Wilderness in the Courts, Webinar #2: Cultural Resources Q&A
February 20, 2013

1. How did the Park service think that access to the historic resources outside wilderness fell under minimum requirement?

That is a good question. I think what the Park service was trying to do, and of course I am not speaking for the Park service, was to balance all of the different management objectives they had for Cumberland Island National Seashore. They had these historic sites on the northern end of the island, and there was originally a plan to create a dock there so that day visitors could get to it. That never happened. So, I think what they were trying to do was allow people to use the various resources at the Park as best as they could. I think the reason the Park service lost this case is that the court rejected the minimum requirements analysis because it was hard to see how running a scheduled van service through a wilderness area met the minimum requirements standard which of course is necessary for justifying the use of motor vehicles in a wilderness area.

2. So, in this case the structures were all outside the wilderness?

Correct.

3. Rewriting the boundaries is a pretty dramatic action. Did wilderness groups object?

My understanding is there was some objection to it. The congressman whose district includes Cumberland Island, Jack Kingston, was fairly heavily involved in not only helping to create the wilderness area, but also in the legislation that rewrote the boundary, and mandated that the Park service actually establish a schedule for the van to operate. Of course Congress has the authority to change any wilderness boundary it wants.

4. Do we know anything about where the term "historical use" comes from in the WA?

I do not know offhand exactly how the term “historical” got added to the Wilderness Act. My understanding is that it was part of some of the original language that was drafted in the first wilderness bill in 1956.

5. Does this suggest that the Wilderness Act has some kind of primacy over NHPA in all situations?

What we see in the other case studies is the courts have seemed to prefer the Wilderness Act over the National Historic Preservation Act. This is the kind of question that we lawyers like to talk about which is when you have two statues that conflict, which one governs. Often what the courts will try to do is harmonize them and make sure they don't conflict. In cases where there is conflict generally the courts will say the more specific statute governs over the more general statute. Or the later statute governs over the earlier statute on the

assumption, which is probably contrary to fact, that Congress knows what it's doing when it creates the legislation and knows all of the law it is legislating against. What the courts say is that even though the Wilderness Act predates the National Historic Preservation Act, the National Historic Preservation Act is the more general of the two and Congress is much more specific in the Wilderness Act about what the act requires. In addition, the courts emphasize the obligations that agencies have under the National Historic Preservation Act are largely, not completely, but largely procedural--consultation with state agencies and going through the evaluation processes, etc. The Wilderness Act is much more substantive in terms of establishing what an agency must do on the ground, for example the construction of permanent structures and avoiding the use of motorized equipment.

6. If future cases have hinged on the Cumberland case, can we say that it is a precedent setting case for cultural resources in wilderness?

The quick answer is yes and I will address this toward the end of my comments. In terms of being an actual precedent, the Cumberland case establishes precedent for the 11th Circuit. So it doesn't establish binding precedent in the courts outside the 11th Circuit. But, as we will see from the other cases today, which are all from the 9th Circuit, the courts have found the Cumberland case influential. I think it is safe to regard it as something to be aware of and certainly regarded as precedent and, I think, before going against what the court held in Cumberland it would be wise to bring that up with your agency counsel and see if they are comfortable with you doing that. If you're in a wilderness area that is within the 11th Circuit (that would be Florida, Georgia, and Alabama) you would be wise to simply follow that because that is the law in that circuit.

7. Is that the best solution? To redraw the boundary? Couldn't they just make people walk or use stock to get there? Keep the buildings and the history, but drop the motor use?

I am not saying that redrawing the boundary is the best answer. That is the answer Congress came up with in its wisdom. Of course I use “in its wisdom” a little bit tongue in cheek. Stock animals could have been used. I think it would be difficult to do under the situation of Cumberland. The problem is that for day visitors it is a bit of a hike to get to Plum Orchard and especially to the settlement which is at the real northern end of the island and then make it back in time to meet the ferry which docks at the south end of the island.

8. Did the enabling legislation for Cumberland Island NS have any bearing on the court decision?

Not that I know of, no.

