2d 817, 819 (1977).

24. There was some debate as to whether the lake was, in fact, state waters. However, the 8th Circuit Court held that the actual status of lake ownership did not affect the outcome of the decision. Therefore, the opinion assumes, for the sake of argument, that the waters were under state sovereign jurisdiction. *See id.* at 821.

Mr. Brown was convicted of hunting in violation of Park Service regulations that forbade the possession of firearms and hunting activity within the perimeters of the park. Brown appealed, arguing that the Property Clause cannot authorize federal land management regulation to apply to state property.

In upholding the conviction, the court ruled that the Property Clause is broad enough to reach beyond territorial limits.[25] Applying this rule to the facts presented in the case, the court stated that congressional power over federal lands includes the authority to regulate activities on non-federal public waters in order to protect wildlife and visitors on the federal park land.[26] The court found

> hunting on the waters in the park could significantly interfere with the use of the park and the purpose for which it was established...[b]ecause duck hunting occurs in close proximity to adjacent lands, [and] there is potential danger of unwarranted intrusion on public lands, injury to park users, and disruption of wildlife migration patterns.[27]

The regulations prohibiting hunting within the perimeter of the park boundaries were valid prescriptions designed to promote the purposes of national parks. These park purposes, the court determined, are contained within the Park Service Organic Act of 1916[28] and extend to all national parks (including Voyagers) to "[C]onserve the scenery and the natural, historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."[29] The court, relying solely on the Property Clause, required no additional statutory authorization from Congress to permit the Park Service to regulate conduct on non-federal property.

The next important case addressing extra-territorial application of the Property Clause also originated in Minnesota's wilderness waters. It dealt with provisions of the Boundary Water Canoe Area Wilderness Act. The act imposed restrictions upon motorized transportation occurring on state and private property within the boundary perimeter of a designated wilderness area.[30] In *Minnesota v. Block*, the state of Minnesota and the National Association of Property Owners brought action to invalidate the statutory provisions which limited motorized boat and snow machine use

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25. *See id.* at 822.
26. *See id.*
27. *Id.*
28. 16 U.S.C § 1 (1994). *See Brown*, 552 F.2d at 822 n. 7.
29. *Brown*, 552 F.2d at 822-823 and n. 7.
30. Act of Oct. 21, 1978, §§ 4, 14-16, 92 Stat. 1649.

on 121,000 acres and 7,000 acres of state and private land respectively. In this instance, federal lands constituted ninety percent of the area contained within the wilderness boundaries. The court upheld the statute ruling that "Congress' power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of the federal lands."[31] Under the Property Clause, Congress possesses the ability to protect its lands against interference with their intended purposes, and that unregulated use of motorized boats and snow machines on private land inholdings would "significantly interfere with the use of the wilderness by canoeists, hikers, and skiers..."[32]

Almost any state activity, even the most traditional of police powers endeavors, fall before the Property Clause if the activity poses a significant impediment to federal land management objectives. In 1986, the National Park Service sought to prevent the broadcast of insecticides by the state of West Virginia on state and private property within the perimeter area of the New River Gorge National River without first seeking an agency permit.[33] Congress established the New River in accordance with criteria mandated by the National Wild and Scenic Rivers Act.[34] Unlike the situation in both *Brown* and *Block*, the federal government, in this case, was the minority landowner within the park perimeter. Of the 63,000 acres encompassed within the designation, less than ten percent (about 6,000 acres) was federal property. The remaining ninety percent of the land was in either private or state ownership. The state asserted that under its general police powers to protect public health, safety, and welfare, the state was empowered to control black fly infestations without first seeking federal permission, especially on those properties to which the federal government held no title.

