

UNDERSTANDING THE WILDERNESS ACT OF 1964
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“More Law than Order: the Wilderness Act and its Progeny”

On September 3, 1964, the eight-year legislative battle to establish a statutory wilderness system came to an end as President Lyndon Johnson signed the Wilderness Act.

The Wilderness Act created a statutory wilderness system, but it was neither the commencement nor the conclusion of congressional involvement in the protection and management of the American wilderness. Early congressional involvement in wilderness preservation is discussed in detail in *The Politics of Wilderness Preservation*¹. This chapter explores the origin and impact of more than 100 statutes, which collectively have established and implemented the National Wilderness Preservation System (NWPS). Fortunately, a clear understanding of the Congressional role in wilderness protection and management can be achieved without a separate analysis of each law.

Wilderness-related statutes to date fall loosely into two epochs, each introduced by landmark legislation. The Wilderness Act of 1964 established the NWPS, set general management direction, and introduced the era of primitive and contiguous area reviews. The Alaska National Interest Lands Conservation Act of 1980 (ANILCA) quadrupled the size of the NWPS and introduced the era of state by state sufficiency release.

THE WILDERNESS ACT OF 1964

Introduction

By 1964 federal land managers, with a degree of encouragement from Congress, had evolved two different systems of wilderness management on federal lands: national parks and national forest wilderness and primitive areas.

The first national park had been established in 1872, and the core of the modern system of national parks in the contiguous 48 states was in place by 1916. It is difficult to determine the degree to which early national parks were viewed as wilderness preserves. The Yellowstone Act speaks only of a "public park or pleasuring-ground for the benefit and enjoyment of the people." Within two decades, however, Congressional voices were being raised in defense of Yellowstone's naturalness, and in 1916 naturalness became a part of the statutory mandate governing all the national parks. The National Park Service Act of August 25 declared the purpose of parks to be conservation of the "scenery and the natural and historic objects and the wildlife therein . . . unimpaired for the enjoyment of future generations." Wilderness management of a sort has been a part of the park service mission ever since.

¹ Craig W. Allin, *The Politics of Wilderness Preservation* (Westport, CT: Greenwood Press, 1982), chapters 1-3.

The first national forests were established in 1891. Six years later the National Forest Organic Act established the first national forest management policy, one championed by development-minded westerners and designed to meet their needs. Nothing in the Forest Service Act of February 1, 1905, served to alter the distinctly utilitarian mission of the national forests. Although there may be room to quibble, both the Forest Service and the wilderness movement have chosen to celebrate June 3, 1924, the date of the Gila Reservation, as the birth date of a national forest wilderness system.

By 1963 the nation's wilderness system had grown to embrace more than 14 million acres in the national forests² and arguably 90 percent of the 22 million acres in national parks and national monuments (Hist. Stats of the U.S., 396).³ The gross acreage is less than xx percent of the more than 100 million acres which are today managed as wilderness [*I need to get a figure for national park and other wilderness recommendations*], but the size of the system was not the primary motivation for those who undertook to pass a wilderness act in the mid 1950s.

The impetus for a wilderness act came more from the perception that designated wilderness was in danger than from the perception that too little had been designated. In the National Park Service, where no clear distinction was drawn between wilderness management and park management, the threat was tourist development. The end of World War II had unleashed a flood of tourists on the nation's parks, and no end was in sight. The park service responded by undertaking the largest development effort in its history. With the support of unprecedented appropriations from Congress, the service embarked on Mission 66, a ten-year effort to upgrade the infrastructure of the parks to meet the potentially unlimited demands of tourism. Disneyland had opened its doors in 1955, and immediately demonstrated that, to the average American tourist, total artificiality was far more attractive than total naturalness. Advocates of natural parks feared a continuing transition toward artificiality.

In the national forests, the threat was more easily articulated. The demand for commodity production from the nation's forests was growing, and the Forest Service remained an essentially utilitarian agency eager to meet that demand. The service's lethargy in reclassifying its primitive areas suggested administrative resistance to permanent wilderness, and even the presumably permanent wilderness, wild and roadless areas enjoyed protection that could be revoked by the stroke of an agriculture secretary's pen.

After forty years of intermittent activation in defense of specific wilderness--Yosemite's Hetch Hetchy Valley, the Superior roadless area, or the scenic canyons of Dinosaur National National Monument--wilderness proponents were ready to take the offensive and to seek statutory protection for a national system of wilderness areas. The decade of struggle that culminated in

² U.S. Congress, Senate Report 109, 88 Cong., 1 sess. (April 3, 1963), p. 6.

³ U.S. Department of Commerce, Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970 (Washington: G.P.O., 197x), p. 396.

passage of the Wilderness Act has been chronicled elsewhere.⁴ Our purpose here is to examine the product of that struggle and what it has meant for what remains of the American wilderness.

