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# THE NORTHERN ROCKIES ECOSYSTEM PROTECTION ACT: IN SUPPORT OF ENACTMENT

## I. INTRODUCTION

The northern Rocky Mountains (Northern Rockies) comprise the wildest region in the contiguous forty-eight states and have been called "America's Serengeti."<sup>1</sup> More than 300 species of animals, including grizzly bears, lynx, gray wolves, woodland caribou, and salmon, call the area home.<sup>2</sup> The Northern Rockies contain the United States' last vestiges of complete biodiversity.<sup>3</sup> Congress recently recognized that this multi-state region is a unique area of land with characteristics that give it high value as undeveloped wilderness.<sup>4</sup> These characteristics include diverse wildlife living in vast untouched expanses of land, intact ecosystems, and abundant water resources.<sup>5</sup> While an extremely valuable resource, this area is in serious danger.<sup>6</sup> Unwise development decisions already have damaged some of the land.<sup>7</sup> Approximately eighteen local species of animals are endangered and face a threat of extinction, and an additional forty-seven species teeter on the brink of endangerment.<sup>8</sup>

This threat to biodiversity results from a combination of factors, including outdated and unworkable management policies, and political pressure from special interest groups advocating continued logging and development in the area.<sup>9</sup> The value of this land for timber harvesting and other development is actually less than its value if left completely undeveloped.<sup>10</sup> Thus, unwise development decisions in the Northern Rockies perpetuate the destruction of the region's vast, but shrinking, ecosystems, and decrease the area's overall value. Federal land management agencies have made many of these unwise

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<sup>1</sup> *Northern Rockies Ecosystem Protection Act, 1993: Hearings on H.R. 2638 Before the Subcomm. on Specialty Crops and Natural Resources of the House Comm. on Agriculture*, 103d Cong., 2d Sess. (1994) [hereinafter *Hearings I*] (statement of Mike Bader, Alliance for the Wild Rockies).

<sup>2</sup> *Id.*

<sup>3</sup> See *Hearings I*, *supra* note 1 (statement of Dr. Lee Metzgar, Professor of Biology, University of Montana). Biodiversity is defined as "the full range of variety and variability within and among living organisms and ecological complexes in which they occur." H.R. 585, 102d Cong., 1st Sess. § 3(1) (1991).

<sup>4</sup> H.R. 852, 104th Cong., 1st Sess. § 2(a) (1995).

<sup>5</sup> *Id.*

<sup>6</sup> *Hearings I*, *supra* note 1 (statement of Mike Bader).

<sup>7</sup> H.R. 852, *supra* note 4, § 2(a)(9).

<sup>8</sup> *Hearings I*, *supra* note 1 (statement of Mike Bader); see also *Endangered Species Act of 1973*, 16 U.S.C. §§ 1531-1543 (1994).

<sup>9</sup> See *Hearings I*, *supra* note 1 (statement of Mike Bader); see also *Endangered Species Act of 1973*.

<sup>10</sup> H.R. 852, *supra* note 4, § 2(a)(7).

decisions. These agencies include the Bureau of Land Management, United States Forest Service, National Park Service, and U.S. Fish and Wildlife Service, which all work under different congressional mandates to manage separate areas of federal public land.<sup>11</sup>

Based on these and other findings, House Representative Carolyn Maloney introduced the Northern Rockies Ecosystem Protection Act (NREPA or "the Act") in 1993,<sup>12</sup> and reintroduced the Act in early 1995.<sup>13</sup> NREPA presently is pending in Congress. The Act would attempt to avoid destruction of this wild land.<sup>14</sup> NREPA seeks to take advantage of "the conservation wave of the future," ecosystem management.<sup>15</sup> Such an approach focuses on managing entire ecosystems<sup>16</sup> and their resources as a whole, as opposed to present management policies that treat each resource separately.<sup>17</sup> NREPA seeks to protect five separate ecosystems in the Northern Rockies region from any further development and potential destruction, and to preserve the natural character of the land.<sup>18</sup> The Act also would connect the separate ecosystems with "corridors" of similarly protected land.<sup>19</sup> Additionally, NREPA would provide for interagency cooperation under a single statutory mandate for management of the entire region.<sup>20</sup>

NREPA is also wide in scope, affecting a sixteen-million acre area covering parts of Montana, Wyoming, Idaho, Washington, and Oregon.<sup>21</sup> The region contains some of the most popular wild lands in the United States, including

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<sup>11</sup> See *id.*; see also Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1988) (federal public land management policies and procedures); 16 U.S.C. §§ 1-209 (1994) (National Park management policies and procedures); 16 U.S.C. §§ 471-545a (1994) (National Forest management policies and procedures).

<sup>12</sup> H.R. 2638, 103d Cong., 1st Sess. (1993).

<sup>13</sup> See H.R. 852, *supra* note 4. The reintroduced 1995 Act is substantially similar to the original 1993 version. All references to the text of NREPA are to the 1995 version of the Act. Cites to committee hearings on the Act, however, refer to action taken on NREPA when it was first introduced in 1993, as Congress just recently has sent the reintroduced Act to congressional committees.

<sup>14</sup> *Id.* § 2.

<sup>15</sup> *Hearings I, supra* note 1 (statement of John J. Craighead, Professor Emeritus of Zoology and Forestry, University of Montana; founder, Wildlife-Wildlands Institute).

<sup>16</sup> An ecosystem is defined as "the physical environment and all the organisms in a given area, together with the webwork of interactions of those organisms with that physical environment and with each other." PAUL R. EHRlich, *THE MACHINERY OF NATURE* 239 (1986).

<sup>17</sup> Robert B. Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U. COLO. L. REV. 293, 295 (1994). For example, agencies employ different management strategies for timber and endangered species. *Id.*

<sup>18</sup> See H.R. 852, *supra* note 4, § 3.

<sup>19</sup> *Id.* § 4.

<sup>20</sup> *Id.*

<sup>21</sup> Bruce Hamilton, *An Enduring Wilderness? Wilderness Protection*, SIERRA, Spring 1994, at 46.

Yellowstone National Park in Wyoming and Glacier National Park in Montana.<sup>23</sup> Due to its visionary proportions, NREPA has a fair number of opponents.<sup>23</sup> These opponents include the Department of Agriculture and the Department of Interior, which claim that the Act attempts to bypass processes that existing laws mandate.<sup>24</sup> The United States Forest Service ("Forest Service") asserts that NREPA policies and procedures would upset the balance between preservation and development that existing land management law and policy strive to achieve.<sup>25</sup>

This Note will illustrate why Congress should enact NREPA. Section II discusses the laws that currently govern land management agencies. Section III argues that these agencies themselves upset any potential balance under existing law by consistently abdicating their statutory mandates and regularly violating various other environmental laws. Section IV sets out the proposed law and policy under NREPA. Section V suggests that far from attempting to bypass present federal land management law, NREPA actually is consistent with present law. Section VI addresses economic concerns about the Act, and illustrates why it would be in the region's best economic interest if Congress enacted NREPA into law. Finally, Section VII discusses the importance of maintaining any existing remnants of the nation's biodiversity.

## II. CURRENT MANAGEMENT OF THE NORTHERN ROCKIES

To explore the controversy surrounding NREPA and fully appreciate the need for its enactment, it is important to understand the federal laws that currently govern land management decisions in the Northern Rockies. The federal land that NREPA seeks to protect encompasses areas under the jurisdiction of various federal agencies including the United States Forest Service, the National Park Service, and the Bureau of Land Management.<sup>26</sup> These agencies each operate under a different congressional mandate to manage separate areas of federal land.<sup>27</sup>

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<sup>23</sup> H.R. 852, *supra* note 4.