9. Regarding this discussion and pertaining to the National Trust v. Blank case, courts keep referring to the NHPA as an overwhelmingly procedural statute. Essentially, the courts seem to be saying that sections 106 and 110 of the NHPA do not convey substantive, affirmative preservation responsibilities. Courts in the

wilderness/cultural resources cases cited this as precedent regarding the Congress' intent of NHPA. Based on this, the NPS was left without a defense that NHPA conveyed affirmative preservation responsibilities in wilderness areas. I think this may have had something to do with the language of Section 110 (which references the mission of each federal agency) and the fact that most agencies do not have a primary historic preservation mission. The NPS, on the other hand, does. Any thoughts here on the unique mission of NPS to preserve resources unimpaired?

The courts have regarded the NHPA as being largely procedural and the Wilderness Act as very substantive and have found that Congress has been very clear about what it expects to have in wilderness. I understand that the Park service especially has a cultural resource mission. But the problem is one has to put together all the statutes and I of course approach it the way that a lawyer would- looking at the statutes, putting them together, and reading the cases to see where the courts are. The courts have been, as I said, pretty uniform in these conflicts between the NHPA and the Wilderness act. So regardless of what the Park service regards as its mission, one of its missions is preserving wilderness under the wilderness act.

10. Did Congress consider just permitting the motor vehicle use as opposed to redrawing the boundary and did the court address the presence of the permit road in its discussion?

The answer to the first question is I don't know whether Congress considered simply allowing motor vehicle use as opposed to redrawing the boundary. With regard to the second question, the road that was being used had been there and predated the wilderness and there is a decent argument that there were existing private rights over the road. It was a road that was built when the Carnegies first moved to the island. There are lots of private inholdings that are within the park boundary but not within wilderness. Some of them are within wilderness. There is a good argument that the road was necessary to reserve existing private rights, which is something that is acknowledged by section 4c.

11. Was not the act of driving to the historic structures, utilizing the historic vehicle road, considered an historic value as defined by the WA?

No, because the court interpreted the word historic to refer to historic natural things not historic man-made things. If you look at the language I quoted earlier the court said that historic in that context specifically refers to historically natural things not historic human-made things.

12. Any way to have people camp overnight? Use a permit system with a quota? Ferry drops ya off; you hike to the location, spend the night then leave the next day on the ferry? I'm actually shocked because I think both the Wilderness Act and the NHPA could have been served. They didn't have to pit them against each other.

That could have been done and in fact there are campsites on Cumberland Island. The problem is a lot of folks who want to visit Cumberland Island just want to do a day trip. So they could have said if you want to see the historic sites you have to backpack in and you have to spend the night. They could've done that. But what the Park service was trying to do was balance visitor opportunities for those interested in the cultural resources. Cumberland has an interesting history because the Carnegie family occupied it most recently and there are lots of historic sites there that were built by the Carnegie family on the southern end of the island. The ruins of the large Carnegie mansion are there and that is what attracts people. The church that I showed a picture of a few slides ago is the one that JFK Junior was married in so a lot of people want to go to Cumberland to see the JFK Junior marriage church.

13. If the shelters (Olympic Park) had not been removed but rebuilt on site, would the court feel the same way? Is there a formula for re-building using original materials vs. including new materials?

That is a very good question, which will be answered perhaps a little bit in the context of the next case. The courts are pretty dubious about rebuilding structures within wilderness. Because the wilderness act is so clear about not allowing structures. I do not know of a case that positively commands that a structure be removed if it preexisted or predated the creation of wilderness. As we'll see in the next two cases the courts are pretty dubious about rebuilding structures.

14. Were the shelters placed back in wilderness?

Yes, the shelters were placed back in wilderness. The park service did so by helicopter.

15. What was the status of the shelters under NHPA? Had there been a determination of eligibility of some kind?

I believe that there was. Because they had predated wilderness and because they had been around for a while my recollection is that there was.

16. So under this decision if an agency were to propose an action to maintain a historical structure in wilderness that would adversely affect wilderness character (and there were no other minimal requirements actions that could maintain this structure), then maintaining wilderness character would trump maintenance of the historical structure? Also, do these decisions apply nationally or just in the districts where the court is ruling?

Let me tackle that one step at a time. On the maintenance question as we will see for my next case we have one decision where the court is very dubious about maintaining structures. On the second question does it apply nationally or just in the districts where they are decided? As a formal matter the decisions that we are talking about

now, this case and the next two, are all District Court decisions that are not really even binding on the District Courts that decided them. So they are not formal precedent in the sense that a Supreme Court case sets precedent for the nation. Nevertheless one of the points I will be making at the end of my presentation, in the same way the Cumberland Island case leads them into a decision from the Western District of Washington because the court finds a persuasive we'll are going to see the other courts are referring back to the Cumberland Island case, that our next case refers back to the Olympic case and so on and so forth. I think part of that is because there are not a whole lot of decisions in this area and once one judge decides something other judges tend to find the earlier decisions to be persuasive.

