

## ESSAY

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# HELPLESS GIANTS? THE NATIONAL PARK SERVICE'S ABILITY TO INFLUENCE AND MANAGE EXTERNAL THREATS TO REDWOOD NATIONAL AND STATE PARKS

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## INTRODUCTION

National parks in the United States exist for two related yet opposed purposes: to preserve areas of national or scenic importance, and to provide for the enjoyment of said areas by the public.<sup>1</sup> The federal government tasked the National Park Service (NPS) with numerous tools to supervise interior park areas.<sup>2</sup> A focus on preservation solely within park boundaries, however, would spell doom for these American treasures. Externalities threaten scenic values for nearly every national park in the United States; more than half of the major threats to national parks begin outside their walls,<sup>3</sup> “threatening to engulf [the parks], causing increasingly severe damage *within* the parks to the values and resources which they were set aside to preserve.”<sup>4</sup> Since “few national parks encompass within their boundaries the entire

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1 See 54 U.S.C. § 100101(a) (2014).

2 See *id.* § 200103.

3 William J. Lockhart, *External Threats to Our National Parks: An Argument for Substantive Protection*, 16 STAN. ENVTL. L.J. 3, 40 (1997).

4 *Id.* at 41; see also James E. Colburn, *The Indignity of Federal Wildlife Habitat Law*, 57 ALA. L. REV. 417, 456 (2005) (“[T]he ‘external threats’ to wilderness areas are a constant reminder of how connected landscapes remain in the face of legal constructs.”); Joseph L. Sax, *Buying Scenery: Land Acquisitions for the National Park Service*, 1980 DUKE L.J. 709.

ecosystems necessary to maintain natural balance,”<sup>5</sup> these problems will persist indefinitely if not halted.

Unfortunately, the NPS has presented a mixed response to external threats. Its alleged failure to meaningfully stem the tide of external threats to scenic resources has resulted in many commentators proclaiming it unable to protect its landmarks. Professor Joseph Sax argued that “[f]ull protection of the parks from incompatible [external] development is . . . plainly impracticable.”<sup>6</sup> The NPS itself has claimed that it possesses “no direct regulatory authority to ensure that park resources are not harmed by projects outside of its borders,”<sup>7</sup> while others believe that the NPS “is generally unable to regulate or to control effectively activities or developments originating on federal, state or private lands located outside park boundaries.”<sup>8</sup> Therefore, though threats to national parks inside their walls remain important, the “more vexing questions are usually whether . . . Congress has delegated authority to the federal land managing agency to abate the threats from non-federal development—and if so, whether the agency has the will to exercise it.”<sup>9</sup>

Rarely is this problem so acute as in Redwood National and State Parks (RNSP). Redwood National Park sits adjacent to state and private land, which both impact federal redwood trees. Moreover, “[a]s a result of a political compromise struck by the Ninetieth Congress, the boundaries of the Redwood National Park did not reflect the ecological realities . . . of the redwood forests.”<sup>10</sup> Like other parks, RNSP therefore lies at the mercy of external actors.

Much remains to be lost if external threats prevail over the redwood’s ancient beauty. President Reagan once said that “[a] tree is a tree. How many more do you have to look at?” when considering a Redwood National Park proposal.<sup>11</sup> With all due respect to President Reagan, redwood trees exemplify some of the most scenic forests in the world. RNSP preserves “the largest remaining contiguous section of

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5 THE CONSERVATION FOUND., NATIONAL PARKS FOR A NEW GENERATION: VISIONS, REALITIES, PROSPECTS 126 (1985).

6 Sax, *supra* note 4, at 712.

7 Lockhart, *supra* note 3, at 4 (quoting Letter from Robert Barbee, Superintendent, Yellowstone Nat’l Park, to Mike DaSilva, Coordinator of the Env’tl. Impact Statement on the New World Project proposal by Crown Butte Mines, Inc., Mont. Dep’t of State Lands 4 (Dec. 17, 1993) (on file with the *Stanford Environmental Law Journal*)).

8 Robert B. Keiter, *On Protecting the National Parks from the External Threats Dilemma*, 20 U. WYO. LAND & WATER L. REV. 355, 356 (1985).

9 GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 1081–82 (6th ed. 2007).

10 Dale A. Hudson, *Sierra Club v. Department of Interior: The Fight to Preserve the Redwood National Park*, 7 ECOLOGY L.Q. 781, 781 (1978).

11 Carl Pope, *If You’ve Seen One Redwood, You’ve Seen Them All—Not!*, HUFFINGTON POST (July 12, 2006, 5:12 PM), [http://www.huffingtonpost.com/carl-pope/if-youve-seen-one-redwood\\_b\\_24927.html](http://www.huffingtonpost.com/carl-pope/if-youve-seen-one-redwood_b_24927.html).

ancient coast redwood forest . . . [and] some of the world's tallest and oldest trees."<sup>12</sup>  
The trees "humble[]"<sup>13</sup> those who walk among them,

with their ponderous strength, reaching toward the sky like pillars of a temple.  
With the mystic beauty and stately magnitude of the sun-filtered towering forms,  
the almost infinite variety of light and shade and color, and the unfolding life and  
beauty of the forest, the big redwoods are not looked at; they are experienced . . . .  
An awe-inspiring element of time pervades these living relics . . . .<sup>14</sup>

Their scenic beauty, however, remains imperiled today by external threats. Despite attempts to reduce logging, "[t]here are still ancient redwoods slated for cutting that need to be protected."<sup>15</sup>

This Essay analyzes the interactions between federal, state, and private landowners regarding RNSP to determine what power the NPS has to stop the destruction of its trees resulting from externalities. Part I briefly discusses the historical development of RNSP, focusing on how its boundaries impact inner scenic resources. Part II argues that California state efforts have traditionally hampered redwood protection in RNSP, and Part III examines the limited resources the NPS possesses to protect redwoods. Ultimately, the NPS has few effective tools at its disposal to protect redwoods against external threats, except nuisance litigation. If the NPS cannot successfully influence external forces, national parks—and redwoods themselves—will truly become "helpless giants."<sup>16</sup>

## I. THE HISTORY OF EXTERNAL THREATS TO RNSP

No matter whether the redwoods represent helpless giants today, they certainly held that title in the nineteenth and early twentieth centuries. Eager to exploit their economic potential, private loggers had purchased thousands of acres of redwood lands in California by 1879—nearly all available redwood growths.<sup>17</sup> By 1900, logging became "the most important industry in California."<sup>18</sup> Activists scored early victories against loggers in the 1920s, when they first began purchasing redwood land from loggers. In 1921, the Save the Redwoods League convinced the California legislature to buy land along the Redwood Highway for \$300,000, negotiating with

<sup>12</sup> NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, GENERAL MANAGEMENT PLAN/GENERAL PLAN: REDWOOD NATIONAL AND STATE PARKS, HUMBOLDT AND DEL NORTE COUNTIES, CALIFORNIA 12 (2000).

<sup>13</sup> Hudson, *supra* note 10, at 784 (quoting Bonnie Newton, *Heritage of the World: The Eternal Redwoods*, NAT'L PARKS & CONSERVATION MAG., Sept. 1973, at 20).

