Wilderness in the Courts

Wildlife cases

We asked Peter Appel, Alex W. Smith Professor of Law and former DOJ attorney, to address the questions that he didn't get to on the webinar. His answers appear below. While this Q&A addresses topics and cases interpreting the Wilderness Act, this discussion should not be construed as constituting legal advice applicable to a specific situation. If you have questions regarding the application of these principles to a specific situation or set of facts, you should contact your agency counsel. Carhart staff have added some comments – those appear in *green italics*.

1. **To clarify then, federal government does have control of wildlife on its land?**

   Yes. The Supreme Court has spoken to this several times. The quotations below reflect the tenor of the decisions cited; click on the link to see the entire Supreme Court opinion.

   - *Hunt v. U.S.*, 278 U.S. 96 (1928): "The power of the United States to thus protect its lands and property does not admit of doubt, the game laws or any other statute of the state to the contrary notwithstanding."
   - *Kleppe v. New Mexico* , 426 U.S. 529 (1976): "The 'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there." "We hold today that the Property Clause also gives Congress the power to protect wildlife on the public lands, state law notwithstanding."
   - *Hughes v. Oklahoma*, 441 U.S. 322 (1979): "Time has revealed the error of the result reached in *Geer* through its application of the 19th century legal fiction of state ownership of wild animals."

2. **In California, the USFS asserts that it does not have authority over wildlife management- why do they make that assertion?**

   There is no separate policy for the Forest Service in California.

3. **So is fish stocking for recreational use permitted or not permitted in wilderness?**

   In the so-called "Emigrant Dams" case -- *High Sierra Hikers Association v. USFS*, 436 F. Supp. 2d 1117, 1123 (E.D. Cal.2006) -- the court decision stated, "[C]urrent fish stocking operations are for the purpose of enhancing populations for the benefit of anglers." The court also stated (pp. 1134-35): "Because it is not possible to infer from [the WA] that establishment (much less enhancement) of opportunities for a particular form of human recreation is the purpose of the [WA], it is not possible to conclude that enhancement of fisheries is an activity that [meets the minimum requirements language]." However, check your agency policy for further guidance.

4. **How is enhancing commerce outside wilderness in this case different from the enhancement of commerce outside wilderness such as tourism? Is it purely because the introduction of fish was regarded as an alteration within the wilderness boundaries, whereas commercial tourism is enhanced simply because the wilderness itself exists?**

   Yes.

5. **Re: Tustemana Lake... court ruling was based on commercial nature of the stocking, correct? Despite the language about untrammeled, etc. it does not appear that they were basing the ruling on whether stocking itself, independent of who does it and why, is illegal?**

   Correct. See this quote from the 9th Circuit Court's decision: "In light of the clear statutory mandate, the Wilderness Act requires that the lands and waters duly designated as wilderness must be left untouched, untrammeled, and unaltered by commerce. By contrast, the Enhancement Project is a commercial enterprise within the boundaries of a designated wilderness and violates the Wilderness Act." 353 F.3d at 1067.

6. **The USFS authorizes fish stocking in wilderness areas across the west. How is this consistent with the case law?**

   As discussed, the court has said that enhancing wildlife populations inside wilderness for the purpose of enhancing commercial enterprise outside wilderness (Tustamena Lake case) is a violation of the Wilderness Act. The court also said that using a 4(c) prohibited use to enhance a wildlife population for the purpose of recreation (Emigrant Dams case) is not sufficient grounds to meet minimum requirements. However, some stocking may have been conducted to restore an endangered species or a species that was eradicated from the wilderness due to some human activity -- in which case the activity's use of a "prohibited tool" might possibly meet the minimum requirements of Section 4(c) of the Wilderness Act. You should check agency policies for conditions under which fish stocking might be allowed, with or without the use of a "prohibited tool."

7. **Do BLM regulations have language that essentially directs the agency to defer to the states with regard to wildlife management?**

   Some of the regulations at 43 CFR 24 appear to read so, but they should be interpreted in light of applicable court decisions and the regulations at 43 CFR 6303 requiring BLM authorization for many State actions. The BLM policy, Manual 6340, includes direction on many aspects of wildlife management that requires BLM to ascertain whether the proposed action is necessary to preserve wilderness character before granting approval. Any phrases in policy that seem to direct agency deference to the states should not be taken out of context of the Constitutional authority, legislation, case law, or the whole of the policy.