An Analysis of the Wilderness Act

Public Law 88-577, an act to establish a National Wilderness Preservation System for the permanent good of the whole people, and for other purposes, has seven sections. The first is a short title. The second defines wilderness, establishes a wilderness system, and sets basic policy direction. The third declares certain pre-existing areas to be components of the wilderness system and establishes a review process by which other areas might be brought forward for decision. The fourth sets forth more detailed management directives. The fifth establishes rights of access to non federally owned properties within wilderness areas. The sixth authorizes the interior and agriculture secretaries to accept gifts in furtherance of the wilderness system, and the seventh commands them to report annually to the president and Congress on the state of the system.

The pivotal importance of the Wilderness Act justifies an analysis, section by section. We undertake that here with particular emphasis on those sections which have, in subsequent years, influenced the growth and management of the NWPS.

Section 1, the short title, declares "this act may be cited as the `Wilderness Act.'" It has been ever since.

Section 2 establishes a wilderness system, provides a rationale for doing so, defines wilderness in principle and in practice, and resolves several of the major political controversies that had erupted during the decade-long consideration of various wilderness bills. All of this requires a closer look.

Paragraph (a) begins with a declaration of purpose.

In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness.

This declaration is remarkable for the clarity with which it recognizes that American civilization had reached a degree of technological sophistication that enabled it to modify the remotest of regions. No longer could the nation depend on nature to provide her own defense. Contrast the view expressed here with that expressed in 1871 by Senator Cornelius Cole of California. In an effort to dissuade Congress from establishing Yellowstone National Park, Cole argued, "the natural curiosities there cannot be interfered with by anything that man can do. . . . There is an abundance of public park ground in the Rocky Mountains that will never be occupied. It is all

⁴ Allin, Politics of Wilderness Preservation, chapter 4.

one great park, and never can be anything else."⁵

Paragraph (a) concludes with language establishing a wilderness system, stating a general policy with regard to its management, and preempting the right of administrative agencies to establish wilderness areas on their own authority.

For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas," and these shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness; and no Federal lands shall be designated as "wilderness areas" except as provided for in this Act or by subsequent Act.

Two critically important features of the Wilderness Act are here revealed. First, wilderness areas are set aside for the use and enjoyment of the people generally. This clearly distinguishes American wilderness areas from the "strict nature reserves" recognized by the international conservation movement as being restricted to scientific investigation. The probability that wilderness areas dedicated to the enjoyment of the American people will, of necessity, be less than pristine is reinforced by the statute's call for "preservation of their wilderness character." Perhaps I am guilty of over analysis, but to me this phrase suggests the acceptability of "apparent wilderness." In fact, but for the refrain, "as wilderness," the language of the Wilderness Act sounds very much like the language of the 1916 National Park Service Act, which calls for "the enjoyment of the [national parks] in such a manner and by such means as will leave them unimpaired for the enjoyment of future generations."⁶ This similarity has probably encouraged the view, widespread in the land management agencies, that wilderness is primarily a form of recreational area.

Second, wilderness areas may be created only by Act of Congress. Prior to 1964, all wilderness areas were administratively designated by the Department of Agriculture. Thus, at the same moment that Congress endorsed the work of the Forest Service in establishing wilderness areas, it deprived the Forest Service, and the rest of the federal land management agencies, of the power to continue. This irony was required to appease a politically powerful bloc of congressmen lead by Wayne Aspinall of Colorado. Aspinall and his colleagues were eager to reassert the constitutional authority of Congress to determine the disposition of the public lands, an authority that, in their view, had been appropriated by the executive branch. Early advocates of a wilderness bill had preferred language that would have allowed the executive agencies to establish, but not to abolish, wilderness areas. Such a procedure, they reasoned, would maximize

⁵Senator Cornelius Cole (California), Congressional Globe, 42 Cong., 2 sess. (January 30, 1872), part 1, p. 697.

⁶ Act of August 25, 1916, chapter 408, Public Law 64-408, 39 Stat. 535.

the growth of the wilderness system. An Act of Congress is a major achievement, and proponents feared it would be infrequently accomplished with the result that there would be few new areas added. This language was a disappointment, but, in the end, they had no choice.

In a similar fashion paragraph (b) gives statutory recognition to some prominent political realities. Opponents of wilderness preservation had argued forcefully that a wilderness bill would create a needless layer of bureaucracy and waste the taxpayers' money as well as withdrawing the affected areas from the more productive utilization of their resources. Officials of the Park Service and the Forest Service worried lest a wilderness bill become the vehicle by which lands would be transferred from their control. These fears were put to rest with the declarations that a wilderness "area shall continue to be managed by the Department and agency having jurisdiction thereover immediately before its inclusion in the National Wilderness Preservation System," and that "no appropriation shall be available for the payment of expenses or salaries for the administration of the National Wilderness System as a separate unit[,] nor shall any appropriations be available for additional personnel stated as being required solely for the purpose of managing or administering areas solely because they are included in the National Wilderness Preservation System."