In rejecting the state's claim, the district court noted that general federal regulations for the park system as a whole forbid the destruction, injury, or removal of wildlife unless otherwise permitted. "[H]owever pesky or annoying" black flies may be to the human population, black flies are wildlife for purposes of the regulation and therefore subject to the ban.[35] Consequently, the court decided that the state could not move forward with a spraying program within the designated perimeter until after the state obtained a federal permit for the activity. The court based its decision on the Property Clause, noting that conduct outside of federally

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31. *See* Minnesota v. Block, 660 F.2d 1240, 1249 (1981).
32. *Id.* at 1251.
33. *See* United States v. Moore, 640 F. Supp. 164 (S.D.W. Va. 1986).
34. West Virginia National Interest River Conservation Act of 1987, 16 U.S.C. §§ 460M-15 (1990).
35. *See Moore*, 640 F. Supp. at 167.

owned lands can be regulated by federal agencies if such conduct threatens the designated purpose of the federal land.[36] Because the designated purpose of national parklands is to protect wildlife from capture, harm, or death, the spraying program would certainly interfere with the management of the New River Gorge Wild River by killing large numbers of black flies. Again, specific statutory authority was not necessary to empower the Park Service to alleviate an external threat posed by state conduct.

Even the most favored of private activities is not free of the extra-territorial reach of the Property Clause. The Ninth Circuit upheld Park Service authority to regulate mining activity on privately owned lands in the colorful case of *U.S. v. Vogler*.[37] Joe Vogler, renowned in the north country of Alaska for his founding of the Alaska Independence Party,[38] owned a number of private mines within the perimeter of Yukon-Charlie Rivers National Preserve. The 2.1 million acre preserve is part of more than 120 million acres set aside as national parklands, wilderness areas, and refuges created by the Alaska National Interest Lands Conservation Act (ANILCA).[39]

Park regulations under ANILCA require miners owning property within federal conservation unit perimeters to file operation plans prior to beginning mineral extraction and the transport of mining equipment across federal land. Mr. Vogler, who resented the mere presence of the U.S. government in Alaska, refused to submit to this permitting process. Instead, he chose to drive his D-8 Caterpillar tractor through the preserve until confronted by park rangers. The rangers ordered him to cease immediately. Vogler peaceably, if reluctantly, complied with the park rangers' demand. He then filed this court action to enjoin the federal mining regulations.

The Ninth Circuit, not surprisingly, ruled against Mr. Vogler. The decision noted that Yukon-Charlie Rivers National Preserve was established under ANILCA to protect the area's natural beauty and ecological value. [40] The court also took notice from expert testimony that Mr. Vogler's activity uprooted trees, scraped vegetation away, and left physical scars upon the landscape that could require up to 100 years to return to their original condition.[41] These access permit requirements, the opinion

36. *See id.* at 166.

37. United States v. Vogler, 859 F.2d 638 (9th Cir. 1988).

38. The Alaska Independence Party seeks a referendum on secession for Alaska from the United States. The party held the office of Governor from 1990 to 1994 under former U.S. Secretary of Interior Walter Hickle.

39. 16 U.S.C. § 3101 (1986).

40. *See Vogler*, 859 F.2d at 641.

41. *See id.* at 640.

reasoned, were based upon the Mining in Parks Act[42] and ANILCA, and protected the park from injury of the kind that would interfere with the purposes for which the park was established. Because these statutes were predicated upon the Property Clause, the regulations are valid. Mr. Vogler could not proceed to cross federal land, nor resume mining operations, until such activities had been properly permitted under the appropriate regulatory process. Disgusted, Vogler refused to continue mining, and, upon his death, was buried in Canada. His will forbade interment in Alaska for as long as the American flag waved over the state.

In another mining case, federal regulatory control over dominant, privately owned, subsurface mineral rights was upheld to protect the federally owned surface estate on a U.S. Forest Service National Grassland in North Dakota.[43] In the *Duncan* case, the Eighth Circuit found that "Congress may regulate conduct occurring on or off federal land which affects federal land."[44] Relying upon the Bankhead-Jones Farm Tenant Act,[45] which established the system of National Grasslands, the court said that the Department of Agriculture is authorized to "make rules as necessary to regulate the use and occupancy of acquired lands and to conserve and utilize such lands."[46] This general statute grants "the Forest Service broad power to regulate Forest System land."[47] While the Forest Service cannot prohibit mineral development of the subsurface, it can require the holders to submit to a permitting process that allows reasonable development of the private interests without harming federal conservation interests on the surface.