<sup>14</sup> *Id.* (quoting Newton, *supra* note 13, at 18, 20–21).

<sup>15</sup> *About Redwoods*, SAVE THE REDWOODS LEAGUE, <https://www.savetheredwoods.org/redwoods/> (last visited Apr. 2, 2018) [hereinafter *About Redwoods*].

<sup>16</sup> Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 241 (1976).

<sup>17</sup> DARREN FREDERICK SPEECE, DEFENDING GIANTS: THE REDWOOD WARS AND THE TRANSFORMATION OF AMERICAN ENVIRONMENTAL POLITICS 45 (2017); *League Milestones*, SAVE THE REDWOODS LEAGUE, <https://www.savetheredwoods.org/about-us/mission-history/league-milestones/> (last visited Apr. 2, 2018).

<sup>18</sup> Hudson, *supra* note 10, at 789.

one of the most powerful loggers, Pacific Lumber, in the process.<sup>19</sup> By 1964, the Save the Redwoods League had negotiated with logging companies to help California acquire 102,000 acres of redwoods in areas they later transferred to states, today called Del Norte Coast and Jedediah Smith Redwoods State Parks.<sup>20</sup>

Largely due to the success activists enjoyed in countering powerful logging companies, legislative interest in protecting other redwoods declined; the activists had already “saved” the trees.<sup>21</sup> Activists continued to battle loggers until 1968, when Congress passed the bill creating Redwood National Park.<sup>22</sup> The Act, however, did not adequately protect redwoods; it “was the culmination of a four-year political struggle and represented a compromise between several competing interest groups.”<sup>23</sup>

Since its proponents navigated various competing and uncooperative interests, “park boundaries were tailored to meet political needs instead of ecological realities, [and] the drafters anticipated that problems would be encountered in . . . protecting the park.”<sup>24</sup> The final Redwood National Park Act failed to include key watersheds, but did contain three state parks (Prairie Creek, Jedediah Smith, and Del Norte Coast).<sup>25</sup> From the onset, park boundaries did not represent conservation but politics, arbitrarily designed not to protect redwoods but to protect a smorgasbord of conflicting interests. The Act did not leave the NPS helpless to defend the redwoods, however. It delegated to the Secretary of Interior the power to modify park boundaries and acquire nearby land to assure external threats did not harm park resources.<sup>26</sup>

Logging operations outside Redwood National Park created many risks to trees under NPS protection. Logging companies built numerous roads to transport fallen trees.<sup>27</sup> Constructing these roads exposed slopes and made the surrounding area more susceptible to erosion.<sup>28</sup> Even normal logging operations disturbed the soil’s natural vegetative cover and drainage routes.<sup>29</sup> These developments caused eroded sediment to wash into Redwood Creek, which flowed directly into RNSP.<sup>30</sup> As streambeds inside RNSP eroded, they carried away soil that redwoods needed to stand upright.<sup>31</sup> Not only would wind more easily topple redwoods, but erosion of streambeds caused moisture to leave with the soil, depriving trees of oxygen in the

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19 SPEECE, *supra* note 17, at 51.

20 Hudson, *supra* note 10, at 790; *see also* EDWIN C. BEARSS, REDWOOD NATIONAL PARK: HISTORY BASIC DATA ch. XIV (1969).

21 Hudson, *supra* note 10, at 790.

22 Redwood National Park Act, Pub. L. No. 90-545, 82 Stat. 931 (1968).

23 Hudson, *supra* note 10, at 794. These struggles can be traced to many sources, such as political delays and financial restraints from the Vietnam War, coupled with internal discord among conservation groups over which redwood basins to protect. *See id.* at 794–97.

24 *Id.* at 794.

25 *Id.* at 798, 803; *see Redwood National Park*, NAT’L GEOGRAPHIC (Nov. 15, 2015), <https://www.nationalgeographic.com/travel/national-parks/redwood-national-park/>.

26 Hudson, *supra* note 10, at 803.

27 *See* NAT’L PARK SERV., *supra* note 12, at 19.

28 *Id.*

29 Hudson, *supra* note 10, at 786–87.

30 NAT’L PARK SERV., *supra* note 12, at 19–20.

31 *Id.* at 19.

water.<sup>32</sup> Additionally, other external threats, like air and water pollution as well as human development, threatened redwoods in the 1970s and 1980s,<sup>33</sup> and continue today.<sup>34</sup>

These external threats directly impacted scenic experiences for hikers within RNSP. Hikers frequently saw clear-cut space just beyond park boundaries, causing the “visual character of Redwood Creek’s alluvial plain [to be] . . . modified by deposition of sawed logs, battered culverts and logging cables. . . . Pools have been filled and sculptured logs and streamside vegetation buried by fine gravel.”<sup>35</sup> External threats thereby caused “obvious aesthetic damage”<sup>36</sup> to the park. Clearly, the boundaries established by the 1968 Act could not remain. “Continued timber harvesting on the excluded land was so harmful to the park that ten years later Congress added 48,000 acres to the park at a cost that may reach half a billion dollars.”<sup>37</sup> That congressional action was the Redwood National Park Expansion Act of 1978.<sup>38</sup>

House Representative Phillip Burton sponsored the Redwood National Park Expansion Act to correct the wrongs of the initial 1968 Act. In his opening remarks, he emphasized that logging and water damage on nearby lands jeopardized the “durab[ility]” of Redwood National Park.<sup>39</sup> He noted that due to boundary inefficiencies, the Department of Interior had not stemmed the tide of external threats, or was unwilling to do so.<sup>40</sup> He cited numerous reports showing the need for protection against actions originating outside the Park,<sup>41</sup> and stated that the “[c]learcut logging on privately owned lands adjacent . . . continues to cause substantial, and perhaps irreparable, damage to . . . esthetics.”<sup>42</sup> Scenic impairment from external threats therefore occupied a central focus in the Park’s expansion.

The legislative history of the Expansion Act also addressed the authority of the Department of Interior to impact areas external to RNSP. The House Committee on the Interior and Insular Affairs stated that, without additional authority, the Interior’s “ability to adopt fair and effective cooperative agreements and contracts is totally

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32 *Id.*; see also Hudson, *supra* note 10, at 786–87.

33 RICHARD WEST SELLARS, PRESERVING NATURE IN THE NATIONAL PARKS: A HISTORY ch. 6 (1997); see Steve Norman, *Fire and Forest Fragmentation*, COAST REDWOOD ECOLOGY & MGMT., <https://redwood.forestthreats.org/fragmentation.htm> (last visited Apr. 2, 2018) (“As the human population expands within the coast redwood range, the margins of some privately held second growth experience economic pressure to be subdivided for homes. This brings the wildland-urban interface closer to park boundaries.”).

34 See *About Redwoods*, *supra* note 15 (discussing how pollution and climate change cause uncertainty for the future of redwoods).

35 Hudson, *supra* note 10, at 842 (quoting Richard J. Janda, *Recent Man-Induced Modifications of the Physical Resources of the Redwood Creek Unit of Redwood National Park, California, and the Processes Responsible for Those Modifications* 3–4 (U.S. Geological Survey, Open-File Report Ser. No. 75-561, 1975)).

36 *Id.* at 806.