The final paragraph of Section 2 provides two distinctly different definitions of wilderness. The first is a definition in principle: "an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain." This language, generally attributed to Howard Zahniser of the Wilderness Society, is about as close an approximation of literature as one is likely to find in a land management statute. If it were being written today, it is doubtful that its authors could avoid scientific terms, which have recently crept into the general vocabulary, like ecosystem (the community of life) or the less common and more ponderous biogeocenoses (the earth and its community of life). The concepts are clearly present in the statute although the terms are not.

Contemporary wilderness management is significantly influenced by the way the ecosystem concept is treated in Section 2 (c). Here "the earth and its community of life" are implicitly defined so as to exclude mankind. This is consistent with the view, dominant in Western civilization, of man--at least civilized man--as separate from nature. The act describes man as "a visitor who does not remain," and the wilderness as a place "untrammelled," that is unshackled or unrestrained in its freedom, by man. By its implicit rejection of a role for man as part of wilderness, the act breaks with the Puritanical fear of man in nature exemplified in 1620 by William Bradford's characterization of North America as a "a hideous and desolate wilderness full of wild beasts and wild men."⁷ It breaks equally with the Romantic Movement's glorification of the noble savage in his natural wilderness setting. In 1833 George Catlin's study tour of North American Indians led him to propose "a magnificent park A nation's Park containing man

⁷ William Bradford, Of Plymouth Plantation, 1620-1647 (New York: Alfred A. Knopf, 1952), p. 62.

and beast."⁸ A quarter of a century later, in language reminiscent of Catlin's, Henry David Thoreau called for "national preserves . . . in which the bear and panther, and even some of the hunter race, may still exist, and not be `civilized off the face of the earth.'"⁹

As if in recognition that their definition in principle were unsuited to the practical needs of governing, the Wilderness Act's authors continued.

An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain certain ecological, geological, or other features of scientific, educational, scenic, or historical value.

This further definition begins to clarify the wilderness concept, but important ambiguities remain. Since Congress has reserved to itself the final decision to establish a wilderness area, this definition must be seen as answering the question, "What kind of area might qualify for consideration?" The concept of federal land is reasonably clear, but much federal land is interspersed with state and private holdings. Do such inholdings disqualify an area for consideration as wilderness? The federal land must be undeveloped, but what does that mean? Does the presence of a pack trail constitute development, or a primitive bridge, or a campsite? Might an area once extensively developed for timber or mining qualify once that activity has ceased? The area must be without permanent improvements or human habitation. Is a trail a permanent improvement? What about an abandoned cabin?

The comma in line four of the passage quoted above divides the sentence into two parts; the comma and the subsequent "which" indicate that what follows is a nonrestrictive clause. Nonrestrictive clauses are parenthetical in nature--they can be removed from a sentence without changing its meaning--so the contents of this clause should be read as an elaboration of what has gone before. They should be read that way, but they cannot be. The qualifying phrase, "protected and managed so as to preserve its natural conditions" changes the meaning of the sentence and is, therefore, restrictive. The second "which" clause may or may not be restrictive. All this is of consequence only because it increases the ambiguity inherent in the Wilderness Act's most significant definition.

Whatever its exact relationship to the previous parts of the sentence, the paragraph's list of

⁸ George Catlin, North American Indians, 2 vols. (Philadelphia: Leary, Stewart, and Co., 1913, 1: 294-95.

⁹ Henry David Thoreau, "Chesuncook," Atlantic Monthly 2 (August 1858): 317.

qualifiers does provide some insight into the Congressional intent. The preponderance of qualifiers in item (1) strongly suggests that Congress desired a flexible definition of wilderness: "generally appears . . . affected primarily . . . substantially unnoticeable." Item (2) reinforces the notion that Congress saw wilderness primarily as recreational space. The minimum size established in item (3), generally five thousand acres, is a far cry from the 500,000 acres advocated by Aldo Leopold, but consistent with Forest Service practice under the U-Regulations. The list of optional wilderness features in item (4) appears to be a relatively lame attempt to recognize nonrecreational values that might be served by wilderness preservation.

Section 3 of the Wilderness Act is devoted to the details of establishing a statutory wilderness system. The "wilderness," "wild," and "canoe" areas previously established by the Forest Service under its U-Regulations are designated as wilderness areas in paragraph (a). Although the Wilderness Act does not say so, the "instant wilderness" so designated comprised 54 areas in 13 states and 9.1 million acres. Among the better known wilderness areas designated by the act were the Superstition in Arizona, John Muir and Marble Mountain in California, Selway-Bitterroot in Idaho and Montana, Bob Marshall in Montana, Gila and Pecos in New Mexico, Eagle Cap and Three Sisters in Oregon, Glacier Peak in Washington, as well as Bridger, North Absaroka, Teton and Washakie adjacent to Yellowstone National Park in Wyoming. Paragraph (a) also requires the Secretary of Agriculture to file maps and legal descriptions of each wilderness with the appropriate committees of Congress and to make information available to the public including maps, legal descriptions, regulations, and reports.