8. **BLM's wilderness Manual 6340 states: "'In general the States possess broad trustee and police powers over fish and wildlife within their borders, including fish and wildlife found on Federal lands within a State.' (43 CFR 24.3)." This appears to not agree with what you are saying.**

As discussed immediately above, the phrase should not be taken out of context of the rest of the policy. And as the Supreme Court unanimously ruled in the *Kleppe* case: "Unquestionably the States have broad trustee and police powers over wild animals within their jurisdictions. But...those powers exist only in so far as [their] exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal Government by the Constitution." This decision formed the basis for the 10th Circuit's clear direction in *Wyoming v. U.S.*, 279 F.3d 1214 (2002): "Federal management and regulation...preempts state management and regulation...to the extent the two actually conflict, or where state management and regulation stand as an obstacle to the accomplishment of the full purposes and objectives of the federal Government." BLM may defer to the States when State management objectives coincide with the Federal requirement to preserve wilderness character. The policy makes clear that if the State action would degrade wilderness character, the BLM has the authority – and legal mandate – to deny it.

9. So...what happened at Kofa?

The district court originally ruled that the Fish and Wildlife Service (FWS) had the right to install the water structures. The Ninth Circuit ruled that the FWS's decision to install the water structures in wilderness violated the provision of the Wilderness Act that prohibits "structures" in wilderness unless they are "necessary to meet the minimum requirements for the administration" of wilderness:

> "…a *generic* finding of necessity does not suffice...; the Service must make a finding that the structures are "necessary" to meet the *minimum* requirements for the administration of the area for the purpose of [conserving bighorn sheep], " (emphasis in original). The Service failed to make [the] required finding. The Service undoubtedly found that, assuming that improvements to water facilities were necessary, the development of the two water structures was necessary. The record contains the requisite necessity finding as to that narrow question and a reasoned analysis justifying the finding. But the key question— whether water structures were necessary at all—remains entirely unanswered and unexplained by the record, even though the Service's own documentation strongly suggests that many other strategies could have met the goal of conserving bighorn sheep without having to construct additional structures within the wilderness area (for example, eliminating hunting, stopping translocations of sheep, and ending predation by mountain lions). Unless the Act's "minimum requirements" provision is empty, the Service must, at the very least, *explain* why addressing one variable is more important than addressing the other variables and must *explain* why addressing that one variable is even necessary at all, given that addressing the others could fix the problem just as well or better." Importantly, in contrast to the creation of new structures within the wilderness, the Wilderness Act does not prohibit any of those actions....Indeed, the [FWS's own] report concluded that "[n]ew water developments can likely be constructed outside of wilderness," which would not require a finding of necessity."

The court also suggested "temporary trail closures" as a possible solution, to which you might add area closures or seasonal closures. The court required the FWS to reexamine its reasoning that any action was necessary at all.

The point from this case is that wilderness managers must follow the mandate of the Wilderness Act: prohibited actions in wilderness must be the minimum necessary for the administration of the wilderness for wilderness purposes.

Of course "ending predation by mountain lions" would have its own negative impact on the Untrammeled and Natural qualities of wilderness character. The Minimum Requirement Decision Guide is a framework that helps managers to determine if, at first, action is necessary at all, and second, if it is, what the minimum action should be.

10. **How about guzzlers that were installed before an area was designated as wilderness. Should they be removed or can they still be maintained?**

    You should check your agency policy for specific guidance. In general, they may be maintained if they are the minimum necessary to preserve wilderness character. On the other hand, they may be removed if they don't meet the "minimum necessary" test. Guzzlers are not "grandfathered" like installations associated with Valid Existing Rights. Note that the Wilderness Act says "there shall be no...installations," not "there shall be no...new installations."