37 Sax, *supra* note 4, at 712.

38 Pub. L. No. 95-250, 92 Stat. 163 (1978).

39 121 CONG. REC. 11,347 (1975) (statement of Rep. Burton).

40 *Id.*

41 *Id.*

42 123 CONG. REC. 4,965 (1977) (statement of Rep. Burton).

dependent upon the attitudes of the concerned companies.”<sup>43</sup> The Committee thus proposed that the amendment permit “the rehabilitation of areas within *and upstream from* the park; to authorize the adoption of *regulations*, after consultation with the State of California and a finding that the existing State regulations are inadequate”<sup>44</sup> to give NPS actions teeth outside park boundaries. The final bill, however, did not include these provisions; the Interior could rehabilitate areas only after contracting with the state government, and the final bill excluded independent Interior regulatory authority.<sup>45</sup>

RNSP faces other external threats today that have yet to be resolved. A highway expansion plan along RNSP borders would eliminate fifty-four redwood trees, while placing human development even closer to park boundaries.<sup>46</sup> In 2016, California’s Board of Forestry approved logging of 402 acres of redwood forest in the lower Gualala River.<sup>47</sup> Though California courts ordered the Board to revise its timber harvest plan for the Gualala River, timber companies may later revise it.<sup>48</sup> Approval of such plans, though far from RNSP, “could set a precedent for granting future logging efforts in sensitive habitats statewide.”<sup>49</sup> Finally, as President Donald Trump proposed to reduce the Interior’s budget by \$1.6 billion,<sup>50</sup> an already-strapped NPS reduced its workforce in “nearly 90 percent of parks” and received “23 percent fewer resources to fund the highest-priority resource management

43 AMENDING THE ACT OF OCTOBER 2, 1968, AN ACT TO ESTABLISH A REDWOOD NATIONAL PARK IN THE STATE OF CALIFORNIA, AND FOR OTHER PURPOSES, H.R. DOC. NO. 95-581, at 25 (95th Sess. 1977). The Committee also cited Secretary of the Interior Andrus, who said that park expansion remains unnecessary so long as the timber activities are regulated by California with NPS guidance. *Id.* Thus, NPS actors preferred cooperation with state governments and loggers to NPS action.

44 *Id.* (emphasis added).

45 Redwood National Park Expansion Act of 1978, Pub. L. No. 95-250, 92 Stat. 163, 165. Why the final bill did not include these protections is not clear based on the legislative record.

46 Jamie Henn, *Is California Still Cutting Down Redwood Trees?*, HUFFINGTON POST (Oct. 12, 2011, 10:16 PM), [http://www.huffingtonpost.com/jamie-henn/is-california-still-cutting\\_b\\_1008161.html](http://www.huffingtonpost.com/jamie-henn/is-california-still-cutting_b_1008161.html). The highway plan would also disrupt the roots of sixty-six additional trees. *Id.*

47 Peter Baye & Rick Coates, *Notice of Intent to Sue CAL FIRE Over Approval of Controversial Gualala River Floodplain Redwood Logging—“Dogwood” Timber Harvest Plan, Sonoma County*, FRIENDS OF GUALALA RIVER (July 11, 2016), <http://gualalariver.org/forestry/floodplain-logging/notice-intent-sue-cal-fire-approval-controversial-gualala-river-floodplain-redwood-logging-dogwood-timber-harvest-plan-sonoma-county/>.

48 See Frank Robertson, *Environmentalists Get Attorneys’ Fees for Halting Gualala Logging*, CLOVERDALE REVEILLE (July 5, 2017), [http://www.sonomawest.com/cloverdale\\_reveille/news/environmentalists-get-attorneys-fees-for-halting-gualala-logging/article\\_64a7b954-61c3-11e7-837a-5bb41ca981d5.html](http://www.sonomawest.com/cloverdale_reveille/news/environmentalists-get-attorneys-fees-for-halting-gualala-logging/article_64a7b954-61c3-11e7-837a-5bb41ca981d5.html).

49 Taylor Hill, *A Plan to Log Century-Old Redwoods Could Set a Bad Precedent*, TAKEPART (July 15, 2016), <http://www.takepart.com/article/2016/07/15/redwood-century-old-logging-approved>.

50 Devin Henry, *Lawmakers Take Aim at Trump’s Interior Budget*, THE HILL (June 8, 2017), <http://thehill.com/policy/energy-environment/336944-lawmakers-take-aim-at-trumps-interior-budget>.

projects . . . including . . . mitigation of threats.”<sup>51</sup> Without the necessary funds to acquire land or manage external threats, RNSP remains at risk for future harm.

When the NPS assumed joint control with California over RNSP in 1994,<sup>52</sup> it did so with little regulatory authority to impact external threats. The NPS still had some allies in protecting the redwoods, however. NPS’s partner, California, previously established state schemes to defend against private logging.<sup>53</sup> If these ventures succeeded, the NPS’s apparent lack of authority would, effectively, be irrelevant.

## II. STATE RESPONSES TO REDWOOD THREATS

The NPS itself believed that cooperation with states—or independent state regulation itself—provided the first line of defense against external threats to RNSP.<sup>54</sup> Thus, when Congress first purchased Redwood National Park from private landowners, it began “a long collaboration between the state and federal governments regarding redwood parks.”<sup>55</sup> Conflicts between the preservation goals of the federal and state bodies persisted, however. Since development on private lands is “ordinarily governed only by state law and local zoning codes,”<sup>56</sup> if private lands produce threats to nearby RNSP lands, the NPS could stand at the mercy of California regulations. The NPS recognized this, stating that active participation in state and local land use decisions represented an important method to influence decisions outside park boundaries.<sup>57</sup> However, local land use bodies normally succumb to pressure from private landowners who would impose far less strict regulations than the NPS would prefer.<sup>58</sup> Thus far, the NPS has occasionally worked

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51 NAT’L PARK SERV., U.S. DEP’T OF THE INTERIOR, BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION: FISCAL YEAR 2018, at Overview-3, Overview-23 (2017), <https://www.nps.gov/aboutus/upload/FY-2018-NPS-Greenbook.pdf>.

52 *Frequently Asked Questions*, NAT’L PARK SERV., <https://www.nps.gov/redw/faqs.htm> (last visited Apr. 2, 2018).

53 See generally Thomas Lundmark, *Regulation of Private Logging in California*, 5 ECOLOGY L.Q. 139 (1975).

54 See *supra* note 43 and accompanying text.

55 SPEECE, *supra* note 17, at 74; see Michael Mantell, *The National Park System and Development on Private Lands: Opportunities and Tools to Protect Park Resources*, in EXTERNAL DEVELOPMENT AFFECTING THE NATIONAL PARKS: PRESERVING “THE BEST IDEA WE EVER HAD” 1, 2 (1986) (“[T]he most important opportunities to protect National Park resources from the adverse effects of development on private lands may lie less in the application of various legal doctrines and more in a variety of cooperative mechanisms that involve local governments . . .”).

56 George Cameron Coggins, *Protecting the Wildlife Resources of National Parks from External Threats*, 22 U. WYO. LAND & WATER L. REV. 1, 6 (1987); see also Darren Speece, *From Corporatism to Citizen Oversight: The Legal Fight over California Redwoods, 1970–1996*, 14 ENVTL. HIST. 705, 716 (2009) (noting that forestry operations were generally “governed at the state level”).