The remainder of Section 3 is devoted to establishing a process by which additional areas are to be brought before Congress as candidates for inclusion in the NWPS. Paragraph (b) directs the Secretary of Agriculture to review each of the remaining "primitive" areas with regard to "its suitability or nonsuitability for preservation as wilderness," and report his findings to the President. The President in turn is directed to make recommendations to the Congress on a ten-year schedule. Advocates of wilderness preservation had hoped to make the "primitive areas" instant wilderness. Opponents had hoped to have them excluded from the wilderness system at least in so far as they might be profitably developed for commodities. Opponents argued these areas had not been sufficiently studied to be locked up, and in fact, areas that retained the "primitive" designation in 1964 did so, at least in part, because the Forest Service had been unwilling to forego their timber potential in perpetuity.

The review process of paragraph (b) along with the appendant management language delineates one of the core compromises which allowed the act to be passed. Primitive areas are not instant wilderness, but they may be designated wilderness later. Congress will be offered opportunities to do so over the next decade. Furthermore, "areas classified as 'primitive' . . . shall continue to be administered under the rules and regulations affecting such areas on the effective date of this Act until Congress has determined otherwise." Since the Forest Service generally managed primitive areas just as it managed wilderness, wild and canoe areas, the effect of this language was to include the primitive areas in the wilderness system in practice while excluding them in theory. Only an act of Congress could change that status.

Congress granted one exception to the benefit of developers. Upon completion of his review, the

Secretary of Agriculture was permitted on his own authority to delete an area not to exceed 7,000 acres from the southern tip of the Gore Range-Eagles Nest Primitive Area in Colorado [*where it presumably obstructed the preferred route of a proposed highway.*] {check on this, based on a faint memory} A second exception appears to benefit wilderness. The president was allowed, "at the time he submits his recommendations to the Congress [to increase the size of any primitive area] by not more than five thousand acres with not more than one thousand two hundred and eighty acres of such increase in any one compact unit." The plain meaning of this passage is that the president is allowed to make minor boundary adjustments but not to appropriate Congress's prerogative to create wilderness areas. A president might propose to exceed these guidelines, but if he does so "the increase in size shall not become effective until acted upon by Congress." The president is prohibited from substantially increasing the size of a primitive area, yet he is virtually invited to propose that Congress do so:

Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress, the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness character.

Paragraph (c) of Section 3 puts the Secretary of the Interior on a review and recommendation schedule very much like the one set out for the Secretary of Agriculture in the previous paragraph. The Interior secretary's mission is to review every roadless area of 5,000 or more contiguous acres and every roadless island throughout the national park system and the national wildlife refuge system. Here, as with the primitive area reviews, "a recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress." Proponents of the Wilderness Act had exercised great care to assure that the act not become a vehicle to undo the protections established by regulation for primitive areas in the national forests and for roadless areas in the national parks. Assurance on the latter issue is written into the last sentence of paragraph (c): "Nothing contained herein shall, by implication or otherwise, be construed to lessen the present statutory authority of the Secretary of the Interior with respect to the maintenance of roadless areas within units of the national park system."

Paragraph (d) marks the Wilderness Act as a precedent setting exercise in natural resources policy making. More than six years before passage of the National Environmental Policy Act (NEPA), the Wilderness Act required that the process of review and recommendation be accompanied by significant public involvement. The act's public participation requirements were opposed by advocates of an expansive wilderness system but insisted upon by Congressman Aspinall and others concerned that wilderness denied the nation necessary resources. This heritage is apparent in a careful reading of paragraph (d), for the public participation requirement subtly favors wilderness opponents.

First, in paragraph (b) the Agriculture secretary is required to review each primitive area with regard to its "suitability or nonsuitability" for preservation as wilderness. Exactly the same words are used with respect to the Interior secretary in paragraph (c). In paragraph (d), however, the public participation requirement is invoked "prior to submitting any recommendations to the President with respect to the suitability of any area for preservation as wilderness." Although ambiguous in isolation, when read in the context of the preceding two paragraphs, the language

of paragraph (d) makes it clear that the interior and agriculture secretaries are required to submit to public participation before recommending wilderness, but that they are excused from that process if they chose to recommend against wilderness. *[find out how the agencies have interpreted this language]* Public participation has become an accepted--though not always appreciated--component of agency wilderness decision-making, so it is unlikely that this statutory bias has created any practical disadvantage for wilderness advocates.

Second, once the process is invoked, its requirements give particular attention to the wishes of those who live and work in proximity to the proposed wilderness. The public notice requirement, paragraph (d)(1)(A), calls for "publication in the Federal Register and in a newspaper having general circulation in the area or areas in the vicinity of the affected lands." The public meeting requirement, paragraph (d)(1)(B), repeats the language of the public notice requirement and further requires "a public hearing or hearings at a location or locations convenient to the area affected [provided that] at least one hearing shall be held in each State in which a portion of the land lies." The governmental notice requirement, paragraph (d)(1)(C), guarantees formal notice to state governors and county governing boards as well as to the "Federal Departments and agencies concerned."

