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> *[Wilderness areas] are delicate, sensitive places where the often mysterious and unpredictable process of nature [is] to be preserved for the study and enjoyment of mankind. Congress directed that man must tread lightly in these areas, in awe and with respect.*[1]

September 3, 1964:

> *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, leaving no lands designated for preservation and protection in their natural condition, 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. For this purpose there is hereby established a National Wilderness Preservation System. . . . [F]ederally owned areas designated by Congress as "wilderness areas," . . . 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 . . . .*[2]

INTRODUCTION

Thirty-five years! Enough time for courts to establish some clear interpretive trends for the Wilderness Act. Most fundamentally, they have recognized a classification of lands reserved and dedicated to a preservation purpose, as opposed to more traditional resource commodity purposes, and they have vigorously defended the wilderness quality of those lands from many challenges. They have also had to balance wilderness preservation with conflicting use exceptions contained in the Wilderness Act itself or in enabling legislation for individual wilderness areas. Again, wilderness principles and objectives have come off rather well.

Naturally, legislation of this significance will always be tested in court, and many chapters will be written in the future. I have arranged my discussion of existing case law in a manner which I feel comfortably addresses the issues litigated. I find three broad categories or themes: the definition of wilderness, the scope or breadth of protection afforded by the Act, and management questions regarding wilderness areas themselves.

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1. Sierra Club v. Lyng, 662 F. Supp. 40, 43 (D.D.C. 1987) (Gesell, J.).

2. Wilderness Act of 1964, Pub. L. No. 88-577, § 2(a), 78 Stat. 890, 890 (codified as amended at 16 U.S.C. § 1131(a) (1994)).

I. DEFINITION OF WILDERNESS

The first question is what constitutes wilderness? What kind of land, precisely, is wilderness? By what values may it be recognized? The operable statutory language is the long definition set forth in section 2(c) of the Act:

> (c) "Wilderness" defined. A wilderness . . . is . . . an area where the earth and its community of life are untrammeled by man. . . . [It] is further defined . . . [as] an area . . . 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]

The first reported case focusing on the definition of wilderness, *Parker v. United States*,[4] addressed the presence of a road leading into proposed wilderness, and whether that disqualified the area for inclusion in a wilderness review and recommendation.[5] The court determined that East Meadow Creek "seems to have significant wilderness resources and could be determined by the President to be predominately of wilderness value," that outside of the road, "the area in question is untrammeled by man," and that "the testimony indicated that due to the dense forest conditions, this road is substantially unnoticeable from approximately 100 yards away."[6] The court went on to note:

> East Meadow Creek has outstanding opportunities for solitude and a primitive and unconfined type of recreation. . . . [T]his region is significantly interrelated with the Gore Primitive Area. [The road] serves as an access route. . . . [B]oth regions are inhabited by deer and elk. . . . [D]estruction of the natural state of East Meadow Creek might have an adverse effect on this wildlife. . . . [I]t is desirable to have both alpine and sub-alpine zones within a wilderness area.
>
> In conclusion, we hold that the East Meadow Creek region meets the minimum requirements of suitability for wilderness classification . . . .[7]

Other courts have spoken in a similar vein. "[T]he term 'wilderness,' as used by Congress, is a technical term which serves to classify areas containing primitive characteristics."[8] The district court in Utah

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3. Wilderness Act § 2(c), 16 U.S.C. § 1131(c).
4. 309 F. Supp. 593 (D. Colo. 1970), *aff'd*, 448 F.2d 793 (10th Cir. 1971).
5. *See Parker*, 309 F. Supp. at 596.
6. *Id.* at 601.
7. *Id.*
8. Minnesota Pub. Interest Research Group v. Butz, 401 F. Supp. 1276, 1330 (D. Minn. 1975), *rev'd on other grounds*, 541 F.2d 1292 (8th Cir. 1976).

faced the difficult question of access to exempted land over other land being reviewed for potential wilderness. The court found that access could be regulated as to location and mode in order to protect wilderness characteristics, and cited the statute for the following: "The definition of wilderness . . . contemplates that some human activity can take place in wilderness areas as long as the area, 'generally appears to have been affected *primarily* by the forces of nature, with the imprint of man's work *substantially* unnoticeable.'"[9] For example, *Northwest Indian Cemetery Protective Ass'n v. Peterson*[10] noted that a closed-off road track incapable of being traversed by non-four-wheel drive vehicles and not maintained by the Forest Service, which over time would be overgrown with vegetation, may not disqualify an area for wilderness classification.[11]

The courts have adopted a practical definition, recognizing the primitive, untrammeled nature of wilderness, but acknowledging the often unavoidable presence of conflicting circumstances or uses. Purist notions of completely untrammeled, unblemished land have not been sympathetically received. An important effect of this approach has been to maximize the availability of lands, some of which may be minimally impacted by a conflicting circumstance or use, for eventual wilderness classification.