57 See NAT’L PARK SERV., *supra* note 12, at 36; Mantell, *supra* note 55, at 27 (“Local constituency building on the part of park staff can be an important response to external pressures.”). To date, however, there have been few, if any, conflicts with local planning authorities that have resulted in litigation.

58 Sax, *supra* note 4, at 710; see *infra* notes 81–86 and accompanying text for a more detailed discussion of local cooperation.

with localities in the redwoods, but little documentation exists of such interactions; it has relied more expressly on state authorities to regulate externalities.

For most of the twentieth century, the NPS could do little but watch as the California Department of Forestry's Board of Forestry (CDF), a state body overseeing private timber plans, eviscerated protections against logging on lands adjacent to federal and state redwood parks. The CDF included timber representatives in its decision-making process, ostensibly to improve the effectiveness of its directives by allowing those regulated—who know the most about their industry—to have a say.<sup>59</sup> Predictably, the inclusion of loggers on a board with dueling objectives to promote development and prevent environmental harm favored the former goal. “[T]he Board was more committed to its economic development goals than it was to its conservation mission.”<sup>60</sup> People “pecuniarily interested in the timber industry”<sup>61</sup> therefore promulgated CDF decisions.<sup>62</sup> The CDF continued harming the interests of Californian redwoods until local citizens and activists began to sue.

*Bayside Timber Co. v. Board of Supervisors*<sup>63</sup> represented “the first successful attack on the Board’s independence.”<sup>64</sup> There, a local county board challenged the CDF’s granting of harvesting permits to Bayside Timber.<sup>65</sup> The appellate court found that the CDF’s membership consisted almost entirely of timber companies and land owners, each having an interest in exploiting redwoods for monetary gain.<sup>66</sup> Since these private parties faced “no [legislative] guides or standards to prevent . . . abuse,”<sup>67</sup> they had “uncontrolled discretion”<sup>68</sup> in choosing to protect—or not protect—redwoods. As a result, the court held the CDF’s enabling legislation, the Forest Practice Act, to be an unconstitutional delegation of legislative power.<sup>69</sup>

Today, the CDF still faces challenges from citizens and localities. In *Sierra Club v. State Board of Forestry*, the California Supreme Court noted the significant judicial deference given to CDF decisions, requiring prejudice to overturn CDF decisions.<sup>70</sup> Yet, this deference can be overcome. The California Supreme Court held that the CDF violated California environmental law by approving a timber plan without examining any information about the plan’s impact on wildlife.<sup>71</sup> Though courts owed the CDF deference, it could not engage in a merely cursory analysis of

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59 See Speece, *supra* note 56, at 707.

60 *Id.* at 710.

61 *Bayside Timber Co. v. Bd. of Supervisors*, 97 Cal. Rptr. 431, 436 (Cal. Ct. App. 1971).

62 See Speece, *supra* note 56, at 711.

63 97 Cal. Rptr. 431 (Cal Ct. App. 1971).

64 See Speece, *supra* note 56, at 712.

65 *Bayside Timber Co.*, 97 Cal. Rptr. at 432.

66 *Id.* at 435–36.

67 *Id.* at 437.

68 *Id.*

69 *Id.* at 438–40. California later passed an updated Forest Practice Act in response in 1973. See *Forest Practice*, CAL FIRE, [http://calfire.ca.gov/resource\\_mgt/resource\\_mgt\\_forestpractice](http://calfire.ca.gov/resource_mgt/resource_mgt_forestpractice) (last visited Apr. 2, 2018).

70 876 P.2d 505, 518 (Cal. 1994).

71 *Id.* at 519; see also *Envtl. Prot. Info. Ctr. v. Cal. Dep’t of Forestry & Fire Prot.*, 50 Cal. Rptr. 2d 892 (Cal. Ct. App. 1996) (declining to defer to CDF decision when it did not act according to its authorized power).



harvest plans. Even with the CDF's reliance on timber representatives mitigated after *Bayside*, it still largely deferred to timber plans,<sup>72</sup> calling into question its ability to reliably protect land outside RNSP.

This deference to timber plans has continued to alarming levels. For example, in *EPIC v. California Department of Forestry & Fire Protection*, the court analyzed a Sustained Yield Plan (SYP) from Pacific Lumber.<sup>73</sup> Though the court largely upheld the Board's approval of the SYP, it chastised the CDF for its close relationship with loggers. The CDF had delegated to Pacific Lumber the job of revising parts of the SYP and consolidating documents into the agency's final plan, tasks within the CDF's exclusive control.<sup>74</sup> Like in *Sierra Club v. State Board of Forestry*, the CDF excessively deferred to a timber company's plan.<sup>75</sup> The plan approved by the CDF also contained insufficient information about the area to be harvested.<sup>76</sup> The CDF must engage in more detailed discussions about environmental impacts,<sup>77</sup> no matter whether the effects of logging "may be expected to fall *on or off the logging site*."<sup>78</sup> The Board, therefore, despite repeated court decisions to the contrary, tends to side with questionable timber company plans, failing to accurately consider their environmental impacts.

If the CDF can simply "rubber-stamp[]"<sup>79</sup> timber companies' harvest plans, and private lands remain principally governed by state law, then the NPS may need its own regulatory authority to protect internal redwoods. To be sure, the above cases demonstrate that the CDF's unilateral and unbridled authority to approve logging plans has diminished over time, "forc[ing] the Board of Forestry to back away from its traditional alliance with the timber industry."<sup>80</sup> Yet, continued litigation against the CDF in the twenty-first century indicates it still fails to consider many external effects of timber plan approvals, court orders notwithstanding.

What, then, can the NPS do to protect itself from inevitable externalities that harm internal scenic resources? As noted above, the NPS can attempt to cooperate with local and state governments to influence their decision-making processes.<sup>81</sup> Yet

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72 Even today, the CDF rarely hesitates to grant harvesting rights to timber companies. *See, e.g.,* *Envtl. Prot. Info. Ctr. v. Cal. Dep't of Forestry & Fire Prot.*, 118 Cal. Rptr. 3d 352 (Cal. Ct. App. 2010).

73 187 P.3d 888 (Cal. 2008).

74 *Id.* at 911.

75 *Id.*

76 *Id.* at 916–17. California courts have held that if the CDF encounters evidence of damage logging would do to the surrounding areas—such as academic papers or reports—the CDF must engage in cumulative impact analysis for environmental damage elsewhere. *See, e.g.,* *Friends of the Old Trees v. Cal. Dep't of Forestry & Fire Prot.*, 61 Cal. Rptr. 2d 297, 308–10 (Cal. Ct. App. 1997).

77 *See* *Envtl. Prot. Info. Ctr. v. Johnson*, 216 Cal. Rptr. 502, 515–16 (Cal. Ct. App. 1985).

78 *Friends of the Old Trees*, 61 Cal. Rptr. 2d at 311 (alteration in original) (quoting *Laupheimer v. California*, 246 Cal. Rptr. 82, 93 (Cal. Ct. App. 1988)) (internal quotation marks omitted).

79 *Speece, supra* note 56, at 720; *see also id.* at 721 ("Court after court found the Board guilty of operating under a de facto policy of automatically approving timber harvest plans without considering environmental effects.").