17. Do you think if the park service had decided to repair the structures onsite that the court would have allowed the repairs and the structures to remain in the wilderness?

Possibly.

18. On the Olympic NP case, did the court comment on the means by which the shelters were reconstructed (aviation support, etc.) or was the focus of the court entirely on the question of whether the shelters could be justified given the wilderness designation?

It was more the latter. I think what got the Olympic Park Associates riled up was the manner in which they were being reconstructed and the use of the helicopter to transport, etc.

19. You have not specified whether the Olympic shelters were listed on the National Register of Historic Places. Would this make a difference in 'balancing' the conflict between the WA and the NHPA?

I don't think it would make a difference. Because the court, you will recall in the Cumberland case, reasoned that some of the stuff that the park service was saying (and doing) was in some ways not really necessary. What the court was really concerned about was the minimum requirements language. And, the places on Cumberland were listed on the national register.

20. If the NPS had argued from Section 4a(3) that these activities were required by the Act of August 25th 1916 and or the Act of June 8, 1906 (Antiquities Act) would the arguments have more merit?

I do not think so because the language in section 4b makes it clear that the wilderness requirement, even though it states nothing in this act trumps the organic act or the antiquities act, 4b says you still have these wilderness preservation obligations.

21. What is an example of an historic "natural" thing?

That is a good question I am not entirely sure what the Cumberland court was referring to when it said that the word historic refers to

natural as opposed to man-made resources. I cannot come up with one on the top of my head.

22. So, in the light of these cases, could wilderness designation be construed as a negative impact to cultural resources?

I think some people would construe it that way, because it does impact the ability of agencies to preserve certain cultural resources.

23. What about maintenance and reconstruction of administrative sites in wilderness?

I think that would be subject to the minimum requirement analysis so if it survives the minimum requirement analysis it would be okay.

24. The 11th District Court decision that WA "historical use" equals "natural, rather than man-made features" is odd and I would guess subject to challenge. Most dictionaries would find this interpretation arbitrary. Comment?

I think that gets back to the first question we handled in this round of questions. Which is off the top of my head can I come up with something that is naturally historical? Not off the top of my head I have not thought about it. The problem is the 11th circuit reasoning as I've shown you now into cases and we will see in our final case, has nevertheless been persuasive and I think as I said at the beginning of the presentation, what the courts have been mostly working on is a conflict between the Wilderness Act and the National Historic Preservation Act and in each of the cases the Wilderness Act wins. And again before trying to do something that flies in the face of the 11th circuit reasoning even if you're not in the 11th circuit it would behoove you to run that by agency counsel.

25. Did the stocking (fish in Emigrant Dams) occur there before it was designated wilderness?

Yes.

26. What about maintenance on the dams for the purpose of grazing?

That would be an interesting question because there are instances of pre-existing grazing and that is something that is recognized by the Wilderness Act and allowed. But that concerns the activity of grazing not necessarily structures to support it. I think that would be posed as a somewhat different question than what was going on in Emigrant dams.

27. Would the case against the Emigrant Dams have gone differently if only hand tools were used to maintain them? Or did tool use have nothing to do with the decision?

I don't think it was the tool used I think it was they were actually going to maintain structures within the wilderness area and it did

not meet minimum requirements and the fact that some of them were going to be maintained and again there was a dispute about are they going to be maintained or rebuilt? The court seemed to believe they would be maintained. I do not think it was the tools used; I think it was the structures themselves were not the minimum requirement necessary for the administration of area for wilderness purposes.

28. Does "maintain" in this case simply mean "keep" rather than repair?

Again there was some dispute about what they were going to be doing. From my reading of the facts of the case I tend to think in actuality they were going to do fairly expensive repair. The Forest Service characterized it in its document as maintenance. The environmental plaintiffs, the High Sierra folks, characterized it as rebuilding. I have only read the court's opinion; I have not read all the background documents so I have to speculate on what they would do.

29. Do you think there may be a difference if ESA were involved – for example - maintaining a dam preventing non-native fish species (and keeping T&E species intact) from going up the creek?