II. BREADTH OF WILDERNESS PROTECTION

The Wilderness Act is an extremely significant departure from historical practices in the management of the nation's public lands. A preservation ethic rose to challenge the suzerainty of the traditional commodity interests, such as logging and mineral development. While environmentally sensitive practices were gradually seeing more application by 1964 and the Forest Service had begun an administrative process designating its own wilderness and primitive areas, the Wilderness Act marked a quantitative leap in the evolution of wilderness protection.

Over the next three decades, millions of acres came before Congress for wilderness classification. In 1976, Congress brought Bureau of Land Management lands, the huge remaining reservoir of unclassified public lands, into the process through the enactment of the Federal Land Policy and Management Act of 1976.[12] Review and wilderness designation of significant parts of our national parks and national wildlife refuges contributed to the flow. A rapidly increasing population, enjoying the benefits of an expanding economy and increased leisure time, flooded into

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9. Utah v. Andrus, 486 F. Supp. 995, 1007 (D. Utah 1979) (quoting the Wilderness Act § 2(c), 16 U.S.C. § 1131(c) (1994)) (emphasis added).

10. 565 F. Supp. 586 (N.D. Cal. 1983), *aff'd in part, vacated in part*, 764 F.2d 581 (9th Cir. 1985), *aff'd in part, vacated in part, on reh'g*, 795 F.2d 688 (9th Cir. 1986), *rev'd*, 485 U.S. 439 (1988).

11. *See Northwest Indian Cemetery*, 565 F. Supp. at 603–04.

12. Pub. L. No. 94-579, § 603, 90 Stat. 2784, 2785 (codified as amended at 43 U.S.C. § 1782 (1994)).

many of the existing areas, producing a demand for more. This translated into the political momentum which Congress needed to dedicate new areas. And, this continues today.

Inevitably the scope and force of the Act were tested from the beginning, as wilderness preservation clashed with the traditional commodity uses. *Parker v. United States*,[13] involving timber sales and road building, early resolved that Forest Service management of statutorily mandated wilderness study areas could not include activities which would destroy their wilderness character.[14] In the words of the district court, "it thwarts the purpose and spirit of the Act to allow the Forest Service to take abortive action which effectively prevents a Presidential and Congressional decision."[15] The court of appeals agreed: "[B]oth the President and the Congress shall have a meaningful opportunity to add contiguous areas predominately of wilderness value to existing primitive areas for final wilderness designation."[16] The directive in section 3(b) of the Act to review these contiguous areas amounted to "a 'proceed slowly' order until it can be determined wherein the balance between proper multiple uses of the wilderness lies and the most desirable and highest use established for the present and the future."[17]

Rocky Mountain Oil & Gas Ass'n v. Watt[18] involved the wilderness review provisions of FLPMA, governing public lands under the Bureau of Land Management.[19] The court upheld the Department of the Interior determination that mineral leasing activities not specifically grandfathered under FLPMA would be regulated so as not to impair a wilderness study area's suitability for wilderness.[20] In *Getty Oil Co. v. Clark*,[21] the court approved federal agency action suspending a proposed oil drilling operation in a study area pending determination of impacts upon wilderness values.[22]

Wilderness area designation includes a federal reserved water right. *Winters v. United States*[23] and *Arizona v. California*[24] established that when Congress sets aside or reserves land from the public domain, such reservation includes an implied right to a sufficient quantity of water

13. 309 F. Supp. 593 (D. Colo. 1970), *aff'd*, 448 F.2d 793 (10th Cir. 1971).
14. *See Parker*, 309 F. Supp. at 599.
15. *Id.*
16. Parker v. United States, 448 F.2d 793, 797 (10th Cir. 1971).
17. *Parker*, 448 F.2d at 795.
18. 696 F.2d 734 (10th Cir. 1982).
19. *See Watt*, 696 F.2d at 750.
20. *See id.*
21. 614 F. Supp. 904 (D. Wyo. 1985).
22. *See Clark*, 614 F. Supp. at 920.
23. 207 U.S. 564 (1908).
24. 373 U.S. 544 (1953).

needed to fulfill the purposes of the reservation.[25] *Sierra Club v. Block*[26] determined that the Wilderness Act established such a reserved water right for wilderness areas.[27] Moreover, the government must take steps to protect this right and cannot escape its responsibility by obfuscation and irresolute declarations.[28]

One court determined that the congressional direction to protect the wilderness quality of wilderness areas overrides contrary sections of the Act protecting preexisting private rights in the subsurface mineral estate.[29] Although suggestive, this opinion stands by itself to date. The fact that the case was decided on other grounds has probably contributed to its apparent obscurity.