Federal ability to reach beyond the confines of public land and regulate activity on adjacent state and private lands has startled many states, particularly in the West, where federal lands are extensive. State fear of the extra-territorial application of the Property Clause may actually induce cooperation between states and the federal government so as to avoid litigation by identifying federal interests early in the planning stage. A successful example of state and federal cooperation in the recognition of extra-territorial interests held by the federal government is found in the Alaska wolf predator control plan promulgated by the Alaska Department of Fish and Game in 1993.[48] The Wolf Management Plan included provisions for the creation of a buffer strip system around federal National

42. 16 U.S.C. § 1907 (1996).
43. *See* Duncan Energy Co. v. U.S. Forest Serv., 50 F.3d 584 (8th Cir. 1995).
44. *Id.* at 589.
45. 7 U.S.C. § 1010 (1994).
46. *See Duncan*, 50 F.3d at 589.
47. *Id.*
48. *See* Alaska Admin. Code tit. 5, § 92.125 (1989), Wolf Management Implementation Plan.

Park lands in which no active predator control efforts would be implemented by the state, even on lands owned by the state or by Native corporations.[49] The state of Alaska voluntarily sought and incorporated federal input in the development of its wolf control plan through the National Park Service, U.S. Fish and Wildlife Service, and the U.S. Bureau of Land Management. Consequently, the federal government made no objection to the program that led to the Alaska Department of Fish and Game trapping wolves on federal lands as well as state lands.[50] Had it not been for the very real possibility of federal intervention under the Property Clause, the Alaska wolf plan would not have accommodated Park interests in wolves.[51]

III. GENERAL RULES FOR THE APPLICATION OF REGULATIONS TO PRIVATE AND STATE PROPERTY UNDER THE FEDERAL PROPERTY CLAUSE

When deciding whether it is appropriate for federal agencies to regulate private and state property to protect federal lands from external threats, several rules must be developed to determine the availability of the Property Clause for extra-territorial application. The rules that may be gleaned from case law can be generalized as relating to three primary subject areas: (1) the location of lands to be regulated in proximity to federal land, (2) the purpose which the regulation is to serve, and (3) the nature of the federal interest to be protected.[52]

A. Location of Lands to be Regulated

Private and state lands subject to regulations under statutes pursuant to the extra-territorial application of the Property Clause must be within the perimeter area of a designated conservation unit or entirely surrounded by federal lands under various management agencies. In every

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49. *See* 43 U.S.C. § 1601-29a (1994). Native Corporations are special creations of the Alaska Native Claims Settlement Act and are subject to state sovereignty, unlike Indian Reservations in the lower 48 states. *See* Native Village of Venetie Tribal Government v. Alaska, 522 U.S. 520 (1998) (holding that Native corporations created by Alaska Native Claims Settlement Act are not Indian Country).

50. While no litigation ensued to attempt to stop the killing of wolves in Alaska, a political campaign led by animal welfare and rights groups succeeded in convincing Alaska Governor Tony Knowles to terminate the predator control program less than two years after it was begun.

51. The author served as an assistant to Chris Smith, Director of Alaska Department of Fish and Game, Division of Wildlife Conservation-Interior Region.

52. *See* Harry Bader, *Potential Legal Standards for Resolving the R.S.2477 Right-of-Way Crisis*, 11 PACE ENVTL. L. REV. 485, 505-07 (1994).

case cited for the application of the Clause in the previous discussion, the lands subject to regulations were either within a particular unit's perimeter,[53] surrounded by federal land,[54] or located beneath a federal surface estate.[55] It is important to limit the application of the Clause in this fashion to ensure a close nexus between the affected non-federal land and the protected federal property. Without a clear and distinct demarcation, courts would be drawn into a technically difficult process of fact finding to determine the appropriate "zone of impact" for upholding the reach of the Clause.

This determination is especially problematic because scientific disagreement abounds concerning zones of impact, and the nature of impacts, for a variety of anthropogenic disturbances ranging from footpaths,[56] to roads,[57] to timber harvesting,[58] to global warming.[59] Indeed, due to the complexities of ecological interconnectedness and the lack of definitiveness within the environmental field sciences, the determination of such a zone would probably be impossible. The definitiveness of the "inholding rule" provides a major advantage over a statutory buffer approach because statutes would be unable to accurately define the proper boundaries for an infinite number of potential anthropogenic disturbances. Under the "inholders rule" a property owner within federal unit perimeters falls subject to potential regulation automatically.