<sup>23</sup> See *Northern Rockies Ecosystem Protection Act, 1993: Hearings on H.R. 2638 Before the Subcomm. on Environment and Natural Resources of the House Comm. on Merchant Marine and Fisheries and Subcomm. on Specialty Crops and Natural Resources of the House Comm. on Agriculture*, 103d Cong., 2d Sess. (1994) [hereinafter *Hearings II*] (statements of Mark Reimers, Deputy Chief, Forest Service and James W. Stewart, Assistant Director, Department of Interior).

<sup>24</sup> *Id.* The Department of Agriculture administers the United States Forest Service, while the Department of the Interior administers both the National Park Service and the Bureau of Land Management. See 16 U.S.C. § 472 (1994); 16 U.S.C. §§ 1-2 (1994); 43 U.S.C. §§ 1701(a)(8), 1731 (1988).

<sup>25</sup> *Hearings II, supra* note 23 (statement of Mark Reimers, Deputy Chief, Forest Service).

<sup>26</sup> See 16 U.S.C. §§ 1-209; 16 U.S.C. §§ 471-545a; Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784.

<sup>27</sup> See 16 U.S.C. §§ 1-209; 16 U.S.C. §§ 471-545a; Federal Land Policy and Man-

### A. Federal Land Management Agencies and Their Mandates

As part of the Department of Agriculture, the Forest Service operates under the authority of the Secretary of Agriculture to manage the national forests of the United States.<sup>28</sup> In 1891, Congress created national forests to provide a "continuous supply of timber for the use and necessities of citizens of the United States."<sup>29</sup> The Forest Service statutory mandate developed with this history in mind, as well as the idea of its first manager, Gifford Pinchot, that federal land managers should strive to ensure "the greatest good [for] the greatest number in the long run."<sup>30</sup> Thus, the Forest Service currently manages the land under its jurisdiction based on principles of multiple use,<sup>31</sup> which dictate that all resources are to be utilized in a combination that will "best meet the needs of the American people" without hurting the productivity of the land.<sup>32</sup> The Secretary of Agriculture may allow various uses including outdoor recreation, range timber and watershed interests, and wildlife and fish preservation.<sup>33</sup>

Under the National Forest Management Act of 1976 ("Forest Management Act"),<sup>34</sup> the Forest Service must develop specific forest management plans that conform to guidelines set out in that act.<sup>35</sup> The statute directs the agency to consider both economic and environmental aspects of resource management when developing and implementing these plans.<sup>36</sup> Additionally, the Forest Service must provide for "diversity of plant and animal communities" when adopting a particular forest management plan.<sup>37</sup> This represents the only statutory reference to biological diversity in all of the current land management

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agement Act of 1976.

<sup>28</sup> See 16 U.S.C. § 553 (1994).

<sup>29</sup> 16 U.S.C. § 475.

<sup>30</sup> GIFFORD PINCHOT, *BREAKING NEW GROUND* 261 (1947). Gifford Pinchot was head of the Division of Forestry in the Department of Agriculture in 1898. Scott W. Hardt, *Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship*, 18 HARV. ENVTL. L. REV. 345, 355 (1994). At that time National Forests were known as Forest Reserves, which the Department of the Interior managed. *Id.* at 352-53. Pinchot campaigned President Roosevelt to turn over control of the Forest Reserves to the Department of Agriculture, which he did in 1905. *Id.* at 355. Pinchot then opened the Reserves to mining, timber harvesting, and grazing, and managed the land based on principles we now call multiple use and sustained yield. *Id.* at 356. See *infra* text accompanying note 31. Sustained yield involves controlling the rate at which resources are exploited to insure that they will exist for future use. See 16 U.S.C. § 531 (1994).

<sup>31</sup> 16 U.S.C. § 529 (1994).

<sup>32</sup> 16 U.S.C. § 531(a); 36 C.F.R. § 219.3 (1994).

<sup>33</sup> 16 U.S.C. § 528 (1994).

<sup>34</sup> 16 U.S.C. §§ 1600-1687 (1994).

<sup>35</sup> *Id.* § 1604.

<sup>36</sup> See *id.* § 1604(g).

<sup>37</sup> 36 C.F.R. §§ 219.26, 219.27(5) (1994); 16 U.S.C. § 1604(g).

laws and regulations,<sup>38</sup> however, such a reference should place environmental preservation towards the top of Forest Service priorities and goals.

The National Park Service ("Park Service") has jurisdiction over the national parks of the United States as part of the Department of Interior.<sup>39</sup> The Park Service's purpose is to conserve the scenery, natural and historic objects, and wildlife in the parks.<sup>40</sup> Further, its congressional mandate directs the Park Service to manage the parks in a way that will "leave them unimpaired for the enjoyment of future generations."<sup>41</sup> The Park Service's purposes and directives stem from a recognition that the areas of land within national parks are special to the American people, who cherish their environmental quality and national character.<sup>42</sup> National Park Service management decisions must accord with this recognition.<sup>43</sup> Thus, the range of possible uses for national park land is limited much more than that of national forest land.<sup>44</sup>

The Bureau of Land Management (BLM), a branch of the Department of Interior, administers all other federal public lands.<sup>45</sup> The BLM must base management of its land on principles of multiple use, similar to national forest land.<sup>46</sup> Congress also has provided that "where appropriate," the BLM must "preserve and protect certain public lands in their natural condition."<sup>47</sup>

Congress has made environmental quality a BLM priority. The BLM must manage its land in such a way as to "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values."<sup>48</sup> Further, the BLM must give priority to the designation and protection of areas of critical environmental concern.<sup>49</sup>

#### B. *Other Statutory Restrictions on Federal Land Management Agencies*

In formulating land management plans, each land management agency must consider several statutes in addition to those mentioned above. These include the Wilderness Act of 1964<sup>50</sup> and the Endangered Species Act of

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<sup>38</sup> Keiter, *supra* note 17, at 310.

<sup>39</sup> 16 U.S.C. § 1.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* § 1a-1.

<sup>43</sup> *Id.*

<sup>44</sup> See generally 16 U.S.C. § 3.

<sup>45</sup> Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701(a)(8), 1702(e), 1731.

<sup>46</sup> *Id.* §§ 1701(a)(7), 1732. See *supra* text accompanying notes 30-31.

<sup>47</sup> 43 U.S.C. § 1701(a)(8).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* § 1701(c)(3). Critical environmental concern is defined as "areas within the public lands where special management attention is required . . . to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes." *Id.* § 1702(a).

<sup>50</sup> 16 U.S.C. §§ 1131-1136 (1994).

1973.<sup>51</sup> Both statutes limit the scope of permissible uses of certain areas of federal land, and curb the agencies' decision-making discretion in different ways.