This systematic bias toward soliciting local views would be unremarkable if its impact on the process of wilderness designation were politically neutral. The historical impact of the public participation requirements is difficult to judge, but there is little doubt that the authors of the Wilderness Act believed this language would constrain wilderness growth. The entire history of preservation politics in the United States supplies evidence for the proposition that men and women living on the frontier--where natural resources still appear abundant and where an economic livelihood is likely to depend, either directly or indirectly on the commercial exploitation of those resources--are least likely to support policies that withdraw resources from commercial exploitation. By contrast, the most numerous advocates of wilderness preservation, and the national organizations most committed to that goal, are likely to be concentrated in urban areas far from the land in question. Senator James A. Reed of Missouri observed as much in 1913 during the debate over damming the Hetch Hetchy Valley in Yosemite National Park in order to provide water for San Francisco. "The degree of opposition [to flooding the valley] increases in direct proportion with the distance the objector lives from the ground to be taken. When we get as far east as New England the opposition has become a frenzy."¹⁰ In structuring the public participation requirements as they did, the authors of the Wilderness Act systematically advantaged opponents and disadvantages proponents of wilderness.

The final paragraph of Section 3 establishes that boundaries of existing wilderness areas may be modified only by Act of Congress following the process of public participation, departmental recommendation to the president, and presidential recommendation to Congress described above. In the debates over the Wilderness Act some proponents had advocated a system where wilderness could be created by administrative action but abolished only by Congress. Some opponents had advocated a system where wilderness could be abolished administrative action but

¹⁰ U.S. Congress, The Congressional Record 51 (December 6, 1913): 362.

created only by Congress. In the final analysis, Congress chose the system that promised the greatest stability and the most Congressional control. An Act of Congress would be required to create or abolish any wilderness area.

Section 4 of the Wilderness Act is of particular interest because it set statutory direction for management of the NWPS. Subsequent acts have imposed special management provisions on particular wilderness areas, but the Wilderness Act itself has never been amended. It remains the foundation for wilderness management nationwide.

Section 4 (a) declares that "the purposes of this Act are hereby to be within and supplemental to the purposes for which national forests and units of the national park and national wildlife refuge systems are established and administered." Standing alone the intent of this declaration is unclear, and the language that follows does not resolve the ambiguity. What is at issue is the relative primacy of wilderness status as compared with the overlapping statuses of national forest, national park, or national wildlife refuge.

Paragraph (a)(1) states, "nothing in this Act shall be deemed to be in interference with the purposes for which national forests are established as set forth in the Act of June 4, 1897 (30 Stat. 11), and the Multiple-Use Sustained Yield Act of June 12, 1960 (74 Stat. 215)." Conflict with the latter act is unlikely. It was passed only four years before the Wilderness Act at a time when wilderness was already very much on the Congressional agenda. It declares, "the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." If that is not clear enough it adds, "the establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of this Act."¹¹ The Wilderness Act has clearly withdrawn the authority of the Forest Service to create wilderness areas, but both statutes agree that wilderness preservation is consistent with the purposes for which national forests are created.

The National Forest Organic Act of June 4, 1897, is more problematic. It declares, "no public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States."¹² The Interior secretary, later the Chief of the Forest Service, is authorized to regulate the "occupancy and use" of the forest reserves consistent with the purposes declared. This statute constitutes a clear mandate to preserve the forests in productive condition but none whatsoever to preserve wilderness. Yet, it was under the general authority of this statute that the Forest Service created the nation's first designated wilderness areas. Although it might reasonably be read to mean just the opposite, Congress' declaration that "nothing in this Act shall be deemed to be in interference with the purposes for which national forests are established as set forth in the Act of June 4, 1897," was apparently meant to reassert the claim set forth in the Multiple-Use Act, that

¹¹ 74 Stat. 215.

¹² 30 Stat. 11, 35.

wilderness preservation is a bona fide use of national forest lands.

Paragraph (a)(2) declares "nothing in this Act shall modify the restrictions and provisions of [various public laws] as applying to the Superior National Forest or the regulations of the Secretary of Agriculture." Taken together these laws and regulations provided a detailed management plan for the area now known as the Boundary Waters Canoe Area Wilderness. That management plan authorized significant nonwilderness uses of the BWCA, the most important of which was continuing commercial forestry and the most obvious of which was widespread use of motor boats and motorized canoes. The legal impact of this paragraph is to say, "notwithstanding that this act makes the BWCA a federal wilderness area, it shall be managed exactly as if this act had never been passed." Section 4 (d)(5) contains additional language pertaining to the BWCA.