80 *Id.* at 708.

81 *See supra* notes 54–55 and accompanying text.

cooperation, while useful in theory, provides little—if any—ability for the NPS to meaningfully prevent external threats to RNSP. First, to the extent cooperation would occur with state entities, the CDF would continue to play a prominent and problematic role; cooperation with an agency with a track record of failure to protect redwoods seems undesirable. Even when the NPS cooperated with the CDF in 1973, “over the objections of the National Park Service, the Board ruled that clear-cutting in the Redwood Creek watershed did not harm”<sup>82</sup> the Park and approved harmful harvest plans. Moreover, on private lands upstream of RNSP, the CDF allows *private landowners* to determine if they want the NPS to participate in preventative measures like inspections—allowing their conflicts of interest to impair NPS investigations.<sup>83</sup>

Second, the NPS still has no power to direct local or state authorities to enact the regulations it wants. Historically, “the prospects for . . . abating [external] threats through intergovernmental cooperation alone [have been] bleak”<sup>84</sup> because NPS influence over other governments “is purely advisory and often ignored.”<sup>85</sup> The importance of NPS’s purely advisory authority becomes magnified when the localities with which it wishes to cooperate “ordinarily are satisfied with fewer restrictions than the Park Service wants, because preservation is not their mission.”<sup>86</sup>

Therefore, though cooperation with local and state governments offers promise, it can at best produce helpful but inferior ways for the NPS to influence external threats. State agencies like the CDF have proven ineffective at protecting redwoods whose logging produces harmful effects on RNSP lands. The NPS must rely on its own authority to solve external threats.

### III. THE NPS’S ABILITY TO MANAGE EXTERNAL THREATS

Many commentators have vigorously debated whether the NPS possesses the authority to regulate outside park boundaries. Some argue that the NPS does not have such authority.<sup>87</sup> They claim the Organic Act at best gives the NPS power over federal lands, not private or state lands.<sup>88</sup> On the other hand, many supporters of increased NPS regulatory authority have contended that, even with ambiguous Organic Act language, national parks can issue regulations covering external threats. Under Section 1 of the Organic Act, the NPS must regulate the “use” of national parks.<sup>89</sup> Since common park experiences like hiking rely on vistas that can reach outside parks, some argue that the “use” the NPS can regulate includes outside

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82 Speece, *supra* note 56, at 714.

83 NAT’L PARK SERV., *supra* note 12, at 23.

84 Coggins, *supra* note 56, at 19.

85 Sax, *supra* note 4, at 716.

86 *Id.* at 732.

87 See, e.g., COGGINS, *supra* note 9; Coggins, *supra* note 56; Keiter, *supra* note 8.

88 See COGGINS, *supra* note 9, at 1082 (stating that since Section 1 of the Organic Act says the Secretary can regulate the use of “*Federal areas*,” it is a negative inference against regulating non-federal areas); Coggins, *supra* note 56, at 17, 17 n.129 (describing the Organic Act as only applicable to activities “within” a park based on the now-repealed language of 16 U.S.C. § 1); Keiter, *supra* note 8, at 356; see also *id.* at 393 (“The Organic Act mandates the protection of park resources but it does not extend Park Service jurisdiction beyond park boundaries.”).

89 54 U.S.C. § 100101(a) (2014).

areas.<sup>90</sup> Additionally, under the Redwoods Amendments<sup>91</sup> they claim Congress evinced an intent for the NPS to become more involved in protecting against external threats.<sup>92</sup> The inability to conclusively resolve this debate has resulted in much uncertainty among academics and government officials alike.<sup>93</sup>

Regardless of whether the NPS has this authority, however, currently the willpower and mechanisms to satisfy a duty to regulate against external threats do not exist in the NPS. By examining the trio of *Sierra Club* cases from the mid-1970s, it becomes demonstrably clear that even if a duty to regulate against external threats applies to RNSP, the NPS faces difficulty, in its current form, fulfilling that duty.

#### A. *The Sierra Club Litigation and the Failure of the NPS Response*

In *Sierra Club v. Department of Interior (Sierra Club I)*, the activist Sierra Club sued the Interior to force it to protect RNSP from damage by logging operations on peripheral privately owned lands.<sup>94</sup> The district court held that the Redwood National Park Act “impose[s] a legal duty on the Secretary to utilize the specific powers given to him whenever reasonably necessary for the protection of the park”<sup>95</sup> and that “any discretion vested in the Secretary concerning time, *place* and specifics of the exercise of such powers is subordinate to his paramount legal duty . . . to protect the park.”<sup>96</sup> The court’s reference to the “place” of Secretary powers, then to the legislative history of the Act (including a congressional intent for the NPS to address externalities),<sup>97</sup> shows a desire to apply this regulatory duty to external threats. The importance of *Sierra Club I* cannot be overstated: “*Sierra Club I* is the first reported case to hold that this trust relationship creates a *judicially enforceable* duty to protect a national park from threatened injury”<sup>98</sup>—and it happened to occur for RNSP.

The Sierra Club remained unsatisfied with the NPS’s responses to external loggings after *Sierra Club I*, so it sued again in 1975, claiming that logging continued to occur and the Secretary of Interior had failed “to discharge his statutory and fiduciary duty [established under *Sierra Club I*] to protect Redwood National Park from damage caused by logging operations on privately owned lands immediately adjacent to . . . the Park.”<sup>99</sup> The court began *Sierra Club II* by noting that the Redwood National Park enabling legislation “expressly vested the Secretary with authority to take certain specifically stated steps designed to protect the Park from

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90 See Lockhart, *supra* note 3, at 62; James J. Vinch, *The Telecommunications Act of 1996 and Viewshed Protection for the National Scenic Trails*, 15 J. LAND USE & ENVTL. L. 93, 118–19 (1999).

91 See *supra* note 45 and accompanying text.

92 See Lockhart, *supra* note 3, at 61, 65–67; Vinch, *supra* note 90, at 124.

93 Lockhart, *supra* note 3, at 47–48.

94 *Sierra Club v. Dep’t of Interior (Sierra Club I)*, 376 F. Supp. 90, 92 (N.D. Cal. 1974).

95 *Id.* at 95.

96 *Id.* at 96 (emphasis added).

97 *Id.* at 94 n.3.

98 Hudson, *supra* note 10, at 815.

99 *Sierra Club v. Dep’t of Interior (Sierra Club II)*, 398 F. Supp. 284, 285 (N.D. Cal. 1975).

damage caused by logging operations on the surrounding privately owned lands.”<sup>100</sup> These steps included three explicit measures: modification of boundaries, acquisition of interests in land or cooperative agreements with peripheral landowners, and acquisition of land near the highway.<sup>101</sup> Since RNSP boundaries authorized by Congress “represented a compromise and did not include” important areas just outside the Park,<sup>102</sup> the Secretary had a duty to ensure those areas did not jeopardize NPS lands.<sup>103</sup>

Here, the Secretary failed to fulfill his duties by ignoring multiple reports that showed logging upstream caused detrimental effects in Redwood National Park. He knew of, and then summarily disregarded, at least four reports—two from the Interior itself—that recommended the Interior take immediate action to create buffer zones, prevent adjacent logging, acquire land, and cooperate with companies.<sup>104</sup> The court commanded the Secretary to acquire land interests, contract with peripheral landowners, modify park boundaries, ask Congress for funds, and give the Sierra Club a progress report on its compliance with the court order.<sup>105</sup> For the first time, a court gave specific orders for the Interior to meet a duty to prevent external park threats.