In 1964, Congress sought to secure the benefits of wilderness as an everlasting resource for both present and future generations when it declared that "[w]ilderness . . . is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain."<sup>52</sup> This statutory definition of wilderness was central to the establishment of the National Wilderness Preservation System ("Wilderness Preservation System") through the Wilderness Act of 1964.<sup>53</sup> The Wilderness Preservation System is simply the set of all pockets of federal land that the Wilderness Act designates for protection. Areas of federal land which retain "primeval character and influence" are eligible for inclusion in the Wilderness Preservation System and subsequent designation as a Wilderness area.<sup>54</sup>

Once admitted into the Wilderness Preservation System by Congress, a so-called "designated Wilderness area" (Wilderness) is managed by the same federal agency that regulated it before its designation.<sup>55</sup> That agency must manage the Wilderness so as to protect and preserve its wild character and natural conditions, and leave it unimpaired for future use and enjoyment.<sup>56</sup> To further this policy, a Wilderness area may not permit commercial enterprises, roads, cars, motorboats or other mechanical transports, airplane landings, or any manmade structures within its boundaries.<sup>57</sup>

The Wilderness Act significantly restricts the actions that the land management agencies can take on Wilderness land.<sup>58</sup> Congress intended the purposes specified in the Wilderness Act to be primary, rather than secondary to any other concerns affecting the Wilderness land.<sup>59</sup> To uphold this congressional intent, courts have held that when a conflict arises between maintaining the primitive character of the land<sup>60</sup> and any other use, the policies of the Wilderness Act must supersede all others.<sup>61</sup> This priority restricts logging and other resource extraction. Thus, it is fair to say that the Wilderness Act significantly

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<sup>51</sup> 16 U.S.C. §§ 1531-1543 (1994).

<sup>52</sup> 16 U.S.C. § 1131(c).

<sup>53</sup> *Id.* §§ 1131-1136.

<sup>54</sup> *See id.* § 1131(c).

<sup>55</sup> *Id.* § 1131(b).

<sup>56</sup> *Id.* § 1131(a).

<sup>57</sup> *Id.* § 1133(c).

<sup>58</sup> *See id.*

<sup>59</sup> *Sierra Club v. Block*, 622 F. Supp. 842 (D. Colo. 1985).

<sup>60</sup> Maintaining the primitive character of the land is arguably the primary purpose of the Wilderness Act.

<sup>61</sup> *Minnesota Pub. Interest Research Group v. Butz*, 401 F. Supp. 1276 (D. Minn. 1975), *rev'd on other grounds*, 541 F.2d 1292 (8th Cir. 1976), *stay denied*, 429 U.S. 935 (1976), *cert. denied*, 430 U.S. 922 (1977).

limits the decision-making discretion of federal land management agencies.

The Endangered Species Act of 1973 ("Endangered Species Act" similarly restricts the administrating agency's discretion.<sup>62</sup> In passing this act, Congress declared a need to preserve biodiversity not only for aesthetic, but for scientific purposes as well.<sup>63</sup> It recognized that many animal species threatened with extinction perform important biological services within their native environments, that help maintain a balance of natural ecological conditions.<sup>64</sup>

Section 4 of the Endangered Species Act sets up requirements for identifying and listing species as endangered or threatened, and for establishing critical habitat<sup>65</sup> designations to help protect these species.<sup>66</sup> Section 9 limits how anyone, whether a public entity or private citizen, may affect an endangered species.<sup>67</sup> This includes a prohibition against the taking of any endangered animal and the removal or destruction of any plant listed as endangered.<sup>68</sup>

The Endangered Species Act narrows the discretion of the federal land management agencies by placing restraints on all actions that may interfere with endangered and threatened species.<sup>69</sup> Section 7 requires that any action taken by an agency must not jeopardize the continued existence of any endangered or threatened species, or modify or destroy any critical habitat.<sup>70</sup> The Supreme Court has determined that the Endangered Species Act must be read as a strict substantive statute.<sup>71</sup> Thus, agencies should not attempt to find a balance between economic and environmental concerns. Instead, the agencies

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<sup>62</sup> See Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1994).

<sup>63</sup> S. REP. NO. 307, 93d Cong., 1st Sess. 3 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2990.

<sup>64</sup> *Id.*

<sup>65</sup> "Critical habitat" is defined as a block of land that must be given special consideration and protection if physical or biological characteristics of the land are essential to the preservation of any endangered or threatened species. See 16 U.S.C. § 1532(5)(A).

<sup>66</sup> 16 U.S.C. § 1533. This provision is probably a response to Congressional recognition that a major cause of extinction of animal species is the destruction of their natural habitat. S. REP. NO. 307, *supra* note 63, at 3.

<sup>67</sup> 16 U.S.C. § 1538.

<sup>68</sup> *Id.* §§ 1538(a)(1)(B), (2)(B). The Endangered Species Act defines a taking very broadly, as it includes any "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or any attempt to engage in any such conduct." *Id.* § 1532(19). The Supreme Court recently upheld the Secretary of the Interior's very broad definition of harm, which prohibits anyone from modifying or degrading an endangered species' habitat for any reason. *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407 (1995).

<sup>69</sup> See *Hardt*, *supra* note 30, at 382; see also 16 U.S.C. §§ 1531-1543.

<sup>70</sup> 16 U.S.C. § 1536(a). Agencies may be granted an exemption from this provision by a special committee, often referred to as the "god-squad," but it may only be granted in the most extraordinary circumstances. *Id.* §§ 1536(a)(2), (h). The committee has yet to grant one of these exemptions.

<sup>71</sup> *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978).



must consider the endangered species the top priority when land management agencies want to take action that could affect them.<sup>72</sup> The directives in the Endangered Species Act and the Wilderness Act thus serve to restrict agencies' decision-making capacity in many instances.

### III. PROBLEMS IN THE NORTHERN ROCKIES WITH EXISTING STATUTORY SCHEMES

While this giant web of management mandates, regulations and policies provides a good deal of discretion for agencies in charge of federal land, it has resulted in fragmented management decisions by those agencies with no cohesive strategies. Problems arise with applying the current federal law to land management decisions due to conflicting mandates both within single statutes and among different statutes.<sup>73</sup> Thus, because of their discretion, federal land managers wield great power when formulating specific management strategies.<sup>74</sup> Consistent solutions to land management problems become nearly impossible due to the power each land manager exerts. Their decisions are often made in response to local political pressures rather than national concerns and interests.<sup>75</sup>

#### A. *Deterioration of the Northern Rockies*

In the Northern Rockies, these agencies and their decisions are working to the detriment of the land and its inhabitants. Studies have shown that the northern Rocky Mountain region is in danger of losing its high degree of biodiversity.<sup>76</sup> In Montana alone, 397 plant species are threatened with extinction.<sup>77</sup> Eighteen species of animals are listed as endangered under the Endangered Species Act and another ninety-seven species are "critically imperiled."<sup>78</sup> The habitats of these native plants and animals are separating into "shrinking islands" divided by areas of intensive human activity, which is a major step towards their extinction.<sup>79</sup>

Experts recently estimated that 2000 grizzlies are needed to keep the bear from becoming extinct.<sup>80</sup> For survival, grizzlies require a density of no more

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<sup>72</sup> *Id.* at 185.

<sup>73</sup> Bradley C. Bobertz & Robert C. Fischman, *Administrative Appeal Reform: The Case of the Forest Service*, 64 U. COLO. L. REV. 371, 426 (1993). Conflicts occur within statutes when, for example, the Forest Service must promote such different multiple uses as preserving biodiversity and providing the nation's timber supply. Conflicts occur between such statutes as the Forest Management Act and the Wilderness Act.

<sup>74</sup> Hardt, *supra* note 30, at 397.

<sup>75</sup> *See id.*

<sup>76</sup> *See Hearings I, supra* note 1 (statement of Dr. Lee Metzgar).

<sup>77</sup> *Id.* (statement of Mike Bader).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* (statement of Dr. Lee Metzgar).