By no means have all cases been resolved in favor of wilderness. Valid preexisting mining claims will be recognized and their appurtenant rights protected.[30] Road access will be allowed across wilderness study lands to private interest or state lands although the route and mode of access can be regulated.[31] In *Sierra Club v. Hodel*,[32] widening a county road even though it would impair an adjoining wilderness study area was allowed, but it was limited to what was reasonable and necessary with respect to preexisting uses.[33]

Furthermore, the land manager will have discretion to make the close calls. Because the Wilderness Act allowed timber management in the so-called "portal zone" of wilderness portions of the Boundary Waters Canoe Area, the Forest Service in *Minnesota Public Research Group v. Butz*[34] had discretion to decide a management alternative, logging,

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25. *See Winters*, 207 U.S. at 577 (stating that "[t]he power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be"); *see also Arizona*, 373 U.S. at 600 (following *Winters*). For an examination of federal reserved water rights in wilderness areas, see Karin P. Sheldon, *Water for Wilderness*, 76 DENV. U. L. REV. 555 (1999).

26. 622 F. Supp. 842 (D. Colo. 1985).

27. *See Block*, 622 F. Supp. at 862 (holding that pursuant to the Wilderness Act, federally reserved water rights exist "in previously unappropriated water"); *see also* Sierra Club v. Lyng, 661 F. Supp. 1490, 1495 (D. Colo. 1987) (noting the Solicitor General's findings that the Wilderness Act does not eviscerate the implied reserved water rights doctrine), *vacated sub nom.*, Sierra Club v. Yeutter, 911 F.2d 1405, 1412 (10th Cir. 1990) (pointing out that the Forest Service acknowledges the existence of federally reserved water rights under the Wilderness Act).

28. *See Lyng*, 661 F. Supp. at 1495 (holding that "Congress intended to continue the status quo which allows for the creation and assertion of reserved water rights on lands withdrawn and reserved under the Wilderness Act" (internal quotation marks omitted)).

29. *See* Izaak Walton League of Am. v. St. Clair, 353 F. Supp. 698, 715 (D. Minn. 1973), *rev'd and remanded on other grounds*, 497 F.2d 849 (8th Cir. 1974).

30. *See* Wilderness Soc'y v. Robertson, 824 F. Supp. 947, 951 (D. Mont. 1993).

31. *See* Utah v. Andrus, 486 F. Supp. 995, 1009–10 (D. Utah 1979).

32. 848 F.2d 1068 (10th Cir. 1988).

33. *See Hodel*, 848 F.2d at 1084–85.

34. 541 F.2d 1292 (8th Cir. 1976).

which would arguably cause more wilderness impairment than the plaintiffs' alternative, controlled burning.[35]

A number of cases unsuccessfully tried to stretch the limits of the Wilderness Act. Road construction and timber harvesting on land contiguous to a wilderness study area would not be stopped.[36] Similarly, a ski area expansion next to an area recommended for wilderness status by the President was allowed to proceed.[37] Land contiguous to a wilderness study area where the existing primitive area and certain of its contiguous lands had been studied and the whole had been submitted to the President and Congress omitting the subject land, could be involved in a land exchange with a private interest.[38]

Two unusual cases tested the limits of the law. In *Brown v. United States Department of the Interior*,[39] the special mining provisions of the Wilderness Act for Forest Service lands could not be stretched to allow such activity in Buffalo National River managed by the National Park Service.[40] And, in *Pacific Legal Foundation v. Watt*,[41] unilateral action of a congressional committee could not prevent mineral leasing in the face of statutory sections allowing leasing.[42]

Obviously, the wilderness review process has been critical to the eventual decisions of the President and Congress as to what lands would be dedicated as wilderness areas. Much of this acreage was coveted by private interests attracted to conflicting uses, such as logging and mining, activities which had traditionally been allowed. The courts have adopted a common sense approach, vigilantly protecting wilderness study areas until the President and Congress make their decisions. However, land outside the boundaries of formally designated wilderness study areas does not enjoy such protection. Wilderness areas themselves enjoy the full protection of the Wilderness Act, including reserved water rights, and firm application of the Act's imperatives to protect wilderness quality.