I think that would be an interesting question. Then we would get into the same thing we have been talking about with potential conflict between the Wilderness Act and the National Historic Preservation Act, a conflict between the substantive obligation that an agency has under the Wilderness Act versus the substantive obligation it has under ESA namely not violating the jeopardy standard would be a very interesting question. One can only speculate about it because there are no court cases presenting a conflict.

30. What about stocking fish with stock (pack animals) transport? I presume the stocking in the case was performed by mechanized means...

I don't know offhand how this stocking was done. I know in the last case it was not done with mechanized or motorized means it was done by folks walking it in with pack animals or whatever. I don't know offhand how it was done here. But the Tustumena Lake case in Alaska, which was a Ninth Circuit case and therefore covered the District Court in the Eastern District of California, in which the court said fish stocking is not allowed in wilderness. That is to say fish stocking to support commercial fisheries is not allowed.

31. Can a historic landscape be considered a natural and historic resource? For example, keeping a scenic vista frozen in time by managing vegetation removal?

That might be a good example of what the 11th circuit means by natural historic use.

32. Courts seem to be advocating for benign neglect of historic structures in wilderness - may not be a positive requirement to remove them but if they are not integral to the administration of the area as wilderness, then no maintenance is allowed.

That seems to be the trend in case law.

33. Had the objective of the agency been a different conservation purpose (e.g. restoring a native species), would the courts have viewed the minimum requirement argument differently? I'm thinking Kofa here, in which the court appeared to accept the conservation goal, but objected to the argument for necessity...

Kofa is a good comparison. The court did agree with the goal of conservation, which involved a herd of big-horned sheep. This goal was part of the establishment of the larger wildlife refuge of which the Kofa Wilderness made up a part. In the Emigrant Dams case case, because the fish stocking was not a part of the reason for establishing the national forest or the wilderness area, it is not the purpose of the wilderness area even though Congress was aware of the fish stocking when it made the area wilderness.

34. The wilderness act section 2C4 provides that wilderness areas may also contain ecological geological or other features of scientific educational scenic or historical value. If a specific cultural resource were determined to contribute to wilderness character of that specific wilderness area based on the enabling legislation of that wilderness prior to any legal challenge and the management decision was made to appropriately maintain that resource because of its contribution to wilderness character, would that have been influential to the outcome of any of these cases?

Possibly. I think the lesson to take away from these cases is that making a decision to look at something of historic value, looking at the specific act that includes an area of wilderness especially if Congress mentions something as being essential to the wilderness, if it is a structure, whether it is necessary for meeting minimum requirements for the administration of the area—all that would be relevant. The trend line indicates however that the courts have not been terribly receptive to arguments about historic structures within wilderness.

35. What does this trend of "no care" for historic structures in recent Wilderness case law mean towards other cultural resources such as archeology, historic cultural landscapes, ethnographic resources which may happen to be in Wilderness too?

I do not have a firm opinion about that. Again, what we have been talking about here is the conflict over cultural resources not archaeological or ethnographic resources. If we were looking at something that was prehistoric for example the courts might be sympathetic to an agency saying we are trying to preserve the cultural resource for its historic value.

36. If "historical use" (whatever the courts think that is) is a "valid goal", THEN a minimum requirement argument COULD be made - the agency just failed to persuade in this case (Green Mountain Lookout)...correct?

I think that is largely correct. The court in the Green Mountain Lookout case was not quite as firm as the court was in the Cumberland Island case. Of course just as a reminder one could argue that the language in the Cumberland Island case about "historic means natural, not human-made" is not necessary to the outcome of the case and therefore maybe is not binding. Nevertheless the three other cases turned to that language and found it to be persuasive. I think what really pushed things over the edge on the lookout was that there were 67 helicopter trips to build a new structure, even though they used some original pieces, essentially a new structure within wilderness.

37. Do you think if they never removed the lookout but instead repaired it on site with traditional tools the outcome would of been different?

It might have been. Again part of that and this will be part of my summary, my take away message point, is that again the environmental plaintiffs have been very careful about the cases they have picked and chosen. If you are rebuilding a structure in wilderness and especially with something like Green Mountain Lookout and all the helicopter trips it took, if they had repaired it on site maybe a lawsuit would not follow. The environmental plaintiffs are picking and choosing their cases.