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53. *See* United States v. Vogler, 859 F.2d 638, 639 (9th Cir. 1988); United States v. Moore, 640 F. Supp. 164, 165 (S.D.W. Va. 1986); United States v. Arbo, 691 F.2d 862, 863 (9th Cir. 1982); Minnesota v. Block, 660 F.2d 1240, 1244 (8th Cir. 1981); United States v. Lindsey, 595 F.2d 5, 6 (9th Cir. 1979); United States v. Brown, 552 F.2d 817, 817 (8th Cir. 1977).

54. *See* Stupack-Thrall v. United States, 70 F.3d 881, 881 (6th Cir. 1995).

55. *See* Duncan Energy Co. v. U.S. Forest Serv., 50 F.3d 584, 584 (8th Cir. 1995).

56. For descriptions of different scientific findings concerning trail impacts and the zone of disturbance, see Harry Bader et. al., U.S. Fish & Wildlife Serv. and the University of Alaska-Fairbanks, *Impacts of Recreational Trail Development on a Subarctic Alpine Tundra of Central Alaska, in* PROCEEDINGS: RECREATION IMPACTS IN ALASKAN ECOSYSTEMS, Apr. 15-17, 1997; David Cole, Abstract, *Experimental Trampling of Vegetation: Relationship between Trampling Intensity and Vegetation Response*, 32 J. APPLIED ECOLOGY 203 (1995).

57. *See* F. Stuart Chapin III & Gaius Shaver, *Changes in Soil Properties and Vegetation Following Disturbance of Alaskan Arctic Tundra*, 18 J. APPLIED ECOLOGY 605 (1981); Gary Ahlstrand & Charles Racine, *Response of an Alaskan Shrub-Tussock Community to Selected All Terrain Vehicle Use*, 25 ARCTIC & ALPINE RESEARCH 142 (1993).

58. *See* W. MEEHAN, FISHERIES SOC'Y PUBLICATION 19, INFLUENCES OF FOREST AND RANGELAND MANAGEMENT ON SALMONID FISHES AND THEIR HABITATS (1991); W. Platts & R. Nelson, *Fluctuations in Trout Populations and Their Implications for Land-Use Evaluation*, 8 NORTH AM. J. FISHERIES MGMT. 333 (1988); Ivars Steinblums et. al, *Designing Stable Buffer Strips for Stream Protection*, J. FORESTRY 49 (1984).

59. *See* Richard Lindzen, *Some Coolness Concerning Global Warming*, 71(3) BULLETIN AM. METEOROLOGICAL SOC'Y 288 (1990); W. Reifsnyder, *A Skeptical Enquirer's View of the Carbon Dioxide/Climate Controversy*, 47 AGRIC. & FOREST METEOROLOGY 349 (1989).

Another advantage of the "inholding rule" is that it gives reasonable notice to potentially regulated parties that the application of agency rules may be extended extra-territorially towards them. As an inholder, one would rationally expect possible federal regulation; whereas a statutorily defined buffer strip may surprise a good number of individuals who invested in property under the belief that they were sufficiently distant from the concerned parkland.[60] The "inholder" rule places an absolute limit on the extra-territorial extension of the property clause.[61]

B. Objective Which the Regulations Serve

Extra-territorial application of the Property Clause requires that the aim of the agency be to prevent significant interference with the purposes for which the federal land is managed.[62] This limitation on the extension of the Property Clause can be thought of as the "significant interference" rule.

Significant interference is defined as those activities that frustrate a federal agency's ability to realize its management purposes on the affected lands. However, simply making federal tasks more difficult or adding to administrative costs is not significant. Similarly, frustrating a preferred management technique, when other effective means of achieving a federal purpose are also available, does not constitute a significant interference. Case law sheds some gray light as to what types of situations may constitute "significant interference."

In *U.S. v. Brown*, the court ruled that waterfowl hunting upon a lake within a national park posed a direct danger to the safety of visitors and could conceivably alter wildlife migration patterns. These potential consequences associated with hunting significantly interfered with the purpose of the park, which was to conserve wildlife unimpaired and provide for the human enjoyment of the parklands[63] because firearm discharges disturbed wildlife and put visitors in fear.