<sup>80</sup> *Id.*

than four bears per one hundred square miles of land.<sup>81</sup> Thus, a population of 2000 grizzlies needs approximately 50,000 square miles of land to ensure the survival of the species.<sup>82</sup>

Roads and other development, however, are quickly invading many parts of the Northern Rockies region.<sup>83</sup> Such development is closing off much of grizzly habitat into separate blocks of land, none of which are large enough alone to support a self-sustaining grizzly bear population.<sup>84</sup> Thus, without some change, the grizzly faces a very real threat of extinction.<sup>85</sup>

Although the grizzly is just a single species, the threat of its extinction has far-reaching ramifications for the biodiversity of the Northern Rockies region.<sup>86</sup> First, grizzlies are an "umbrella species," which is defined as any species which requires a habitat that supports a large number of other species.<sup>87</sup> Since the grizzly demands a biologically diverse habitat, if the bear becomes extinct due to lack of habitat, a large number of other species also will have been destroyed.<sup>88</sup> Thus, preservation of the grizzly and its habitat saves many other species from extinction as well.<sup>89</sup> The second ramification of the grizzly's extinction is that the bear is an "indicator species."<sup>90</sup> This simply means that since it is at the top of the food chain, the health and status of the grizzly reliably indicate the health of many other species as well.<sup>91</sup> Thus, if the grizzly bear appears to be in danger of extinction, this signals that other species of plants and animals are also in danger of extinction.<sup>92</sup>

Moreover, the Northern Rockies region has become a "sacrifice zone" for the timber industry, which has compounded the problem of maintaining biodiversity.<sup>93</sup> The government recently reduced timber cutting levels along the northwest coast.<sup>94</sup> This has resulted in a lot of pressure on the Northern Rockies region to increase timber activity.<sup>95</sup> Increased timber cutting means a

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *See id.*

<sup>86</sup> *See Northern Rockies Ecosystem Protection Act, 1993: Hearings on H.R. 2638 Before the Subcomm. on National Parks, Forests and Public Lands of the House Comm. on Natural Resources, 103d Cong., 2d Sess. (1994) [hereinafter *Hearings III*] (statement of Derek Craighead, President, Wildlands-Wildlife Institute).*

<sup>87</sup> *Id.*

<sup>88</sup> *See generally id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *See id.*

<sup>93</sup> *Hearings I, supra* note 1 (statement of Mike Bader).

<sup>94</sup> *Id.* This is due primarily to injunctions against the Forest Service and BLM barring further timber sales in spotted owl habitat. *See infra* notes 113-128 and accompanying text.

<sup>95</sup> *Hearings I, supra* note 1 (statement of Mike Bader).

substantial increase in the number of roads in the area, which creates a biological liability.<sup>96</sup> For example, roads contribute sedimentation to streams for an indefinite period of time, and the cuts made for these roads create unstable soil conditions of indefinite duration.<sup>97</sup> Moreover, the elk population directly declines with road density. Six miles of road per square mile of land will destroy virtually all the elk in that area.<sup>98</sup> Also, grizzlies avoid roads by an average distance of a half-mile. Thus, an increased number of roads will decrease the potential grizzly bear habitat.<sup>99</sup> If unchecked, these development practices in the Northern Rockies region will destroy the grizzly, and ultimately, area biodiversity and the pristine natural condition of the landscape.

The Forest Service provides a useful way to examine some of the problems in the Northern Rockies. Forest Service regulations require management to provide for adequate fish and wildlife habitat to maintain viable populations of all vertebrate and other indicator species.<sup>100</sup> The Forest Service, however, shows substantial bias towards logging and other resource extraction industries (such as mining, and oil and gas exploration and development) at the expense of preservation. The Forest Service demonstrates this bias by siding consistently against efforts to protect the environment.<sup>101</sup> Further, as the following discussion will demonstrate, the Forest Service regularly makes planning decisions that are contrary to its mandate and which also violate other environmental laws.

### B. *Problems with Present Forest Service Management*

Since its inception, the Forest Service has sought to fulfill two distinct and often conflicting goals.<sup>102</sup> On one hand, it must strive to conserve and protect the ecology of the national forests and their natural resources.<sup>103</sup> On the other hand, it must provide a stable and sustainable supply of commodities from those forests.<sup>104</sup> Early in its existence, the Forest Service defended our national forests against private interests that wanted to exploit them for commercial

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<sup>96</sup> *Hearings III, supra* note 86 (statement of Michael T. Garrity).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> 36 C.F.R. § 219.19 (1994). The Forest Service must select as "indicator species" those species that it believes indicate the effects of its management policies on wildlife habitat in the planning area. *Id.* § 219.19(1).

<sup>101</sup> *Hearings on Forest Service Reform Before the Joint Subcomms. on National Parks, Forests and Public Lands and Oversight and Investigations of the House Comm. on Natural Resources*, 103d Cong., 2d Sess. (1994) [hereinafter *Forest Service Reform*] (statement of Dr. Donald M. Waller, Botanist, University of Wisconsin, Madison).

<sup>102</sup> See generally National Forest Management Act, 16 U.S.C. §§ 1600-1687 (1994).

<sup>103</sup> See *id.*

<sup>104</sup> 16 U.S.C. § 475 (1994).

gain.<sup>106</sup> More recently, however, the Forest Service has been both inconsistent and deficient in protecting and enhancing the ecological, as well as economic, value of its jurisdictional lands.<sup>106</sup> The agency has also inefficiently implemented its congressionally mandated duties.<sup>107</sup>

The Forest Management Act explicitly states that biological diversity should be a goal of Forest Service management plans for national forests.<sup>108</sup> Despite this clear directive, the Forest Service remains biased toward timber cutting.<sup>109</sup> In fact, the agency recently chose to interpret the biological diversity provision to mean that the forests should be logged repeatedly, so as to maintain "age class diversity" of the trees in a forest.<sup>110</sup> This interpretation defies general logic and fails to respond to the congressional intent of forest resources stewardship. The Forest Service has refused to accept its responsibilities under the Forest Management Act, the Endangered Species Act, and the Wilderness Act to protect threatened populations of plants, fish, and wildlife.

An illustration of the Forest Service's disregard for the Forest Management Act is the continuing controversy surrounding the spotted owl in the Pacific Northwest.<sup>111</sup> As discussed earlier, the Forest Service selects indicator species to evaluate how the agency's activities affect specific habitats. They should use this information to help maintain viable populations of existing species in the planning area.<sup>112</sup>

The United States Fish and Wildlife Service listed the spotted owl as threatened in 1990.<sup>113</sup> Soon after it was listed as threatened, the Forest Service decided it could abdicate its mandate and regulations under the Forest Management Act,<sup>114</sup> and comply only with the provisions of Endangered Species Act.<sup>115</sup> In a challenge to Forest Service-authorized logging sales in the national forests of Washington and Oregon, the United States Court of Appeals for the Ninth Circuit held that this view violates the Forest Management Act.<sup>116</sup> An agency may not decide that it will address only one of two statutes governing it when both clearly apply to the situation at hand.<sup>117</sup> As a result, the court ordered the Forest Service to create a management plan addressing the requirements of both the Endangered Species Act and Forest

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<sup>106</sup> See *Forest Service Reform*, *supra* note 101.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> 16 U.S.C. § 1604(g)(3)(B).

<sup>109</sup> *Forest Service Reform*, *supra* note 101.