11. **What are the purposes for establishment of Kofa? Did it include maintenance of sheep populations? How would the reasons for establishing an area affect the management of that area in or outside of established W? Was wilderness established at the time Kofa was established?**

    See the answer to number 9 above. The refuge was established over 50 years before the wilderness was designated. The Wilderness Act states: "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 also to preserve its wilderness character" (section 4(b)). USFWS Wilderness Stewardship Policy states: "The wilderness portion of a refuge is encompassed both within the Refuge System and the NWPS. Refuge System laws, regulations, and policies apply to refuge wilderness, but we carry them out in ways that preserve wilderness character and comply with the Wilderness Act's prohibitions. Refuge purposes and Wilderness Act purposes tell us what to accomplish on a refuge. The Wilderness Act, however, may affect how we accomplish these purposes and the Refuge System mission." (610 FW 1.17 A.)

12. **Stocking nonnative trout into high elevation wilderness across the west has trammeled native ecosystems on a massive scale. Because removing those trout to restore ecosystems is an additional trammel, it has been used to question whether it's appropriate. However, not**

restoring the ecosystems when feasible accepts leaving those areas as massively trammeled. Where should agencies fall on this spectrum?

This question gets away from the focus of this webinar, which is case law concerning wildlife management in wilderness, but we are providing an answer because it is of interest to many of you. The decision to trammel the wilderness in an attempt to restore more natural conditions is always a difficult one and often involves tradeoffs between maximizing wildness and naturalness, the second cornerstone of wilderness stewardship. Each situation is different and involves different levels of natural conditions and the extent of trammeling that might be required to restore those conditions. Careful analysis of the impacts to all of the qualities of wilderness character needs to be carried out before any decision to take action in wilderness is made keeping in mind Howard Zahniser's caution that we should be "guardians not gardeners of the wilderness."

You may find further guidance on this topic in the Carhart Center's online course, "Challenges in Natural Resource Restoration." (http://www.wilderness.net/NWPS/elearning)

13. **Any kind of enhancement of wildlife could be considered to be a trammeling event. Would it ever be permissible to enhance a population in wilderness, say to increase a population of an endangered species, assuming minimum requirements were followed in pursuing the enhancement?**

    Yes. However, if an action is taken in wilderness to meet the requirements of the Endangered Species Act (for example) it must be the action satisfies both laws if at all possible. I am unaware of any case law in which the Endangered Species Act and the Wilderness Act have met head-to-head. See agency policies for other conditions under which enhancing species might be permitted.

14. **Extirpation of native species from a wilderness area due to human action is evidence of humans in wilderness (trammeling). How are activities to restore this characteristic (intact suite of native fauna) addressed in implementation of the wilderness act?**

    The Wilderness Act in section 4(b) directs managers to preserve wilderness character. "Natural condition" has been defined as one of the qualities of wilderness character. The report called *Keeping It Wild: An Interagency Strategy to Monitor Trends in Wilderness Character Across the National Wilderness Preservation System* embodies careful consideration by experts of the different qualities of wilderness character. However, I am not aware of any court cases informed by the *Keeping It Wild* report. With that in mind, nevertheless, restoration of an extirpated native species could be considered an act to preserve wilderness character under Section 4(b) that would likely receive deference from a court reviewing the agency's decision.

15. **This case has huge implications for the way NPS manages wolves at Isle Royale National Park (99% wilderness). Has NPS done a rigorous MRA THERE?**

The Carhart Center is not aware of an MRA that Isle Royale NP may have prepared. Contact the park for further information.

16. **Can you discuss when to do NEPA and when an agency does not need to do NEPA for stocking and for conducting assessments that require the use of motors and airplanes?**

    Nothing in the Wilderness Act changes the requirements for completing NEPA requirements. NEPA says you must consider alternatives to, and the environmental effects of, federal agency actions, incorporate environmental information, and use public participation. Check your agency policy regarding NEPA compliance. The Wilderness Act states that you can only administratively employ prohibited uses (motors and airplanes, etc.) when they are the minimum necessary. Wilderness policy for each agency provides guidance on completing minimum requirements analyses (MRA's) for taking action in wilderness, so be sure to check your agency's policy. Often managers will use information gathered in an MRA to supplement information required by NEPA. Alternatively, the NEPA process itself might inform the MRA. The Carhart Center has helpful modules of how to think about MRAs, and you will see that many of the steps are steps that a careful agency is already considering in its NEPA documentation.