Like wildlife viewing, wilderness enjoyment too is an important purpose for federal land management. In *Minnesota v. Block*, the Forest

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60. *See, e.g.*, Lucas v. South Carolina Coastal Commission 505 U.S. 1003 (1992) (discussing protection of investment-backed interests).

61. Otherwise, one might argue that the Park Service, in order to prevent air pollution damage to Joshua Tree National Park, might regulate factories in Los Angeles more than 150 miles distant. While, surely, air pollution should be controlled, it should not be the Park Service that sets limits on the more than three million property owners of Los Angeles County.

62. *See*, United States v. Brown, 552 F.2d 817, 822 (8th Cir. 1977); Minnesota v. Block, 660 F.2d 1240, 1249 (8th Cir. 1981); United States v. Moore, 640 F. Supp. 164, 166 (S.D.W. Va. 1986).

63. *See Brown*, 552 F.2d at 822.

Service was to maintain a wilderness area. Wilderness areas are managed to be untrammeled by humans and maintained in primeval character with a substantially unnoticeable human imprint in order to provide outstanding opportunities for solitude.[64] The unrestricted drone of motorboats and snow machines would prevent these wilderness purposes from being realized.[65]

Maintenance of ecological integrity and natural populations of wildlife is also an important purpose of national parks.[66] Therefore, the destruction of black flies within a designated national river way, which was a unit of the national park system, significantly interfered with the park goals to conserve wildlife populations.[67] The black flies in *U.S. v. Moore* are to be treated no differently than the ducks in *U.S. v. Brown*, despite the lack of mega fauna appeal for these rather pesky critters.

The "significant interference" rule serves as another rational limitation to the extra-territorial application of the Property Clause. Activity on non-federal lands whose effects are a mere inconvenience to the managing federal agency cannot be regulated by agency rules under the Property Clause. To allow a more lenient definition would invite the possibility of agency harassment against inholders, an activity that may occasionally occur.[68]

C. The Nature of the Federal Purposes

The federal purpose that extra-territorial application of the Property Clause is to protect must be one that is fundamental to the management of the park unit when viewed in its entirety by considering existing statutory and regulatory mandates for both the unit and the agency. Thus, wildlife conservation, wilderness solitude, and preservation of scenic quality are all fundamental to the mission of national parklands.[69] In order to meet these criteria, a federal agency must directly link regulations to language contained in a relevant statute, and cannot create

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64. *See* 16 U.S.C. § 1131(c) (1994).

65. *See Block*, 660 F.2d at 1251.

66. *See* Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445, 1452 (9th Cir. 1996); Michigan United Conservation Clubs v. Lujan, 949 F.2d 202, 206-207 (6th Cir. 1991).

67. *See Moore*, 640 F. Supp. at 167.

68. A federal district court recently found that conduct by the National Park Service towards an inholding within Katmai National Park in Alaska, was tantamount to harassment. See Heirs of Palakia Melgenak v. United States, No. A95-0439 CV (D. Alaska 1997).

69. *See generally, Bicycle Trails Council of Marin*, 82 F.3d 1445; Wilkins v. Department of the Interior, 995 F.2d 850 (8th Cir. 1993); National Rifle Association v. Potter, 628 F. Supp. 903 (D.D.C. 1986).

"fundamental" federal purposes by fiat through the administrative rules process alone to deal with perceived external threats.[70]

The three rules (proximity to federal land, significance of interference, and federal management purpose), when taken together, create a consistent doctrine that clearly demarcates the limits of the extra-territorial reach of the Property Clause while allowing sufficient flexibility to accommodate application to a host of problems without requiring troubling modifications or case specific exceptions. Of particular importance, the three rules lend predictability to the types of situations that the Clause will reach and the probable outcomes of those applications. This air of predictability is an essential element because it allows a potential litigant to anticipate whether or not his/her conduct will invoke the Clause and the likely consequences. Therefore, an individual can conform behavior in advance to prevent costly surprises and reduce disappointment from expectations.

Each of the three rules serves as a barrier to the extra-territorial reach of the Property Clause. If the facts do not meet the strictures of any one of the rules, then agency regulatory action under the Clause, to control conduct on non-federal lands, is not available to the national government. In order for the Property Clause to bestow its enormous extra-territorial power, each rule must be satisfied. While protecting private and state interests on non-federal lands, the doctrine also provides the federal government with a potent tool to guard important environmental values on federal lands from external threats without requiring additional and complicated statutory authorization. Federal agencies can regulate and stop behavior on non-federal land, which poses real potential harm to fundamental uses of federal land. As *Camfield*[71] long ago pointed out, no one has the validly held expectation to interfere with the purposes to which federal lands are put.

