

Heritage Assets and Wilderness

Agencies continue to lose litigation on cases involving heritage assets and designated wilderness areas (see insert below). Plaintiffs have questioned the presence of historic structures in these areas, as well as the intent and methods used for access, preservation and maintenance. This document serves to inform Heritage personnel of previous court cases and provide guidance, so they can make informed recommendations on managing historic structures in wilderness areas.

Wilderness Character & Historical Value. The Wilderness Act calls for the preservation of wilderness character. Wilderness is defined in Section 2(c) of the Act, and includes what is often referred to as the 5th Quality of wilderness character: “...other features of scientific, educational, scenic, or historical value.” The 5th quality acknowledges features of historic value as potentially contributing to wilderness character. The USFS is currently working on how to identify features of historical value that are integral to wilderness character as part of the agency’s wilderness character monitoring strategy.

<u>Qualities of Wilderness Character</u>
1) Untrammeled
2) Undeveloped
3) Natural
4) Outstanding Opportunities
5) Other Features of Value

Public Purpose & Historical Use. Agencies are tasked with preserving wilderness character while also allowing for public purposes, as listed in Section 4(b) of the Act: “*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 section appears to be inclusive of structures that may be associated with historical use, however, the words “*Except as otherwise provided in this Act*” are important, as other sections of the Act mandate the preservation of wilderness character (Sections 2(a) and 4(b)) and prohibit certain uses, including structures and installations (Sec 4c). The agency must ensure that public purposes are compatible with the mandate of the Act, which is to preserve wilderness character.

A recent court case discussed historical use. The case considered whether actions involving a historic lookout were necessary to meet minimum requirements for administration of the area for the purpose of historical use (Wilderness Watch v. Y. Robert Iwamoto & USFS 2012). In this case, necessity was evaluated in the context of public purpose (historical use). However, the Minimum Requirements Analysis (MRA) evaluates the necessity of an action in the context of wilderness character, not public purposes. The first step of the minimum requirements decision guide (MRDG) asks us whether an action is necessary to preserve one or more of the qualities of wilderness character, not whether the action is necessary to allow for or perpetuate a public purpose.

Court Cases. Federal agencies lost in all of the cases listed below. It is recommended you become familiar with the situations in these cases as you consider activities in wilderness that involve a historic structure. For a thorough summary of findings, consider viewing the webinar, “*Wilderness in the Courts: Cultural Resources*” available online at the Arthur Carhart National Wilderness Training Center (www.wilderness.net). Each case is complex and you are encouraged to read the case law, take online courses, and talk to your Wilderness staff or Office of General Counsel.

Wilderness Watch, et al. v. NPS Cumberland Island National Seashore (2004): Use of motorized vehicles to transport visitors through designated and proposed wilderness areas to access cultural resources.

Olympic Park Associates, et al. v. Mainella & Olympic National Park (2005): Replacement of two historic shelter structures in wilderness area with new structures that were built off-site, then transported to site using helicopter.

High Sierra Hikers, et al. v. USFS, et al. (2006): Maintenance of NRHP eligible rock and earthen dams in wilderness area.

Wilderness Watch v. Y. Robert Iwamoto & USFS (2012): Rehabilitation of lookout in Wilderness Area; helicopter used.

Recommendations. Consider the following when proposing an activity in a wilderness area:

Training. Several free online training courses about cultural resource management and in wilderness are available from the Arthur Carhart National Wilderness Training Center at www.wilderness.net. Trainings include, but are not limited to the following webinars and e-course: *Wilderness in the Courts, The 5th Quality of Wilderness Character, Minimum Requirements Analysis Live, Wilderness Character and its Application to Wilderness Stewardship*, and *Managing Cultural Resources in Wilderness*.

Communicate. Communication between Wilderness and Heritage managers is essential. If Heritage is proposing an activity in wilderness, engage Wilderness managers immediately. It is also necessary to engage Line Officers, from the local level to the Regional level, depending upon nature of the proposed activity. If Recreation or other resource areas are proposing an activity in wilderness that involves a cultural resource, Heritage staff should be involved, as National Historic Preservation Act Section 106 compliance may be necessary depending on the nature of the proposed activity.

National Historic Preservation Act (NHPA). In a recent court case the USFS stated that maintenance and preservation activities on historic structures were necessary in order to meet agency responsibilities under the NHPA. Courts have not agreed with this position and have ruled that the NHPA, including Section 110, is primarily procedural in nature and does “*not compel particular preservation-oriented outcomes*” (Wilderness Watch v. Y. Robert Iwamoto & USFS, 2012). Consider the justification for maintenance or preservation activities under provisions of the Wilderness Act, see Minimum Requirements Analysis below.

Other Features of Value. Work with Wilderness staff to identify features of historical value that may be integral to the wilderness character under the 5th quality.

Minimum Requirement Analysis. Utilize the Minimum Requirements Decision Guide (MRDG) to conduct a Minimum Requirements Analysis (MRA) regardless of whether you think it is necessary or not; your Forest’s Wilderness staff or Line Officer will let you know if it is not required. Don’t make this decision on your own. Be prepared to justify why the proposed activity is “*necessary to meet minimum requirements for the administration of the area for the purposes of this Act*”:

- Is the proposed activity necessary to preserve wilderness character (i.e., 5th Quality)? Work with your Wilderness staff to identify cultural resources that are part of the wilderness character.
- Is the proposed activity required by other Federal laws? Careful here, because although the agency is required to comply with the NHPA, courts have recently ruled that the NHPA does not mandate *particular* preservation or maintenance actions, such as reconstruction.
- If the proposed activity furthers a public purpose, is it compatible with the central mandate of the Act, which is to preserve wilderness character?

Minimum Tools. Be aware of prohibited uses listed in Section 4(c) of the Act. Plan a project so as to avoid use of motorized equipment and mechanized transport. For example, use cross saws and pack strings instead of chain saws and motor vehicles. Reconsider the use of helicopters; historic assets were likely created without helicopters and can be maintained without air support.

National Environmental Policy Act (NEPA). Consult with Planning and Wilderness staff about appropriate level of NEPA for the proposed activity. The Minimum Requirements Decision Guide (MRDG) advises the line officer of the decision that best complies with the Wilderness Act; complete the MRDG before the NEPA. Remember that the Minimum Requirements Analysis is not a substitute for NEPA.