17. **Some agencies use helicopters routinely within wilderness for administrative access. How does this stand in relationship to the helicopter access allowed for restoration of endangered species, and the courts strong disapproval of more routine uses?**

    Unless allowed by law, to satisfy an existing private right, or is the minimum necessary, the Wilderness Act prohibits the landing of aircraft in wilderness. If landing of helicopters is being used "routinely" it needs to have met one of the above three conditions. (Use for the restoration of an endangered species *may* meet the minimum requirement.) Note that in the in the wolf collaring case in the Frank Church Wilderness -- *Wolf Recovery Foundation v. USFS*, 692 F.Supp.2d 1264, 1270 (D. Idaho, 2010) -- the court said, "[T]he Court shares the plaintiffs' concerns that this decision could be interpreted wrongly as a stamp of approval on helicopter use. The proposed activity is designed to aid the restoration of a specific aspect of the wilderness character of the Frank Church Wilderness that had earlier been destroyed by man. The use of helicopters for any other purpose would be extremely difficult to justify under the Wilderness Act, NEPA, or any categorical exclusion."

18. **Is the extirpation of a native species from a wilderness evidence of trammeling by man?**

    I am unaware of any case law that has decided that extirpation of a native species constitutes a problem under section 2(c) of the Wilderness Act. Remember that wilderness areas are set by Congress, and often have evidence of previous interference by humans on the environment.

19. **Many western states are interested in expanding bighorn sheep / mountain goat populations to new areas, including wildernesses, where they may or may not have historically existed. These actions are often proposed to expand hunting opportunities and license applications**

and sales. In your opinion, could this be considered a commercial enterprise similar to Tustumena Lake?

Introducing non-native species into a wilderness for any purpose degrades wilderness character. In the Tustumena Lake case, the reintroduced species was native, and the court found that to be troublesome because a principal motivation was the enhancement of commercial activity outside of the wilderness area. Manipulating wildlife populations inside a wilderness for the benefit of hunting outfitters or to increase income from license fees itself might constitute a "commercial enterprise" banned by section 4(c) of the Act, but there are no court cases on this specific question of which I'm aware.

20. **To clarify the restriction in the Wilderness Act is on the landing of helicopters. Would a helicopter that does not land but merely long lines a load of debris out of the wilderness be a prohibited act?**

*Though they use different language to do so, three of the four agencies include the use of long lines from a helicopter as an extension of the "landing of aircraft" prohibited by Section 4(c) unless the "minimum requirements" test is satisfied. The Fish & Wildlife Service policy is not explicit on the use of long lines, but **any** administrative use over a wilderness must meet the same "minimum requirements" test.*

21. **Note that we had similar Bighorn helicopter Project in California that was approved and not challenged in California. Where have the courts ruled in the favor of the States for management of fish and wildlife in wilderness over the federal interest?**

I am not aware of any cases where the courts have ruled in the favor of the States for management of fish and wildlife in wilderness over the Federal interest.

22. **In Alaska, the state wants to aggressively manage predators such as bears and wolves on USFS lands. Is our passive permission a policy issue? These would not be in wilderness, but could be adjacent.**

The USFS has the authority to prohibit this, but only if there is a federal need to do so. Recall the Wyoming case: "Federal management and regulation...preempts state management and regulation...**to the extent the two actually conflict**, or where state management and regulation stand as an obstacle to the accomplishment of the full purposes and objectives of the federal Government" (emphasis added). There might be a conflict if this proposed action was to take place in wilderness, since such aggressive predator control programs can degrade wilderness character. But outside wilderness there may be no conflict between the federal and state purposes and objectives, in which case the state agency could proceed with their plan.

(Note that while ANILCA allows the public to use modes of transportation not lawful in wilderness areas outside Alaska, it does not change the responsibilities of the State wildlife agency.)

23. At what point is the maintenance or acceptance of historical structures in Wilderness, especially a site that is listed on the National Register, to be allowed?

This was the subject on an earlier webinar. In a nutshell, it's a "minimum requirements" question. For more specific information on historical structures please view the recording of the webinar concerning case law and cultural resources, and the webinars on the 5th Quality of Wilderness Character. You'll find it in the Cultural Resources Toolbox on wilderness.net.
http://www.wilderness.net/cultural