<sup>110</sup> *Id.*

<sup>111</sup> See *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699 (9th Cir. 1993); *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991); *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081 (W.D. Wash. 1991).

<sup>112</sup> 36 C.F.R. § 219.19 (1994).

<sup>113</sup> 55 Fed. Reg. 26,114 (1990).

<sup>114</sup> See *supra* text accompanying notes 34-38.

<sup>115</sup> *Evans*, 952 F.2d at 299-302.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 302.

Management Act to ensure the continued existence of the spotted owl.<sup>118</sup>

Subsequent to the Ninth Circuit's decision, the Forest Service attempted to formulate an owl management plan as ordered by the court.<sup>119</sup> That plan, however, violated the National Environmental Policy Act (NEPA)<sup>120</sup> and the Forest Management Act.<sup>121</sup> The Ninth Circuit held the management plan in violation of NEPA because the Forest Service had failed to take into account scientific evidence regarding the plan's effect on the spotted owl's viability.<sup>122</sup> Specifically, the management plan failed to consider whether the owl could survive with the loss of another half-million acres of its habitat, which is the amount of habitat the plan proposed to authorize for logging sales.<sup>123</sup>

The court also held the plan inadequate under the Forest Management Act.<sup>124</sup> The owl management plan failed to include any discussion regarding the effect a decrease in owl viability would have on other old-growth forest dependent species.<sup>125</sup> Given the owl's status as an indicator species for habitat-impact planning purposes of the Forest Management Act,<sup>126</sup> this failure rendered the management plan inadequate and in violation of the statute.<sup>127</sup> By 1992, these repeated violations of environmental laws had led to injunctions against both the Forest Service and the BLM barring any further logging sales in spotted owl habitat pending compliance with all applicable laws.<sup>128</sup>

In the landmark case of *Tennessee Valley Authority v. Hill*,<sup>129</sup> the Supreme Court declared that endangered species, unlike timber, are not renewable

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<sup>118</sup> *Id.*

<sup>119</sup> *Seattle Audubon Soc'y v. Espy*, 998 F.2d 669, 701 (9th Cir. 1993).

<sup>120</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1988 & Supp. V 1993). NEPA requires all federal actions to consider any impact that their activities will have on the environment. *Id.* § 4332. If a possibility for significant environmental effects exists, the sponsoring agency must write up these findings in an Environmental Impact Statement before the agency is allowed to proceed with major federal actions. *Id.*

<sup>121</sup> *Espy*, 998 F.2d at 704.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* The court found that the BLM has violated NEPA as well under a similar challenge to its Timber Management Plans. *See Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705, 709 (9th Cir. 1993). The Timber Management Plans failed to address adequately the impact of planned timber sales on the survival of the spotted owl. *Id.*

<sup>124</sup> *Espy*, 998 F.2d at 704.

<sup>125</sup> *Id.*

<sup>126</sup> *See supra* note 100.

<sup>127</sup> *Espy*, 998 F.2d at 704.

<sup>128</sup> *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991) (imposing an injunction on Forest Service timber sales pending compliance with Forest Management Act and preparation of Environmental Impact Statement regarding owl viability); *Portland Audubon Soc'y v. Lujan*, 795 F. Supp. 1489 (D. Or. 1992) (imposing injunction on BLM authorized timber sales pending compliance with applicable laws).

<sup>129</sup> 437 U.S. 153 (1978).

resources.<sup>130</sup> When it passed the Endangered Species Act, Congress considered and rejected proposed legislation that would have directed agencies to implement provisions only to the extent that they are consistent with each agency's prior statutory purposes.<sup>131</sup> Thus, the Forest Service must comply with the provisions and regulations of the Endangered Species Act, even though it is directed to manage national forests under multiple use principles.<sup>132</sup> Moreover, endangered species are to take priority over the agency's "primary mission" when it is contemplating action.<sup>133</sup> Despite these clear directives, the Forest Service has violated the Endangered Species Act repeatedly, and thus, has threatened the existence of many species of animals.<sup>134</sup> Additionally, twenty years after the passage of the Endangered Species Act, the Forest Service has not designated a single acre of critical habitat for any endangered or threatened species.<sup>135</sup>

The agency action discussed above highlights the need for new legislation like NREPA. Existing land management law and policies are insufficient to help maintain healthy, viable populations of many animal species in the Northern Rockies.

#### IV. PROPOSED MANAGEMENT POLICIES UNDER NREPA

Concentrating on major ecosystems such as the greater Yellowstone region, NREPA strives to "promote, perpetuate, and preserve the wilderness character of the land."<sup>136</sup> NREPA would ensure that federal agencies manage all resources in the region in an economically and ecologically sustainable way.<sup>137</sup> Finally, NREPA would strive to promote interagency cooperation by providing

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 183.

<sup>132</sup> *Sierra Club v. Lyng*, 694 F. Supp. 1260, 1269 (E.D. Tex. 1988).

<sup>133</sup> *Hill*, 437 U.S. at 185.

<sup>134</sup> *See, e.g., Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994) (holding that Forest Service violated § 7 of the Endangered Species Act when it allowed development activity that may have adversely affected endangered Chinook salmon before consulting with the U.S. Fish and Wildlife Service, as required by law); *Resources Ltd., Inc. v. Robertson*, 35 F.3d 1300 (9th Cir. 1993) (deciding that Forest Service actions were arbitrary and capricious when it concluded that its forest management plan would not jeopardize listed species, including the grizzly bear, in Flathead National Forest, Montana); *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) (concluding that Forest Service violated Endangered Species Act when it failed to comply with provisions of its own wildlife management handbook, resulting in significant habitat modification and population decline of endangered woodpecker); *Lyng*, 694 F. Supp. at 1269 (discussing that Forest Service practices caused and accelerated the decline of endangered species).

<sup>135</sup> *Hearings III, supra* note 86 (statement of Derek Craighead, President, Wildlands-Wildlife Institute).

<sup>136</sup> H.R. 852, *supra* note 4, § 2(b)(2).

<sup>137</sup> *Id.*

the agencies with a single policy of land management.<sup>138</sup>

NREPA seeks to utilize existing tools of federal land management, but to employ them in innovative new ways.<sup>139</sup> First, NREPA would designate five entire ecosystems as Wilderness to become components of the Wilderness Preservation System.<sup>140</sup> These ecosystems extend over parts of the entire five-state region and are denoted as follows: (1) Greater Yellowstone Ecosystem; (2) Greater Glacier/Continental Divide Ecosystem; (3) Greater Salmon/Selway Ecosystem; (4) Greater Cabinet/Yaak/Selkirk Ecosystem; and (5) Islands in the Sky Wilderness.<sup>141</sup>

Each of these ecosystem areas is unique and has distinctive characteristics which Congress has recognized as valuable to its potential Wilderness status.<sup>142</sup> For example, the Greater Cabinet/Yaak/Selkirk Ecosystem contains an ancient forest of the oldest living cedar trees in the country and the only caribou herd in the lower forty-eight states.<sup>143</sup> The Greater Glacier/Continental Divide Ecosystem is home to the largest grizzly population in the lower forty-eight states.<sup>144</sup> The Secretary of Agriculture would administer the Wilderness areas designated by NREPA according to the mandates of the Wilderness Act.<sup>145</sup>

Additionally, NREPA seeks to designate biological connecting corridors.<sup>146</sup> These corridors would encompass a series of mountain ranges, which would connect the five major ecosystems.<sup>147</sup> Congress has found that these corridors are essential to the continued existence of viable populations of native wildlife and a full range of natural ecological processes.<sup>148</sup> NREPA would designate some of the corridors as Wilderness areas, which would become components of the Wilderness Preservation System.<sup>149</sup> The Forest Service, BLM, and United States Fish and Wildlife Service would manage other corridors that are now under their jurisdiction according to specific plans set out in the Act.<sup>150</sup> These plans call for the federal agency administering a corridor to prohibit even-aged silvicultural management, timber harvesting, mining, oil and gas exploration

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<sup>138</sup> *Id.*

<sup>139</sup> *See generally id.* §§ 3-11.