Paragraph (a)(3) protects the national parks against the possibility that the Wilderness Act might be used as a tool to weaken established preservation authorities. The first sentence establishes that the Wilderness Act does not "modify the statutory authority under which units of the national park system are created." The Wilderness Act prohibits the president or any executive agency from establishing wilderness areas, but various statutes authorize the president to establish units of the national park system by proclamation. The most important of those authorities, from the perspective of potential wilderness preservation, is the presidential power to create national monuments under the Antiquities Act of 1906.¹³ In 1907 and 1908 President Theodore Roosevelt used the Antiquities Act to set aside lands which were later incorporated into Lassen Volcanic and Grand Canyon national parks. In 1978 President Jimmy Carter created 17 national monuments in Alaska with a total area of 56 million acres, more than doubling the size of the national park system.

The act continues, "further, the designation of any area of any park, monument, or other unit of the national park system as a wilderness area pursuant to this Act shall in no manner lower the standards evolved for [their] use and preservation." This is an equally vital protection for the parks. The management standards set forth for wilderness areas in the Wilderness Act are in some cases less restrictive than those which already apply to units of the national park system. Thanks to the National Park Service Act, national parks are wildlife refuges; wilderness areas, per se, are not. Most national parks are withdrawn from entry under the mining acts; wilderness areas, per se, are not. National parks and national monuments may have somewhat greater protection against hydro-power developments than do wilderness areas per se. In certain other respects national parks are less well protected than wilderness areas. Motor vehicles, roads, and buildings are generally prohibited in wilderness areas, but not in units of the national park system. The net effect of this paragraph is to assure that when a wilderness area is established within a unit of the national park system, it will be governed by the provisions of the Wilderness Act or the applicable national parks statutes, whichever are the more restrictive.

Paragraphs (b) and (c) of Section 4 may well be the most important in all the Wilderness Act. Together they set forth the general management provisions which are to apply to wilderness areas

¹³ 34 Stat. 225.

throughout the United States. The first of these paragraphs charges the management agencies in positive terms:

Except as otherwise provided in this Act, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as to preserve its wilderness character.

This language meshes nicely with the declaration in paragraph (a) that the purposes of the Wilderness Act are "within and supplemental to" those of the national forests, national parks, etc. Managers are charged to preserve the wilderness character of each wilderness area even as they go about managing that area for its other uses. The constituents of said "wilderness character" are to be found in the definitions of Section 2 and the prohibitions of the paragraph which follows. Of course, the requirement that wilderness character be preserved assumes that an area presently has a wilderness character. This assumption is clearly false where livestock grazing is permitted. The biological impact of cattle and sheep on wilderness ecosystems is enormous. When the Forest Service attempted to reduce wilderness grazing on behalf of wilderness character, Congress said in effect: "Preserving wilderness character means keeping an area as wild as when we made it a wilderness. The Wilderness Act may not be used to reduce grazing where it has previously been established."

Paragraph (b) continues, "except as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use." This language is very similar to that of Section 2 (c) where recreation also leads the list and history brings up the rear. It serves to reinforce the perception that the authors of Wilderness Act saw wilderness areas primarily as a special kind of recreational area.

The heart of wilderness protection is to be found in the specific prohibitions of Section 4 (c). There are two blanket prohibitions: "no commercial enterprise and no permanent road." These are modified by statutory exceptions within the Wilderness Act and by "existing private rights."

Section 4 (d) of the Wilderness Act relaxes the ban on commercial enterprises for mining and minerals development, for water and water-power development, for livestock grazing, and for "commercial services . . . which are proper for realizing the recreational or other wilderness purposes of the areas." The major commercial activity authorized by this exception is the provision of outfitter and guide services to recreational users.

The statutory ban on permanent roads is limited by the established right of access which belongs to land owners, holders of valid mining claims, and other legal occupants of lands completely surrounded by wilderness. Section 5 (a) declares that land owners "shall be given such rights as may be necessary to assure adequate access." The subsequent section, 5 (b), provides that in any case where valid mining claims or other valid occupancies are wholly within a designated national forest wilderness area, the Secretary of Agriculture shall, by reasonable regulations consistent with the preservation of the area as wilderness, permit ingress and egress to such surrounded areas by means which have been or are being customarily enjoyed with respect to other such areas similarly situated.

This language appears to require the secretary to square the circle. The customary means of access for valid mining claims is likely to be by dump truck over at least relatively permanent roads. The secretary is charged to permit this under regulations consistent with preserving the area as wilderness. Clearly the secretary should seek to minimize damage to the wilderness resource.

The remaining prohibitions of Section 4 (c) are the following. "There shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation." Like the prohibitions on permanent roads and commercial enterprise, these prohibitions are limited by other statutory provisions within the Wilderness Act and by "existing private rights." Unlike the bans just noted these are also limited by an administrative exception which reads as follows: "Except as necessary to meet the minimum requirements for the administration of the area for the purposes of this Act (including measures required in emergencies involving the health and safety of persons within the area)." The language establishing this administrative exception is vague; its intent appears to be to create needed flexibility without giving away the store. Except for emergencies involving human health and safety, the managers are left to their own devices to determine what is permissible. The exception appears to be narrowly drawn. It must be "necessary to meet the minimum requirements . . . for the purposes of this Act."¹⁴ That narrowness is somewhat eroded by the declaration in Section 4 (a) that "the purposes of this Act are . . . within and supplemental to the purposes for which national forests and units of the national park and national wildlife refuge systems are established and administered."