38. Is there any case law related to cultural resources in wilderness that are not focused on structures or installations (or otherwise meet the 4C prohibitions)? Does the crux of the issue lie not with the fact that these are cultural resources but rather that these specific resources in question are prohibited by the wilderness act or our treatment of them is runs contrary to the Wilderness Act?

I am not aware of any cases other than these involving cultural resources. When we talk about conflicts of the wilderness act and cultural resources, these are the cases. I cannot say there are any other cases out there.

39. Would the structure be allowed if the fire lookout were being actively used to monitor wildfire activity?

That is a decent question. Because of course section 4D1 says the secretary can take whatever steps necessary for the suppression of fire, insects, and disease. I don't know if the fire lookout were being actively used whether it would fall under this section for the one exception but there would be a decent argument that we are using it for that purpose. And we are maintaining it for that purpose.

There is also a good argument that a court would say it (the Wilderness Act) may allow you to go in and use chainsaws to create a firebreak but it does not allow you to build a structure.

40. I understand the court order to remove the lookout was set aside and there is an effort to specifically name the lookout in an amendment to designating wilderness law. What are the chances this will work?

It could work and if there is a hold on the court order I am not aware of it. I am limited to being able to look up the things I can using databases like Westlaw and if there is something else that is not published or out there I may not be aware of it. That could be the case. It would be similar to what happened in the aftermath of Cumberland Island.

41. Asked: Based on the sum of these cases, it seems the courts have no clear picture of what is meant by "historical use". The Act uses the term "natural" elsewhere, so "historical" MUST be something distinct if the authors elected to include that term.

But what the 11th circuit said and that's what gets us down the path is that the use of historical is paired with terms like ecological and geological and so the court was saying given it is paired with those terms we have to interpret the word historical in that context.

42. Do you think it was the use of helicopters period, or the "excessive" use of helicopters? If instead of removing and then rebuilding, they had used one or two helicopter trips to bring in repair materials, would they have been sued?

I think it was both. I think what did it for the court and the reason the court (at least from the published opinion) ordered the lookout to be removed was that they were building a structure and I think that the number of helicopter trips just sort of tipped it over the edge.

43. What was the tower going to be used for after it was rebuilt? Visitor overnight use? Day use?

My understanding from the court decision was that it was going to be used for visitor use and it was just kind of a location that people would like to take day hikes to. Climb it and look all around.

44. Many of us who manage historic structures in wilderness areas have operated under the assumption that the two laws (NHPA and Wilderness Act) are compatible, and not mutually exclusive. In a sense, an agency must comply with both laws. What do these cases mean for those that take the time to complete Minimum Requirement Analysis, Future Use Determinations, and maintain (not reconstruct) eligible historic structures with non-mechanized means.

The language of the 11th circuit case especially is pretty strong and some of the implications of the other cases seem to suggest that the Wilderness Act trumps the NHPA. Of course courts do start, as I said at the beginning of my discussion, with the assumption that if they can they will harmonize the two statutes that are apparently in conflict. I don't think that approaching things by trying to comply with those minimum requirements and the requirements of the NHPA is a bad strategy. Where the agencies have gotten into trouble is where they seem to have allowed some of the goals of the NHPA to overrule or over shadow the goals of the Wilderness Act.

45. The legislative efforts to modify the Cumberland Island and Green Mtn Lookout suggests that Congress and the American public don't buy this strict interpretation of the W.A. versus historic structures. Is that a fair assessment?

I can't really comment on that simply because it also could be that particular members of Congress that had been very involved in this may try to sneak something into a bill or convince their colleagues to pass something. I am hesitant to say the American people don't buy this. It means that certain members of Congress are not happy with particular outcomes and particular court cases and use their authority under the Constitution to redraw boundaries or allow particular structures.

46. So if a historical structure is in a wilderness area and is deteriorating, and the agency wants to maintain the structure, what factors would you suggest in considering on whether or not to maintain the structure (aside from using nonmotorized equipment and other minimum requirements) to avoid being sued?

I am reluctant to answer this in the context of to avoid being sued because that suggests I am giving you legal advice. I think the trend line of the case is certainly the starting point and it is to avoid using motorized, mechanized uses. Retaining a structure I think that in the Emigrant damn case for example the court characterized that what the Forest Service was planning on doing as maintenance is still subject to a minimum requirement analysis. Certainly going through some kind of minimum requirements analysis is something you would want to do.