<sup>140</sup> *Id.* § 3; *see* 16 U.S.C. §§ 1131-1136 (1994).

<sup>141</sup> H.R. 852, *supra* note 4, § 3.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* § 3(a)(4)(A).

<sup>144</sup> *Id.* § 3(a)(1)(A); *see also id.* § 3(a)(2)(A) (Greater Yellowstone Ecosystem contains the world famous first National Park and extremely diverse habitats); *id.* § 3(a)(3)(A) (Greater Salmon/Selway Ecosystem contains one of the largest intact temperate forest ecosystems in the world).

<sup>145</sup> *Id.* § 3(b); 16 U.S.C. §§ 1131-1136. *See supra* text accompanying notes 52-61.

<sup>146</sup> H.R. 852, *supra* note 4, § 4.

<sup>147</sup> *Id.* § 4(b).

<sup>148</sup> *Id.* § 4(a)(2)-(b).

<sup>149</sup> *Id.* § 4(b)(2).

<sup>150</sup> *Id.* § 4(b)(2)(B).

and development, and new road construction or reconstruction.<sup>161</sup> Also, the Act would direct the agencies to take steps to ensure that road densities within the corridors do not exceed .25 miles per square mile of land.<sup>162</sup>

Unwise resource extraction and development decisions have damaged some areas of the national forests in the region.<sup>163</sup> To help reverse the present deterioration, NREPA would establish the National Wildland Restoration and Recovery System ("Recovery System").<sup>164</sup> NREPA would then authorize the creation of the National Wildland Recovery Corps ("Recovery Corps"), a special unit of the Forest Service<sup>165</sup> which would develop plans to manage land in the Recovery System.<sup>166</sup> Management policies would involve restoring the land, as much as possible, to its predevelopment condition.<sup>167</sup> This would include restoring native vegetation and animals, preventing further erosion, restoring original contours of the land, and removing barriers to natural fish spawning.<sup>168</sup>

Congress recognized the importance of promoting cooperation between the agencies responsible for federal land management.<sup>169</sup> Thus, NREPA would establish an interagency team put together by the Secretaries of Agriculture and Interior. The team would include members from both agencies and an equal number of members from the private sector.<sup>160</sup> The team would ensure long-term results by monitoring, evaluating and adjusting NREPA after its implementation.<sup>161</sup>

If Congress enacts NREPA, the preceding four groups of management policies would have the greatest influence on the status quo of the Northern Rockies region. Additionally, NREPA would implement other policies, which would designate new Wild and Scenic Rivers under the Wild and Scenic Rivers Act,<sup>162</sup> study other roadless areas for possible inclusion in the National Park System, and recognize Native American rights and uses.<sup>163</sup>

In its totality, NREPA would greatly enhance land management in the Northern Rockies region. Despite some publicity to the contrary, the new policies and processes that NREPA seeks to implement would provide a much higher level of benefit for the multi-state region, and the nation as a whole, than that attainable under the present situation.

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* § 9(a). *See supra* text accompanying notes 11-12.

<sup>164</sup> H.R. 852, *supra* note 4, § 7.

<sup>165</sup> *Id.* § 7(e).

<sup>166</sup> *Id.* § 7(f).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* § 7(g).

<sup>160</sup> *Id.* § 12(b).

<sup>161</sup> *Id.*

<sup>162</sup> 16 U.S.C. §§ 1274-1287 (1994).

<sup>163</sup> *See* H.R. 852, *supra* note 4, § 11.



## V. NREPA'S CONSISTENCY WITH EXISTING FEDERAL LAW

NREPA's plans for an ecosystem-based management approach are consistent with present land management laws. This is particularly true of the laws governing the Forest Service and BLM, despite their claims that the Act would circumvent the agencies' existing regulatory schemes. Although NREPA would re-align the agencies' present, and often illegal, ordering of priorities, it would not circumvent any existing mandates.

The governing law of the Forest Service and BLM require the agencies to consider many environmental factors before engaging in an activity on federal land. The Forest Service must base forest management plans upon a "[r]ecognition that the National Forests are *ecosystems* and their management for goods and services requires an awareness and consideration of the interrelationships among plants, animals, soil, water, air, and other environmental factors within such ecosystems."<sup>164</sup> Additionally, the plans must provide for biodiversity and maintainance of viable populations of all existing species of vertebrates and indicator species.<sup>165</sup> Similarly, the BLM must give priority to environmentally sensitive areas.<sup>166</sup>

Recently, in *Seattle Audubon Society v. Lyons*,<sup>167</sup> the Forest Service and BLM actually did form forest management plans based on an ecosystem approach.<sup>168</sup> The Northwest Forest Resource Council and other industry-based interests challenged the plans as violating Forest Service and BLM governing law.<sup>169</sup> The Federal District Court for the Western District of Washington held that an ecosystem-based approach to forest management is consistent with principles of multiple use and sustained yield.<sup>170</sup>

Additionally, the court found that in forming its land management plans, the BLM may use the viability requirement that governs the Forest Service, even though the BLM has no similar requirement by law.<sup>171</sup> According to the district court, maintaining viability furthers the important policy goal of sustaining long-term health of federal forests.<sup>172</sup> Moreover both agencies can protect the viability of species other than vertebrates and indicator species because of the large degree of interdependence between species in old-growth forests.<sup>173</sup>

The fact that the Forest Service and BLM used, and the district court

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<sup>164</sup> 36 C.F.R. § 219.1(b)(3) (1994).

<sup>165</sup> 16 U.S.C. § 1604(g)(3)(B) (1994); 36 C.F.R. § 219.19.

<sup>166</sup> 43 U.S.C. § 1712(c)(3) (1988). *See supra* note 49.

<sup>167</sup> 871 F. Supp. 1291 (W.D. Wash. 1994).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 1310.

<sup>170</sup> *Id.* As discussed previously, the principles of multiple use and sustained yield must guide both Forest Service and BLM management of their respective areas of federal land. *See supra* notes 31-32, 46 and accompanying text.

<sup>171</sup> *Lyons*, 871 F. Supp. at 1316.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

upheld, an ecosystem-based land management plan demonstrates that NREPA, if enacted, would not circumvent any existing laws. If these agencies already employ ecosystem management, they should not object to NREPA's enactment. The Act merely would give the agencies further statutory authority to utilize this new land management tool.