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35. *See Butz*, 541 F.2d at 1295, 1301. For an examination of wilderness issues associated with the Boundary Waters Canoe Area, see Richard A. Duncan & Kevin Proescholdt, *Protecting the Boundary Waters Canoe Area Wilderness: Litigation and Legislation*, 76 DENV. U. L. REV. 621 (1999).

36. *See* Big Hole Ranchers Ass'n v. United States Forest Serv., 686 F. Supp. 256, 259–60 (D. Mont. 1988); *see also* Sierra Club v. Hardin, 325 F. Supp. 99, 124 (D. Alaska 1971) (holding that "[s]ince there were no 'primitive' areas in Alaska on September 3, 1964, and it does not appear that the sale includes any land within a national park, wildlife refuge or game range, the Wilderness Act has no application").

37. *See* Wilson v. Block, 708 F.2d 735, 751–53 (D.C. Cir. 1983).

38. *See* National Forest Preservation Group v. Butz, 343 F. Supp. 696 (D. Mont. 1972), *rev'd on other grounds*, 485 F.2d 408 (9th Cir. 1973).

39. 679 F.2d 747 (8th Cir. 1982).

40. *See Brown*, 679 F.2d at 751.

41. 529 F. Supp. 982 (D. Mont. 1981).

42. *See Watt*, 529 F. Supp. at 1005.

III. MANAGING WILDERNESS

Today, questions of management of actual wilderness study areas and designated wilderness predominate in the courts. The Wilderness Act itself permits some conflicting activities in wilderness areas, while congressional action placing an area within the wilderness system and under the Wilderness Act's authority, sometimes blesses a particular local conflicting use. These contradictory signals have bred much litigation.

Section 5(b) of the Act allows access to valid mining claims within wilderness areas "by means which have been or are being customarily enjoyed with respect to other such areas similarly situated."[43] In *Clouser v. Espy*,[44] plaintiffs sought motorized access to claims in the Kalmiopsis and North Fork John Day Wildernesses in Oregon.[45] The Ninth Circuit found that motorized access was not essential, that pack horses could carry the appropriate equipment, and that this was feasible and customarily done.[46] The court also noted that abandoned road tracks, now trails, that the plaintiffs wished to use had been blocked by a gate for several years, that the trails had not been maintained by the Forest Service, and that "they [were] returning to a natural condition."[47] Finally, the court dismissed plaintiffs' argument that general mining laws of the United States assured them motorized access, since the Wilderness Act specifically addressed the issue for wilderness areas.[48]

On the other hand, in *Voyageurs Region National Park Ass'n. v. Lujan*,[49] where the enabling legislation allowed snowmobiling in the park, snowmobiling would be allowed to continue in a wilderness study area.[50] There was no showing that it would permanently change the area and preclude its consideration for eventual wilderness status.[51]

In *Friends of Boundary Waters Wilderness v. Robertson*,[52] the statute at issue addressed particular boat portages by name and directed the Secretary of Agriculture to terminate motorized use, unless he determined that there was no nonmotorized means of transporting boats across the portages.[53] In reversing the district court decision approving the Forest Service determination in favor of motorized access, the appellate court noted that the evidence demonstrated successful use of portage wheels, and that in a Forest Service test using different boats and people of different age groups, twenty-six out of thirty-four teams completed

43. Wilderness Act § 5(b), 16 U.S.C. § 1134(b) (1994).
44. 42 F.3d 1522 (9th Cir. 1994).
45. *See Clouser*, 42 F.3d at 1525.
46. *See id.* at 1536–37.
47. *Id.* at 1537.
48. *See id.* at 1538–39; *see also* Wilderness Act § 5(b), 16 U.S.C. § 1134(b).
49. 966 F.2d 424 (8th Cir. 1992).
50. *See Lujan*, 966 F.2d at 427–28.
51. *Cf. id.* at 428.
52. 978 F.2d 1484 (8th Cir. 1992).
53. *See Robertson*, 978 F.2d at 1485.

portages without motors.[54] In *Alaska Wildlife Alliance v. Jensen*,[55] commercial fishing, although allowed by Glacier Bay National Park's enabling legislation, was prohibited in the designated wilderness area portions of the park under section 4(c) of the Act banning commercial enterprises in wilderness areas.[56]