The Interior’s response to this order and the Northern District of California’s third foray into the *Sierra Club* litigation evince the prohibitive difficulty in meeting the court’s terms. The Interior attempted multiple solutions to external threats and each failed. It first attempted to cooperate with the CDF.<sup>106</sup> The Interior mistakenly relied on CDF regulation to solve the problem “without inquiring into the adequacy of state restrictions.”<sup>107</sup> In a striking example of the failure of cooperation between state and federal agencies, the NPS presented a formal report to the CDF explaining the damage to the Park from state-approved timber harvests, and recommended restrictions on private actors.<sup>108</sup> The CDF rejected all proposed restrictions.<sup>109</sup> In a similarly futile effort to cooperate with timber companies, they rejected Interior guidelines for adjacent lands, instead choosing to self-regulate.<sup>110</sup>

The Interior considered acquiring land threatening the Park, but it could not secure the funds. The cost would rise to a prohibitive ceiling of \$500 million, and the Office of Management and Budget (OMB) rejected an Interior proposal for a \$15 million buffer zone purchase.<sup>111</sup> When the Interior boldly requested the OMB

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100 *Id.* at 286.

101 *Id.* at 286–87 (citing 16 U.S.C. §§ 79b(a), 79c(d), 79c(e) (1970)).

102 *Id.* at 286.

103 *Id.* at 287.

104 *Id.* at 287–91.

105 *Id.* at 294.

106 Hudson, *supra* note 10, at 824.

107 *Id.*

108 *Id.* at 830.

109 *Sierra Club v. Dep’t of Interior (Sierra Club III)*, 424 F. Supp. 172, 174 (N.D. Cal. 1976); Hudson, *supra* note 10, at 830.

110 *Sierra Club III*, 424 F. Supp. at 174.

111 *Id.* at 173–74.

draft legislation granting “new additional regulatory power over peripheral timber operations,” the OMB denied the request.<sup>112</sup>

Therefore, in a convincing defeat of Interior efforts, “all federal, state, and private entities involved with the problem refused to assist the NPS in meeting the terms of the court’s original order.”<sup>113</sup> Clearly, it is one issue whether the NPS in fact has a duty to regulate or influence external actors; it is another issue entirely whether compliance with that duty remains feasible. The *Sierra Club III* court concluded that further efforts to request funding or regulatory powers from the OMB “would be futile,”<sup>114</sup> and since the Interior made a good-faith effort to comply with a seemingly insurmountable problem, it could not be held liable.<sup>115</sup> Thus, current mechanisms to combat external threats to redwoods will likely fail.

Other reasons exist explaining why the NPS, as it currently stands, cannot adequately protect RNSP from external threats. First, NPS “reticence toward exercising authority outside park boundaries has been pronounced and long-standing.”<sup>116</sup> Its response to *Sierra Club II* notwithstanding, the NPS has historically lacked the willingness to expand its reach outside its borders. The NPS itself believes it needs additional authority to regulate outside its borders.<sup>117</sup> It has stated that the external threats problem “would have to be solved in the political process,”<sup>118</sup> not with NPS action. This mentality may be due to concerns over NPS popularity; engaging in external regulation likely to produce tangible costs, like unemployment, for the abstract benefit of scenic parks could cause the NPS to be perceived as a “meddlesome neighbor.”<sup>119</sup> Regardless, if the NPS remains unwilling to accept a larger role, then no amount of authority will protect RNSP.

Second, Congress does not want to give the NPS additional regulatory power because it wishes to avoid intruding on traditional state and local property authority.<sup>120</sup> Private landowners would “see themselves as . . . subservient to the federal lands”<sup>121</sup> and Congress would not want to create federalism concerns.

Third, the NPS’s major tools for protecting inner scenic resources—land acquisition and boundary modification—prove too expensive and cause more headaches than they are worth. Land acquisition, as noted above, remains highly expensive, which—for RNSP—would already add to “the most expensive national park in history.”<sup>122</sup> But more fundamentally, boundary problems will persist so long as boundaries exist. Acquiring land or modifying boundaries changes little, for

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112 *Id.* at 174.

113 Coggins, *supra* note 56, at 18 n.145.

114 *Sierra Club III*, 424 F. Supp. at 175.

115 *See id.* at 175–76.

116 Colburn, *supra* note 4, at 456 n.158 (citing Sax, *supra* note 16); *see also* Coggins, *supra* note 56, at 18 (“Whether [the NPS] will ever be expanded into something more significant is in part a function of agency willingness to assert it, a willingness heretofore largely lacking.”).

117 *See supra* note 7 and accompanying text; *see also* Sax, *supra* note 16, at 243.

118 JOHN C. FREEMUTH, ISLANDS UNDER SIEGE: NATIONAL PARKS AND THE POLITICS OF EXTERNAL THREATS 137 (1991).

119 THE CONSERVATION FOUND., *supra* note 5, at 141.

120 Sax, *supra* note 16, at 258.

121 WILLIAM E. SHANDS, THE CONSERVATION FOUND., AN ISSUE REPORT: FEDERAL RESOURCE LANDS AND THEIR NEIGHBORS 38 (1979).

122 THE CONSERVATION FOUND., *supra* note 5, at 250.

“[o]ne can move the situs of the problem by acquisition, but the problem itself will remain.”<sup>123</sup> Moving the boundaries, short of buying every redwood tree in the Northwest, only creates new neighbors with equally significant private interests that will conflict with NPS goals. Therefore, while attractive, acquisition fails as a future strategy for RNSP.

### B. Nuisance Suits as a Solution

One option remains for the NPS: instigation of a nuisance suit against adjacent landowners. Since external actions cause the enjoyment of RNSP to decline—by directly affecting the well-being of RNSP trees—the government could prove a prima facie case.<sup>124</sup> Nuisance suits would be particularly apt for loss of scenic value, since development and pollution cause “visitors [to be] less able to find a serene setting in which to . . . enjoy nature.”<sup>125</sup> Even lawful uses of land can become nuisances; CDF approval would not save private logging.<sup>126</sup> Since the federal government enjoys the right, on behalf of the NPS, to sue for nuisance like any private landowner,<sup>127</sup> the government may succeed in bringing a claim.