## VI. ECONOMIC CONCERNS AND SOLUTIONS

The Forest Service and other federal land management agencies consistently favor logging and other resource extraction over preservation.<sup>174</sup> While often cited as sources of economic stability,<sup>175</sup> logging and other extractive industries will not provide economic vitality in the future.<sup>176</sup> Job opportunities in the timber industry, for instance, have declined consistently since their peak in 1979.<sup>177</sup> These opportunities will continue to decline in the future due to technological advancement and a diminishing supply of trees.<sup>178</sup> Economists who have studied the Northern Rockies region expect this decline to have a continuing negative impact on the economies of the surrounding areas.<sup>179</sup>

Despite this potential for economic downfall, the federal government provides considerable support to the timber industry through a form of "corporate welfare."<sup>180</sup> Logging contracts on public land often require the federal government to sell trees at rates far below market prices.<sup>181</sup> Thus, the government is losing a great deal of money as a result of continued timber cutting on federal land, yet extensive logging operations continue to exploit forest services.<sup>182</sup> Specifically, the Forest Service has lost over \$4.5 billion on logging sales on federal land in the last ten years.<sup>183</sup> Last year alone, the Forest Service lost \$185 million just on land that NREPA would potentially protect.<sup>184</sup> Additionally, the Forest Service spends between \$300 and \$500 per mile to maintain closed roads in areas where logging has ended. This expenditure increases in the event of floods or other natural disasters that adversely affect the roads.<sup>185</sup>

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<sup>174</sup> See *supra* text accompanying note 101.

<sup>175</sup> Thomas Michael Power, *Executive Summary: The Timber Employment Impact of the Northern Rockies Ecosystem Protection Act in Idaho, Montana, Oregon, Washington, and Wyoming* (1992) (available from Alliance for the Wild Rockies, Montana).

<sup>176</sup> *Id.*

<sup>177</sup> *Hearings III, supra* note 86 (statement of Michael T. Garrity).

<sup>178</sup> *Id.*

<sup>179</sup> Power, *supra* note 175, at 2-3.

<sup>180</sup> *Id.*; see *Representative Maloney to Introduce Northern Rockies Federal Land Protection Bill*, Nat'l Env't. Daily (BNA) (Jan. 12, 1995) [hereinafter *Maloney to Introduce Bill*].

<sup>181</sup> AL GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* 121 (Plume ed., Penguin Books 1993).

<sup>182</sup> See *id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*; see also *Maloney to Introduce Bill, supra* note 180.

<sup>185</sup> *Id.*

Americans, therefore, are providing an effective subsidy to logging and other extractive industries in the Northern Rockies through their tax dollars, which compensate for the money lost on these unprofitable sales.

Moreover, the public lands of the Northern Rockies belong to all of the American people.<sup>186</sup> The United States government is to hold these lands in trust for the benefit of everyone.<sup>187</sup> All citizens, however, cannot equally utilize and enjoy extractive resources such as timber.<sup>188</sup> These resources instead become the "personal property" of special interest groups who have the power and financial means to exploit the country's natural resources.<sup>189</sup> The federal government provides much of this financial backing, such as the effective subsidy given to the timber industry by simply allowing it to log on federal land at a huge loss to the government.<sup>190</sup> Thus, all of the American people pay extra tax dollars even though just a few people enjoy the benefits of resource extraction and depletion. The decline of job opportunities in these industries intensifies the problem. Therefore, the American public finances temporary resource related employment at the expense of the resource capital that future generations of Americans will require.<sup>191</sup>

Protecting the wilderness and maintaining a flourishing economy are compatible objectives.<sup>192</sup> The Northern Rockies region is far more valuable to the local economy if left in its natural state than as a source of natural resources.<sup>193</sup> The Northern Rockies region is unique because of its superior natural quality and abundance of wildlife. Further damage to the natural environment will threaten the economic welfare and growth of the area.<sup>194</sup> The economic future of the Northern Rockies region is tied to its unique resource — wilderness and biodiversity.<sup>195</sup> Areas well known for their environmental opportunities, such as Bozeman, Montana; Jackson, Wyoming; and Sun Valley, Idaho, also represent the centers of economic growth in the entire Northern Rockies region.<sup>196</sup> This growth can be attributed to the areas' attractiveness as places to live and work, and not to the extractive industries.<sup>197</sup> Thus, the continued economic welfare of the region depends on protection of the area's wilderness and biodiversity.

A study done by Professor Thomas Michael Power of the University of

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<sup>186</sup> *Hearings I, supra* note 1 (statement of John J. Craighead, Professor Emeritus of Zoology and Forestry, University of Montana; Founder, Wildlife-Wildlands Institute).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *See supra* text accompanying notes 180-85.

<sup>191</sup> *Hearings I, supra* note 1 (statement of John J. Craighead).

<sup>192</sup> Power, *supra* note 175, at 7.

<sup>193</sup> *Id.* at 2.

<sup>194</sup> *Hearings III, supra* note 86 (statement of Michael T. Garrity).

<sup>195</sup> Power, *supra* note 175, at 2.

<sup>196</sup> *Id.* at 3.

<sup>197</sup> *Id.*

Montana shows that this decision is not a question of jobs versus the environment.<sup>198</sup> The enactment of NREPA would affect only about one quarter of one percent of total employment in the region.<sup>199</sup> Considering the present rate of job growth, as seen over the last decade, this job loss would be compensated for in about three weeks.<sup>200</sup> The impact is insignificant for several reasons. First, most of the areas covered by NREPA are not suitable for logging.<sup>201</sup> The Forest Service has determined that eighty percent of the roadless land would not be suitable for timber use.<sup>202</sup> Additionally, Forest Service plans exaggerate the amount of land actually available for timber harvesting.<sup>203</sup> If it followed through with its plans, the Forest Service would be unable to comply with its obligations under the Forest Management Act and the Endangered Species Act.<sup>204</sup> Second, as discussed previously, logging presently contributes minimally to the local economy, and experts expect it to decline further in importance in the future.<sup>205</sup> Thus, no compelling economic reasons prevent enactment of NREPA. On the contrary, if Congress considers economic growth in the Northern Rockies an important goal, then it should enact NREPA.

#### VII. WHY DO WE CARE? THE IMPORTANCE OF MAINTAINING BIODIVERSITY AND WILDERNESS IN THE NORTHERN ROCKIES

In the United States, some estimates conclude that more species become extinct each year than are listed as endangered or threatened under the Endangered Species Act in that same year.<sup>206</sup> Habitat loss constitutes the major cause of species extinction and the resulting loss of biodiversity.<sup>207</sup> Habitat loss is a result of human development.<sup>208</sup> Progress and development will eventually be impeded if we continue to lose the nation's biodiversity.<sup>209</sup>

Americans receive many tangible benefits from a biodiverse environment. On a basic level, plants and animals provide food and oxygen, without which

<sup>198</sup> *Hearings III, supra* note 86 (statement of Michael T. Garrity).

<sup>199</sup> *Power, supra* note 175, at 3.

<sup>200</sup> *Id.* The employment impact was estimated by analyzing Forest Service data on "suitable timber" acreage in current roadless areas, allowable sale quantity of the timber, and the long-term sustained timber yield. *Id.* at 4.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 5.

<sup>204</sup> *See id.*

<sup>205</sup> *Id.* at 4-5.

<sup>206</sup> RICHARD TOBIN, *THE EXPENDABLE FUTURE: U.S. POLITICS AND THE PROTECTION OF BIOLOGICAL DIVERSITY* 2-4 (Duke Univ. Press 1990).

<sup>207</sup> Julie B. Bloch, *Preserving Biological Diversity in the United States: The Case for Moving to an Ecosystems Approach to Protect the Nation's Biological Wealth*, 10 *PACE ENVTL. L. REV.* 175, 183 (1992).