The prohibitions themselves are ambiguous. The prohibition of motors is least so, but even here one might speculate whether a battery powered electric shaver is prohibited "motorized equipment." Landing of aircraft is clearly prohibited, but the dropping of supplies is not addressed. None of the prohibitions are defined in the Wilderness Act, and the terms "mechanical transport," "structure," and "installation" might be susceptible to wide latitude in interpretation.

Some potential problems of interpretation are addressed in Section 4 (d) which contains an extensive list of "special provisions" which modify or, in some cases for certain purposes, abrogate the prohibitions of Section 4 (c).

Against the general prohibitions of motor vehicles, motorized equipment, motorboats, and mechanical transport, paragraph (d)(1) declares "within Wilderness Areas designated by this Act the use of aircraft and motorboats, where these uses have already become established, may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable."¹⁵ The secretary has virtually unlimited latitude. The language is permissive ("may") not compulsory ("shall"), and the permissible restrictions apparently need no basis beyond the

¹⁴ Emphasis added.

¹⁵ Emphasis added.

secretary's preference. Thus, the protection of the status quo for aircraft and motorboat users depends essentially on the caprice of the secretary. **[has this ever been tested in court?]**

Exceptions written on behalf of more powerful constituencies provide far less latitude. Wilderness grazing provides a case in point. Like aircraft and motorboat use, grazing appears to be protected where it is already being practiced. In fact, the interests of grazers are far better protected than those of aircraft or motorboat users. Compare the language of Section 4 (d)(4)(2), below, with the provisions quoted above. "The grazing of livestock, where established prior to the effective date of this Act, shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture."¹⁶

The agriculture secretary is also given wide latitude in responding to perceived threats to the forest. "Such measures may be taken as may be necessary in the control of fire, insects, and diseases, subject to such conditions as the Secretary deems desirable." This language, too, is permissive, not obligatory. The secretary may or may not act against fire, insects, or diseases; if he chooses to act, he may do pretty much what he thinks best.

By far the most complex of the Wilderness Act's special provisions involves mining and minerals. The minerals industry has always argued that minerals are where you find them, and in those favored areas minerals extraction and production ought to be the pre-eminent use. For the most part the Congress has agreed. The industry takes a very dim view of any hint that Congress might be weakening its commitment to relatively unregulated minerals development on federal lands, and the debates over the various wilderness bills hinted at exactly that. The convoluted language of sections 4 (d)(2) and 4 (d)(3) is the product of a compromise hammered out between wilderness advocates, who understood that mining and wilderness preservation were incompatible, and minerals advocates, who believed that mineral development ought to have higher priority than wilderness preservation. The impasse between those who would prohibit and those who would permit minerals development in designated wilderness areas was settled by a two part agreement, which can best be understood by examining the second part first.

Section 4 (d)(3) embodies an agreement to withdraw wilderness areas from the jurisdiction of the mining and mineral leasing laws, but not until January 1, 1984.

Notwithstanding any other provisions of this Act, until midnight December 31, 1983, the United States mining laws and all laws pertaining to mineral leasing shall, to the same extent as applicable prior to the effective date of this Act, extend to those national forest lands designated by this Act as "wilderness areas"; subject, however, to such reasonable regulations governing ingress and egress as may be prescribed by the Secretary of Agriculture consistent with the use of the land for mineral location and development and exploration, drilling and production.¹⁷

¹⁶ Emphasis added.

¹⁷ Emphasis added.

Here the regulations of the secretary must be reasonable from the point of view of mineral development. All necessary facilities must be permitted, "including where essential the use of mechanized ground or air equipment." As if to make the point more clearly, the same principle is repeated later in the paragraph.

Mineral leases, permits and licenses . . . shall contain such reasonable stipulations as may be prescribed by the Secretary of Agriculture for the protection of the wilderness character of the land consistent with the use of the land for the purposes for which they are leased, permitted, or licensed.

In effect the minerals industry is granted 20 years to establish "existing private rights" which, in turn, could limit de facto wilderness preservation indefinitely. Still, some restrictions are imposed on the mineral industry. Mining claims may not be used for non-mining purposes like commercial timber harvest or the location of outfitter camps. New patents issued for mining claims within national forest wilderness areas are to convey title to the minerals and a right to use necessary surface resources but to "reserve to the United States all title in or to the surface of the claim." The secretary is granted the authority, when mineral use is terminated, to require prompt "restoration as near as practicable of the surface of the land disturbed."