Before analyzing the possibility of a successful nuisance suit we must first establish the types of nuisance suits the government could bring. First, the federal government could bring a public nuisance claim against entities harming their parks or monuments from outside their borders. A public nuisance “is an unreasonable interference with a right common to the general public.”<sup>128</sup> The Restatement broadly defines unreasonable interferences, including conduct that could involve a significant interference with “the public comfort or the public convenience.”<sup>129</sup> In establishing national parks the government sought to preserve areas of national and scenic importance and allow the public to enjoy those lands.<sup>130</sup> Preservation of scenic areas is a right shared by all citizens because the government (and many vocal citizens) have judged these areas vital to American culture and recreation. The

123 Sax, *supra* note 16, at 254.

124 See *San Diego Gas & Elec. Co. v. Super. Ct.*, 920 P.2d 669, 696–97 (Cal. 1996); *Mendez v. Rancho Valencia Resort Partners, LLC*, 207 Cal. Rptr. 3d 532, 542–43 (Cal. Ct. App. 2016); see also *Redevelopment Agency of Stockton v. BNSF Ry. Co.*, 643 F.3d 668, 672–73 (9th Cir. 2011); *Van Scoy v. Shell Oil Co.*, 98 F.3d 1348 (9th Cir. 1996) (unpublished table decision); *Biglane v. Under the Hill Corp.*, 949 So. 2d 9, 14 (Miss. 2007).

125 John L. Giesser, Comment, *The National Park Service and External Development: Addressing Park Boundary-Area Threats Through Public Nuisance*, 20 B.C. ENVTL. AFF. L. REV. 761, 766 (1993).

126 *Biglane*, 949 So. 2d at 15.

127 Comment, *Protecting National Parks from Developments Beyond Their Borders*, 132 U. PA. L. REV. 1189, 1192 (1984) [hereinafter *Protecting National Parks*]; see *id.* at 1194 n.33 (collecting cases where district courts allowed the federal government to sue to abate nuisances); see also Sax, *supra* note 16 at 251–52 (stating the Supreme Court has recognized that when the defendant’s conduct constitutes a nuisance “the prospect of the federal government having something less than the rights of an ordinary proprietor to abate a nuisance” would be “intolerable”).

128 RESTATEMENT (SECOND) OF TORTS § 821B(1) (AM. LAW INST. 1979).

129 *Id.* § 821B(2)(a).

130 See *supra* note 1 and accompanying text.

ability to visit these areas shines as an example of a public right. If external threats destroy the very objects of their enjoyment (their scenery), the public's "comfort" in visiting the areas declines, and the "convenience" of enjoying areas of aesthetic beauty lessens.

The Restatement provides the following example of a public nuisance: "If, however, the pollution [of a stream] . . . kills the fish in a navigable stream and so deprives all members of the community of the right to fish, it becomes a public nuisance."<sup>131</sup> Like the fish in this stream, runoff from logging or other human development pollutes the water redwoods need to survive, depriving members of the public of their right to see these redwoods. Dust or air pollution from nearby activity could similarly distort the redwoods' habitat. The harm to public rights is twofold: (1) the environmental damage to rare species like redwoods and their habitat, and (2) the aesthetic damage to beautiful (and protected) trees. By interfering with those rights, external actors create a public nuisance.

Second, the federal government, as owners of RNSP, could bring a private nuisance claim against loggers or other external actors. "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land."<sup>132</sup> Courts have required that the invasion be unreasonable.<sup>133</sup> To determine whether the conduct causes an unreasonable invasion of the landowner's use and enjoyment of land, courts balance the harm of the defendant's action against the utility of the challenged conduct.<sup>134</sup> Factors contributing to the harm of the defendant's action include: (1) extent of harm, (2) character of harm, (3) social value of plaintiff's use and enjoyment of the land, (4) suitability of plaintiff's use to the locality, and (5) burden on plaintiff of avoiding the harm.<sup>135</sup> Conversely, factors contributing to the utility of the challenged conduct include: (1) the social value of the conduct, (2) suitability of the conduct to the locale, and (3) the impracticability of avoiding the invasion.<sup>136</sup>

The government, as a landowner of national parks or monuments, has two connected goals: protect areas of scenic, cultural, or recreational importance, and gain revenue from park activities. The scenic value of landmarks—from redwood trees to geysers to mountaintops—lies at the heart of the importance, and profitability, of these locations; landmarks draw people to the parks. Harming redwood trees both prevents the government from protecting the environment on its land and reduces the likelihood citizens will want to spend money to see them. The historical manner of logging—by causing runoff to seep into streams redwoods use to survive—represents a form of water pollution long recognized as a quintessential

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131 RESTATEMENT (SECOND) OF TORTS § 821B cmt. g; *see also* PROSSER AND KEETON ON THE LAW OF TORTS 645, 651 (W. Page Keeton ed., 5th ed. 1984) [hereinafter KEETON].

132 RESTATEMENT (SECOND) OF TORTS § 821D; *see* San Diego Gas & Elec. Co. v. Super. Ct., 920 P.2d 669, 696–97 (Cal. 1996); Biglane v. Under the Hill Corp., 949 So. 2d 9, 14 (Miss. 2007).

133 *See, e.g.,* Mendez v. Rancho Valencia Resort Partners, LLC, 207 Cal. Rptr. 3d 532, 542–43 (Cal. Ct. App. 2016); Prah v. Maretti, 321 N.W.2d 182, 191 (Wis. 1982).

134 RESTATEMENT (SECOND) OF TORTS § 826(a).

135 *Id.* § 827; Prah, 321 N.W.2d at 192, 192 n.16.

136 RESTATEMENT (SECOND) OF TORTS § 828.

private nuisance.<sup>137</sup> “Environmental nuisances often present the easiest [nuisance] cases” because their “injuries . . . are more tangible and more readily measured,”<sup>138</sup> including damage to property. Erosion and runoff from logging has already caused significant damage to redwood trees in RNSP, while clearing trees near its boundaries creates unpleasant open spaces contrasted with dense redwood forests.<sup>139</sup> The harm to redwoods therefore remains a potent threat to the stunning giants, satisfying factors (1) and (2).

Like many national parks, RNSP generates millions of dollars in revenue. In 2010 alone, an estimated 700,000 visitors spent \$42 million in RNSP, generating hundreds of jobs.<sup>140</sup> Aside from the satisfaction the federal government—and, by extension, its constituents—receive from protecting areas of scenic beauty, the tangible monetary benefits of RNSP remain high. As Northern California remains an iconic area for redwoods, factors (3) and (4) are likely to be met.

Finally, the NPS can hardly avoid the harm caused by external factors. As noted above,<sup>141</sup> the NPS possesses precious few tools to combat threats outside its borders. Therefore, they can do little to avoid the harm (factor (5)).

To be sure, the logging industry (and the other uses of residential and commercial lands near RNSP and national parks everywhere) has value of its own. Timber remains important to many fields, such as construction. The Humboldt County timber industry creates revenues north of \$440 million while creating over 7000 jobs.<sup>142</sup> Those numbers, however, include logging for *all* trees, not only redwoods; the contribution of redwoods is likely only a small percentage of those figures. These numbers also include logging everywhere in Humboldt County, even those areas far from RNSP. On the other hand, with fewer trees and less scenic hikes, viewer use and enjoyment of RNSP would certainly decline,<sup>143</sup> substantially interfering with visitors’ experience. Thus, both private and public nuisance suits would likely succeed and justify injunctive relief.<sup>144</sup>

Despite this promise, the author’s attempt to comb Westlaw for a single nuisance case brought by the federal government concerning redwoods generated no results. In general, “nuisance cases involving the federal government as plaintiff have been relatively scarce.”<sup>145</sup> The federal government sued an aluminum plant whose emissions damaged trees and wildlife in Flathead National Forest and Glacier

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137 See KEETON, *supra* note 131, at 619 (“A private nuisance may consist of . . . flooding, raising the water table, or the pollution of a stream . . .” (footnotes omitted)).