IV. APPLICATION OF PROPERTY CLAUSE RULES TO THE NEW WORLD MINE HYPOTHETICAL

Using the facts as presented in Mr. Dykstra's Comment,[72] it appears that Yellowstone National Park can be adequately protected without special buffer legislation. Failure of agencies to respond appropri-

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70. Craig van Rooyen, Going the Extra Mile for the Forty Mile: A Proposal for Extra-Territorial Regulation of Mining in Alaska's Longest National Wild and Scenic River (1994) (unpublished manuscript, on file at the Dep't of Nat. Resources Mgmt., University of Alaska-Fairbanks).

71. *See* Camfield v United States, 167 U.S. 518 (1897).

72. This article makes no attempt to obtain independent verification of factual information presented in the Comment.

ately with the extra-territorial reach of the Property Clause, it would seem, is more a matter of political consideration than a lack of legal authority. Buffer strip legislation would provide no additional relief from these same political pressures unless such legislation contained affirmative duties. The wisdom of congressionally enacted affirmative prescriptions as to what constitutes harm to individual national parks is questionable. Such efforts would intrude into the area of expertise possessed by the Park Service and would be well outside the scope of congressional competency.

According to the Comment, in a quote attributed to a National Park Service employee, the New World gold mine, owned by Noranda, Inc., poses a direct and grievous threat to Yellowstone National Park.[73] The mine is located two and a half miles from the park's nearest border, but lies entirely within the perimeters of the designated Gallatin National Forest boundaries. The threats cited include the leakage of sulfuric acid from mine tailings into the local watershed, the translocation of underground wastes into Yellowstone National Park, and the destruction of wetlands valuable to wildlife.[74] The Comment notes that all mine activities are scheduled to occur on private lands.

The fact pattern as presented in the Comment meets the criteria of applicability under rule one, the "inholding" standard. While the mine is located outside the perimeter of the national park, it does lie entirely within lands owned and managed by the National Forest Service. It is important to recognize that the inholding rule requires only that the subject nonfederal land lie within the perimeter area of a federally owned/managed unit, not that the non-federal land must lie within the particular unit subject to the threat.[75] New World Mine, under this definition, lies within the perimeter area of federally owned and managed lands.

Resolution of the question in rule two, the "significant interference" standard, hinges upon a technical debate as to whether the design of the mine's operation would indeed precipitate the parade of "terribles" previously listed. For purposes of argument, let us assume that the design is indeed inadequate and that park surface and ground waters would become contaminated. That moves us to the question in rule three, the "fundamental purpose" standard.

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73. *See* Dykstra, supra note 1, at 302.

74. *See id.* at 302-03.

75. The implication of this recognition is one that would infer that nearly all non-federal land in states such as Nevada, (which are close to 83% federally owned and managed) would meet the requirements of Rule One. But as was mentioned, this, in and of itself, would be insufficient to invoke the valid exercise of the extra-territorial reach of the Property Clause. Rules Two and Three must also be met. For information on the extent of federal land holdings, see U.S. BUREAU OF LAND MANAGEMENT, 178 PUBLIC LAND STATISTICS 1993 (1994).

In rule three, the issue is whether the federal purpose that is significantly interfered with is a fundamental one. Not all uses of federal lands are fundamental to their management purposes. Many uses may simply be administrative preferences as part of a current policy. To decide whether a purpose is fundamental when national parklands are at issue, one must turn to specific establishing legislation for that particular park unit. One can also turn to the more general National Park Service Organic Act, which controls the management of the entire national park system.[76] Yellowstone National Park is governed by the Organic Act. The act mandates that the Park Service is to "promote and regulate the use of national parks by such means and measures as conform to their fundamental purpose which is to conserve the scenery and natural and historic objects and the wildlife therein..."[77] External activity that significantly interferes with the conservation of wildlife and natural features of Yellowstone National Park, is clearly within the legitimate reach of the Property Clause, even when occurring on non-federal land. Contamination of surface and subsurface waters, which imperils wildlife or hydrologic features such as hot springs and geysers, certainly qualifies as interfering with the park's fundamental purposes, as articulated in both establishing legislation and the Organic Act.