The other part of the minerals compromise is embodied in Section 4 (d)(2), which establishes that gathering information about minerals, even by prospecting, must be allowed to continue indefinitely, "if such activity is carried out in a manner compatible with the preservation of the wilderness environment." The Wilderness Act does not indicate whether the agriculture secretary or the interior secretary or both have the authority to regulate this activity. Although this information gathering may go on in perpetuity, there would be little commercial incentive to continue it beyond December 31, 1983. Recognizing that private exploration would be short-lived and desiring to keep alive the possibility that future minerals discoveries might be made and developed in wilderness areas, mineral interests were able to insist on language requiring wilderness areas to be "surveyed on a planned, recurring basis consistent with the concept of wilderness preservation by the Geological Survey and the Bureau of Mines to determine the mineral values, if any, that may be present." The results of these surveys are to be submitted to the President and Congress and made available to the public. Although mineral rights may not legally be established in wilderness areas after December 31, 1983, a major discovery, certified by a governmental agency, might well persuade Congress to change the rules or to declassify the affected area, so as to allow development to take place.

The complex provisions regarding minerals are followed by relatively straight-forward concession to various other interests. Section 4 (d)(4) declares that the president may authorize water or power projects within the wilderness areas created by this act, upon his determination that such development is in the national interest. This section's protection for established grazing was discussed above.

Section 4 (d)(5) again asserts the unique place of the Boundary Waters Canoe Area in the Wilderness Act. This paragraph provides that the management of the BWCA shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining, without unnecessary

restrictions on other uses, including that of timber, the primitive character of the area, particularly in the vicinity of lakes, streams, and portages: *Provided*, That nothing in this Act shall preclude the continuance within the area of any already established use of motorboats.

This language appears to codify the departmental regulations governing the BWCA at the time the Wilderness Act was passed. Those regulations treated the BWCA more like a national recreation area than like a wilderness.

Paragraph 6 allows commercial services "to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas." This language appears to open the door for outfitter and guide services throughout the areas designated by this act.

The final paragraphs disclaim any intention that the Wilderness Act favors one side or another in the complex interjurisdictional politics of fish, wildlife, and water law.

(7) Nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

(8) Nothing in this Act shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests.

Section 5, in so far as it deals with access rights of inholders, has been discussed above. Paragraph (c) of this section authorizes the acquisition of inholdings, provided "(1) the owner concurs in such acquisition or (2) the acquisition is specifically authorized by Congress." The effect of this paragraph is to deny the government the power of eminent domain--unless exercised through an Act of Congress--with regard to acquiring private property within the perimeter of a wilderness area. [condemnation under other acts?]

Section 6 authorizes the agriculture secretary to accept gifts of land within or, with 60 days' notice to the Congress, adjacent to designated wilderness areas. The secretaries of agriculture and interior are both authorized to accept private contributions and gifts in furtherance of the Wilderness Act.

Section 7 requires an annual report from the secretaries of agriculture and interior to the president on the status of the wilderness system. The report, which is to be transmitted to the Congress, is to include "a list and description of the areas in the system, regulations in effect, and other pertinent information, together with any recommendations they may care to make." This reporting requirement has not been enforced, and the reports, when issued, have fallen far short of the comprehensiveness implied by the statute.

The Political Balance in 1964

Roderick Nash has written that wilderness is a cultural concept, and one to be found only in relatively technological cultures. It is equally true that wilderness areas are a political creation. This is so, not merely in the sense that wilderness areas in the United States are created by law,

but also in the larger sense the statutes that create wilderness areas, and the statutes and regulations by which they are administered, are the product of competing political forces, often with incompatible objectives. The statutes which emerge are the product of compromise. There is no guarantee that they will embrace any logic save for the logic of politics--the art of the possible.

As we have seen, the competing forces that hammered out the Wilderness Act, produced a statute that is, in part, a bundle of contradictions, ambiguities, and redundancies. The Wilderness Act is rightly celebrated as landmark legislation, but the advocates of wilderness preservation were not dramatically more powerful in Congress in 1964 than they had been in 1962 or even 1958. As a result, the compromise enshrined in the Wilderness Act actually changed very little in the short run, and the benefits gained came at a price. Advocates of wilderness preservation achieved their primary goal, statutory protection for a system of wilderness areas, but the acreage protected was no greater than it had been prior to the Act. Administrative agencies and executive branch officials had been deprived of their authority to terminate wilderness designations, but they had also lost the power to establish new ones.

The statutory management language was astonishingly effective in maintaining the status quo. The fundamental principles of wilderness management--no roads, no motor vehicles, no buildings--were perfectly consistent with Forest Service practice in most wilderness area, and where the Forest Service had made exceptions, the Congress wrote those into the law as well. If the act achieved anything significant with regard to management, it was to establish a kind of nondegradation principle: all previously existing nonconforming uses will be accepted, but new ones will not be tolerated. Like local zoning ordinances from time immemorial, the Wilderness Act, for the most part, "grandfathered in" pre-existing nonconforming uses.

The Wilderness Act is a landmark to the balance of forces in 1964. If that balance has since changed, we can look to the pattern of legislation subsequent to 1964 for the evidence.