138 John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 276 (2001).

139 See *supra* notes 27–33 and accompanying text.

140 *Visitors, Money, and Jobs for Local Economy*, NAT’L PARK SERV. (Mar. 8, 2012), [https://www.nps.gov/redw/learn/news/local\\_economy.htm](https://www.nps.gov/redw/learn/news/local_economy.htm).

141 See *supra* Section III(A).

142 *Lumber and Logging on the North Coast*, SUNNY FORTUNA, <http://sunnyfortuna.com/festivals/logging/industry.htm> (last visited Apr. 2, 2018).

143 See Giesser, *supra* note 125, at 798–99 (“[A] court likely would find that some developments substantially interfere with park visitors by creating visual obstructions, noises, odors, and commotion . . .”).

144 See *id.* at 799–800.

145 *Protecting National Parks*, *supra* note 127, at 1192.



National Park for trespass in 1979,<sup>146</sup> but aside from that case, few examples exist of this tactic, making its likelihood of success difficult to judge. Therefore, the tools for a federal nuisance suit exist, and its lack of use is due less to its apparent ineffectiveness than the NPS's "failure to assert it."<sup>147</sup>

Three potential barriers to nuisance suits could challenge their effectiveness. First, "[t]raditionally, aesthetic complaints were insufficient to establish a nuisance."<sup>148</sup> For example, in *Wernke v. Halas*,<sup>149</sup> the court found that a neighbor's combination of ugly orange fencing and a toilet seat nailed to a tree (coupled with obscene language written in cement) did not constitute a nuisance because "it is well-settled . . . that, standing alone, unsightliness, or lack of aesthetic virtue, does not constitute a private nuisance."<sup>150</sup> Yet, the case of national parks protecting against external threats is easily distinguished from these types of cases because (1) damage to redwoods, by constituting environmental harm, causes more than aesthetic harm, and (2) in most cases denying aesthetic nuisances, like *Wernke*, the aesthetic damage occurred on *someone else's* property. For RNSP here, the damage would be to tangible property on their own lands, forcing them to use and enjoy the land differently. Moreover, other courts believe that aesthetic harm, especially if combined with other harm, can constitute a nuisance.<sup>151</sup>

Second, when deciding whether to enjoin a defendant's harmful conduct, courts consider the value of the defendant's conduct.<sup>152</sup> If the defendant's external activity produces a great economic benefit, it could avoid injunctive relief.<sup>153</sup> Though the timber industry—and other external activities—do create some benefits, injunctive relief is still likely. Injunctive relief for environmental damage in the nuisance context is "especially likely" due to "the enormous weight that is given to the preservation of our national resources and the protection of the environment from physical impairment."<sup>154</sup> In particular, for environmental damage creating

146 *United States v. Atlantic-Richfield Co.*, 478 F. Supp. 1215 (D. Mont. 1979). Though the United States sued for a trespass, the jumping of emissions across property lines is more properly characterized as a nuisance. See *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215, 222 (Mich. Ct. App. 1999).

147 *Protecting National Parks*, *supra* note 127, at 1197.

148 Nagle, *supra* note 138, at 286.

149 600 N.E.2d 117 (Ind. Ct. App. 1992).

150 *Id.* at 121–22; see, e.g., *Laubenstein v. Bode Tower, L.L.C.*, 392 P.3d 706, 710 (Okla. 2016) ("Nuisance claims founded solely on aesthetic harm are not actionable.").

151 See, e.g., *Allison v. Smith*, 695 P.2d 791, 794 (Colo. App. 1984) ("[U]nsightly activity . . . may become a private nuisance if it is unreasonably operated so as to be unduly offensive to its neighbors . . ."); *Sowers v. Forest Hills Subdivision*, 294 P.3d 427, 430 (Nev. 2013) ("[A] nuisance in fact may be found when the aesthetics are combined with other factors, such as noise, shadow flicker, and diminution in property value."); *Foley v. Harris*, 286 S.E.2d 186, 190–91 (Va. 1982) (holding that aesthetic harms related to junk and abandoned cars may interfere with the use and enjoyment of land). Though few California state decisions discuss this issue, one California court has held that "[i]n deriving a determination of the extent of the detriment suffered [from a nuisance] the court may consider the sentimental and aesthetic values of things destroyed." *Griffin v. Northridge*, 153 P.2d 800, 802 (Cal. Dist. Ct. App. 1944) (emphasis added).

152 See *supra* notes 128–129 and accompanying text.

153 See *KEETON*, *supra* note 131, at 630–32.

154 *Id.* at 627.

“irreparable harm,”<sup>155</sup> there exists an even greater impetus for injunctive relief. Because damage to redwoods clearly constitutes environmental damage, and because the redwood tree’s imperiled position after years of logging makes irreparable harm from further loss more likely, a court will likely grant injunctive relief despite the clear economic benefit of timber.

Finally, the nuisance approach offers only a piecemeal solution to the more structural problem of external threats. The NPS would have to fight externalities on a case-by-case basis, which creates additional risk that conflicting or inappropriate results occur, while disabling it from affecting more fundamental change to the federal/nonfederal landowner relationship.<sup>156</sup> By creating gaps between the desired result (no external threats) and reality, a case-by-case approach allows potentially harmful development to persist.<sup>157</sup> On the other hand, it remains clear that nuisance suits, however imperfect, move the NPS one step closer to a more optimal response to external threats. Moreover, sustained nuisance litigation success would likely deter external actors from continuing behavior that damages inner park resources, even though the NPS may not realistically sue all possible threats. Therefore, the case-by-case approach should not dissuade the NPS from litigation.

## CONCLUSION

The above discussion paints a pessimistic view of how the NPS can respond to external threats to RNSP. Though the NPS shares some blame—over-relying on cooperation with state and local entities while ignoring potential litigation solutions—the issue began with the initial Redwood National Park Act, which created a systemic mismatch between boundaries and threats to redwoods. Given the historic failure of California state regulatory bodies, and the lack of authority, means, and willingness of the NPS to unilaterally regulate, redwoods largely still lie at the mercy of external actors. Therefore, nuisance suits currently provide one of the only solutions to protect RNSP.

Professor Sax may have been pessimistic when he argued that full protection of national parks from external threats is “plainly impracticable,”<sup>158</sup> but he was not incorrect. That does not mean, however, the NPS cannot improve its current position. By focusing on nuisance litigation until it can convince Congress to expand its authority,<sup>159</sup> the NPS can deter future harmful development while safeguarding current redwoods to the maximum extent possible. Should the NPS take such a route, its historic redwood trees would not remain helpless giants.

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155 *Id.*

156 See Joseph L. Sax & Robert B. Keiter, *Glacier National Park and Its Neighbors: A Study of Federal Interagency Relations*, 14 *ECOLOGY L.Q.* 207, 251–52 (1987); see also Sax, *supra* note 16, at 260 (characterizing litigation as “only an interim remedy”).

157 See *id.* at 252.

158 Sax, *supra* note 4, at 712.

159 A daunting task of its own, given congressional misgivings about expanding federal regulatory power over property, a traditionally local concern. See *supra* notes 120–121 and accompanying text.