<sup>208</sup> *Id.*

<sup>209</sup> *See id.*

humans could not survive.<sup>210</sup> These species also help the earth's natural processes to continue.<sup>211</sup> Scientifically, the United States derives about twenty-five percent of prescription drugs sold in the country from plants.<sup>212</sup> Scientists are just beginning to understand the possible uses for various plants and animals,<sup>213</sup> as they have tested less than five percent of the earth's species for food and medicinal value.<sup>214</sup> Despite their incredible scientific potential, many species are becoming extinct before scientists can even identify, much less test, them.<sup>215</sup> This potential scientific loss was a focus of Congress' deliberations of the Endangered Species Act.<sup>216</sup> Another tangible benefit includes outdoor recreation. Americans' increasing desire to enjoy the natural areas of the country adds economic value to society.<sup>217</sup>

Americans also receive intangible benefits from biodiversity and wilderness. American culture grew out of a history of wilderness. Justice Douglas once declared that "[t]he esthetic values of the wilderness are as much our inheritance as the veins of copper and gold in our hills and the forests in our mountains."<sup>218</sup> Destruction of the wild lands and their ecosystems will put American culture at risk of losing much of its individuality.

Immediately following the American Revolution, Americans needed to justify their new freedom in a way that went beyond building a stable government or a healthy economy.<sup>219</sup> They needed something uniquely "American" to create a distinctive American culture and separate themselves from the Old World.<sup>220</sup> Americans found that distinct difference in the existence of wilderness. By the early to middle 19th century, Americans recognized their wilderness as a "cultural and moral resource and a basis for national self-esteem."<sup>221</sup>

As the American people increasingly recognized the value of wilderness, American culture responded. William Cullen Bryant wrote that "forests protect a country against drought, and keep its streams constantly flowing and its

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 184.

<sup>213</sup> Scientists are turning increasingly to nature to help them fight various diseases. Andrew Pollock, *Drug Industry Going back to Nature*, N.Y. TIMES, Mar. 5, 1992, at D1. Researchers only recently discovered that the bark from the Pacific yew tree contains a compound that doctors can use to treat both ovarian and breast cancers. Bloch, *supra* note 207, at 185.

<sup>214</sup> Bloch, *supra* note 207, at 185 (citing testimony of James McChesney, Institute of Pharmaceutical Sciences).

<sup>215</sup> *Id.* at 186.

<sup>216</sup> S. REP. NO. 307, *supra* note 63, at 3.

<sup>217</sup> Bloch, *supra* note 207, at 187. See *supra* text accompanying notes 192-97.

<sup>218</sup> RACHEL CARSON, *SILENT SPRING* 72 (Fawcett Crest 1962).

<sup>219</sup> RODERICK NASH, *WILDERNESS AND THE AMERICAN MIND* 67 (3d ed. Yale Univ. Press 1982).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

wells constantly full."<sup>222</sup> In 1864, George Perkins Marsh theorized that wilderness offered economic utility.<sup>223</sup> He blamed clear cutting of forests for the decline of the power and influence of Mediterranean empires.<sup>224</sup> Marsh warned Americans to heed this example and keep a large part of the country's land "as far as possible in its primitive condition."<sup>225</sup> Marsh declared that "[m]an has too long forgotten that the earth was given to him for usufruct alone, not for consumption, still less for profligate waste . . . let us be wise in our time, and profit by the errors of our older brethren."<sup>226</sup> Many other early American writers, philosophers, painters, and prominent citizens also drew upon the American wilderness as a source of inspiration.<sup>227</sup>

Despite the profound impact the American wilderness has had on the growth of this country, biodiversity and the wild lands continue to be destroyed. It is nearly impossible to predict the influence that wilderness and biodiversity will have over future generations scientifically, economically, or socially. It is far better to take steps toward preserving the land now than to look back in the future with regret over what has been lost.

### VIII. CONCLUSION

The Northern Rockies region is a very special and rare part of the United States where the grizzlies still roam, trees still stand, and ecosystems still work. Unless we do something quickly, however, this bounty will cease to exist. Development and industry threaten to destroy the Northern Rockies, and current land managers have done little to avert this danger.

Fortunately, the Northern Rockies Ecosystem Protection Act seeks to prevent the destruction of the Northern Rockies, and to protect and preserve the region for future generations. Moreover, NREPA's ecosystem approach has a firm basis in current law. While federal land management agencies could potentially implement a plan similar to NREPA on their own, a few problems exist with such a solution. First, the agencies, such as the Forest Service and BLM, often choose to support industry and development rather than carry out

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<sup>222</sup> William Cullen Bryant, *The Utility of Trees*, in PROSE WRITINGS OF WILLIAM CULLEN BRYANT (Parke Godwin ed. Appleton 1884).

<sup>223</sup> GEORGE PERKINS MARSH, *MAN AND NATURE: OR, PHYSICAL GEOGRAPHY AS MODIFIED BY HUMAN ACTION* (David Lowenthal ed., 3d prtg. Belknap Press of Harvard Univ. Press 1965).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 36.

<sup>227</sup> See NASH, *supra* note 219, at 74-83. For example, James Fenimore Cooper wrote his novel, *The Pioneers*, about the value of wilderness as a moral influence, a source of beauty, and a place of adventure. *Id.* at 76. In 1836, painter Thomas Cole created his five-panel "The Course of Empire," which starts by showing wilderness giving way to cities. The cities subsequently are destroyed, and finally, wilderness re-emerges. Through this painting, Cole hoped to show fellow Americans the importance of appreciating their wilderness heritage. *Id.* at 82.

their mandated duties to protect the environment. Second, a number of different agencies have jurisdiction over the expanse of land that makes up the Northern Rockies region. The governing laws and policies of the various agencies create formidable logistical problems with allowing the agencies to formulate management policies similar to NREPA on their own.

NREPA would help solve these problems. While it would be consistent with land management agencies' current mandates, NREPA would reorder their priorities. Protection of the land and its inhabitants would supersede most other management goals in the Northern Rockies region. Essentially, NREPA would combine the policies bound up in the Wilderness Act, the Endangered Species Act, and each agency's own mandate. Thus, a single "ecosystem" approach to land management would emerge. This strategy also would link the agencies together. Rather than working under inconsistent, fragmented laws, all of the agencies would follow one comprehensive mandate.

NREPA also concurs with the direction of current environmental regulation. In a recent special report of the Environmental Protection Agency, President Clinton and Vice President Gore stated that "[r]ather than focusing on pollutant-by-pollutant approaches, attention must shift to integrated strategies for whole facilities, whole economic sectors, and whole communities."<sup>228</sup> Applied to land management as opposed to pollution management, NREPA takes exactly this approach. Instead of dealing with problems separately, such as endangered species or primitive land preservation, the Act looks at the big picture, whole ecosystems, which are the biological equivalent of whole communities.

In response to the desperate need for a new strategy, Congress should enact NREPA. Its role in both preserving the biodiversity and enhancing the economic value of the Northern Rockies, would be invaluable to the region. The superior natural qualities of the Northern Rockies' ecosystems are simply too precious and too unique to disregard. As Thoreau reflected, "in Wildness is the preservation of the world."<sup>229</sup>

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<sup>228</sup> Bill Clinton & Al Gore, *Special Report — Reinventing Environmental Regulation*, INSIDE EPA WEEKLY REPORT (Environmental Protection Agency), Mar. 16, 1995, at S-3.

<sup>229</sup> Henry David Thoreau, *Walking, in EXCURSIONS, THE WRITINGS OF HENRY DAVID THOREAU* 275 (Riverside ed., Ticknor & Fields 1863).