One could also apply the same rules and find that the National Forest Service, too, possesses the authority to regulate the mine. The Forest Service has a duty to protect the Absoroka Wilderness Area, which lies even closer to the mine than does Yellowstone National Park. Indeed, the effects of the mine (dust, noise, and vegetative removal by large excavation equipment and trucks) are closely analogous to the significant interference with wilderness management purposes posed by motorized boats and snow machines discussed in *Minnesota v. Block*. If noise from snow machines is the proper subject of regulation to protect wilderness values, then protection from the noise and pollution of a huge industrial facility certainly is. The drone of an occasional motor boat is trivial compared to the roar of today's strip mines and the heavy equipment they require.

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76. Unless specific legislation articulates a clear intention to the contrary, all national park lands are governed by the criteria established in the Organic Act. *See* National Rifle Association v. Potter, 628 F. Supp. 903, 912 (D.D.C. 1986); Robert B. Keiter, *Preserving Nature in the National Parks: Law, Policy and Science in a Dynamic Environment*, 74 DENVER UNIV. L. REV. 649, 675-77 (1997).

77. National Rifle Association, 628 F. Supp. at 909.

V. CONCLUSION

The three-rule approach to the Property Clause outlined here is superior to buffer strip legislation. First, this approach immediately recognizes the power of the federal government to protect sensitive environmental values on public lands under existing statutory authority and contemporary constitutional interpretation without having to await additional congressional legislation.

Second, this is a more focused approach. It requires the federal government to affirmatively demonstrate a concrete harm from identifiable conduct on non-federal land that would significantly interfere with fundamental federal purposes. Thus, this approach prevents agencies from attempting to regulate conduct on non-federal land that is merely an irritant or runs counter to an administrative policy currently in vogue.

Third, this approach avoids the technical quagmire of attempting to predict an infinite number of potential and unforeseeable activities that may have deleterious consequences. Also, buffer legislation would require delineating various boundary sizes and shapes for each potential disturbance, an equally daunting task.

Fourth, this approach provides an orderly set of rules which allow states and individuals the opportunity to anticipate and predict the types of behavior which will invoke regulation pursuant to the extra-territorial reach of the Property Clause. This ultimately will reduce potential litigation by allowing parties to conform their behavior in a fashion that avoids conflict.

The most significant drawbacks to a property clause approach in protecting federal lands from external threats is that it relies both upon agency discretion to create and enforce rules with extra-territorial reach, and it requires an aggressive litigation strategy on the part of the government. Agencies are generally reticent to commit the former, while government may lack the necessary funds to ensure the latter.

The Property Clause approach commits the decision as to what significantly interferes with park management to the Park Service. This allows the agency with the most expertise to prioritize both its research and enforcement budgets in the most effective and flexible manner. Buffer strip legislation would restrict agency discretion and reduce management flexibility without guaranteeing the necessary administrative resources to meet additional mandates.

While problems with relying upon the Property Clause and agency initiative are indeed major, they are not remedied by buffer strip legislation, either. Under a buffer strip approach, agencies must promulgate regulations implementing the statute. As has been described, this proactive task is even more complex and difficult than unit by unit, case by case regulatory management. Second, regulations implementing buffer

strips are only as effective as the resolve to enforce them. Again, this depends upon the resolve of both agency regulators and government litigators.

Buffer strip legislation is a well-intentioned attempt to protect our nation's public land natural heritage from unwise activities on neighboring non-federal lands. However, such legislation confers little advantage over reliance upon agency regulatory power now available, while such legislation introduces considerably more burdensome complexities to the management milieu.

It is the purpose of this article to note that agencies already possess the necessary power, and have exercised it, to protect parklands from external threats. That an agency may elect not to do so in a particular circumstance, such as the New World Mine, is an indication that perhaps the activity does not significantly jeopardize federal management purposes within a national park. Or, it may indicate that the agency has opted to work with Congress to fashion a specific and limited statutory remedy, which does not encumber the entire national park system.