A series of cases dealing with Forest Service attempts to control outbreaks of the southern pine beetle in wilderness areas are very instructive. Section 4(d) of the Act authorizes the Forest Service to take "such measures . . . as may be necessary in the control of fire, insects, and diseases, subject to such conditions as the Secretary [of Agriculture] deems desirable."[57] *Sierra Club v. Lyng*[58] allowed the Secretary to use control measures, such as logging, so long as such measures were reasonably designed to restrain or limit the spread of the infestation from wilderness land to neighboring property to its detriment.[59] Rigorous conditions were placed upon this activity, which was only allowed where the adjacent land owners were taking equally vigorous efforts and site specific determinations of specific outbreaks were required.[60]

Logging for other purposes could not be justified by the need to control infestation. For example, cutting hardwoods would be prohibited, because the pine beetle was not found in hardwoods.[61] The method of cutting the trees must be related to the objective of controlling the infestation, and the use of natural barriers, such as rivers or hardwood stands where present, may be required to control the beetles, rather than logging.[62]

Finally, the hard fought case of *Stupak-Thrall v. United States*[63] involved the Sylvania Wilderness Area, which includes Crooked Lake with most of its shoreline within the wilderness.[64] The Forest Service promulgated regulations prohibiting the use of houseboats and sail boats and discouraging the use of electronic fish finders, boom-boxes, and other mechanized or battery operated devices.[65] The district court, whose opinion is controlling here, found the regulations appropriate to preserve

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54. *See id.* at 1485–89.

55. 108 F.3d 1065 (9th Cir. 1997).

56. *See Jensen*, 108 F.3d at 1069 (citing Wilderness Act § 4(c), 16 U.S.C. § 1133(c) (1994)).

57. Wilderness Act § 4(d)(1), 16 U.S.C. § 1133(d)(1).

58. 663 F. Supp. 556 (D.D.C. 1987).

59. *See Lyng*, 663 F. Supp. at 560.

60. *See id.*; *see also* Sierra Club v. Lyng, 662 F. Supp. 40, 42 (D.D.C. 1987) (questioning whether "adjacent properties can be equally well controlled against beetle infestation by measures taken outside of the Wilderness Areas"); Sierra Club v. Block, 614 F. Supp. 488, 491–92 (D.D.C. 1985) (stating that "[i]f the cutting has a limited or no effect on the number of pine trees lost to beetle infestations, wilderness area policy might be better served by no control").

61. *Cf.* Sierra Club v. Block, 614 F. Supp. 134, 139–40 (E.D. Tex. 1985).

62. *Cf. Block*, 614 F. Supp. at 140.

63. 843 F. Supp. 327 (W.D. Mich. 1994), *aff'd*, 89 F.3d 1269 (6th Cir. 1996).

64. *See Stupak-Thrall*, 843 F. Supp. at 328.

65. *See id.* at 334.

the wilderness quality of the area. The court further found that the restrictions upon the plaintiffs' riparian uses of Crooked Lake, where there was no historical use of sailboats and houseboats and the mechanical devices were only discouraged, would only have a minimum impact upon plaintiffs' riparian rights.[66]

To a heartening degree, the federal courts have worked diligently to protect wilderness values in wilderness areas and wilderness study areas. Statutorily excepted uses have generally been put to a rigorous test to assure that no more wilderness conflicting activity was allowed than that necessary to honor the specific statutory language.

CONCLUSION

The Wilderness Act has dramatically impacted established uses of millions of acres of public lands, uses that date back for generations. It propounded an ethic of preservation of primitive lands, rather than consumption, and instituted a process for their serious review and eventual designation as wilderness areas. At the same time, bending a bit in apparently necessary political adjustments to the traditional commodity uses, Congress allowed conflicting activities under certain circumstances within the very areas it protected.

It has taken strong action by the judiciary to strike the balances and make the determinations that have ensured that qualifying lands were all reviewed, and then, when formally dedicated as wilderness, protected. The courts have succeeded by carefully scrutinizing the facts of the cases brought before them and vigorously safeguarding wilderness principles and lands. They have maintained balance and objectivity by recognizing individual conflicting activities sanctioned by the Wilderness Act itself, or by specific legislation establishing individual wilderness areas, where petitioners have met their burden of showing they are clearly proceeding according to a defined exception and are doing no more than necessary to achieve that specific end.

66. *See id.*