



Subject: Q&A for Wilderness in the Courts Webinar Series, Session #1: Commercial Services

Note: The following questions were asked by participants in the Commercial Services Wilderness in the Courts Webinar. The answers were provided by Professor Peter Appel, subject matter expert and guest speaker. 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.

1. *What's the difference between a commercial enterprise and commercial service?*

The statute (the Wilderness Act) doesn't specify a difference. The reason I pointed out the difference in language in the webinar is because courts often operate on the assumption that Congress uses language carefully and specifically. "Commercial enterprise" is what is banned in section 4(c). "Commercial services" are what's permitted (if "necessary" in section 4(d)(6)). Nevertheless, there are no court cases distinguishing the two terms.

2. *Are air tour operators that fly people into wilderness in Alaska providing a proper commercial service?*

They could be. Again, the language of 4(d)(6) emphasizes that commercial services are allowed "to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas." The *High Sierra* cases we discussed give a sense of what the agency must consider to determine whether the commercial service is "necessary." Two considerations: First, special provisions of ANILCA may apply that may (and I emphasize may) have some impact on that consideration. Second, Alaska is within the Ninth Circuit, so the *High Sierra* pack animal cases will be binding precedent for any decision in Alaska (absent some special statutory exception). As I think was clear from my presentation, the standard the Ninth Circuit adopted does not draw bright lines on what is "necessary" and what is not. It does give some general sense of what the agency should consider.

3. *If "commercial services may be performed" for "activities which are proper", then are not the services and the activities distinct? Shouldn't the "activities" be interpreted as things like "hiking, backpacking, fishing, or horseback riding" and other things visitors do which could be supported by a commercial service, as opposed to "commercial photography" or "guide services" - the service itself?*

As a lawyer, I appreciate the close parsing of the language. The services are things that support activities. Guide services have long been recognized as services that are proper for activities in wilderness—they help people with recreational activities which visitors may not be able to do by themselves (or that make those activities safer). Photography by an individual is an activity that

is allowed. Commercial photography is a service that may help realize not just the “recreational” but also the “other wilderness purposes of the areas.” Wilderness purposes are discussed in section 4(b), which include “recreational, scenic, scientific, educational, conservation, and historical use.” A good case can be made that some commercial photography promotes, for example, the educational purpose of wilderness.

4. *Have any agencies been challenged by an outfitter/guide when they determined that a service was not necessary?*

Not to my knowledge.

5. *Commercial filming with use of props and models is not allowed versus commercial photography such as photography workshops, is that right?*

Please refer to my discussion in question 3 above. Unfortunately, I cannot give you a definitive answer to the question. I can't say definitively that photography with props and models is never allowed and that photography workshops are always allowed. That said, there are some distinctions between the two commercial services. I can imagine instances where commercial services involving paid people would be allowed. For example, allowing a guide service to photograph someone (a paid guide) rafting down a river and using that for promotional brochures might (and I repeat, might) be allowable. A Spielberg movie shooting within wilderness, probably not, depending on all of the reasons that Spielberg would want to do the shoot in a particular wilderness area and what it has to do with the reasons allowed in section 4(d)(6). (If it's the remake of “Close Encounters of the Third Kind,” which involved shooting at Devil's Tower—or at least a mock-up of it—that is not particularly related to wilderness purposes.) On the other hand, a photography workshop that draws in a lot of visitors week after week and is having demonstrable negative environmental impacts on the resource and the wilderness experience of other visitors could run into problems. I understand that the standards of the *High Sierra Hikers* case are frustratingly nebulous, but I think the court is asking agencies to make individualized factual determinations under the standards of 4(d)(6).

6. *What empowers the USFS to limit the volume of commercial service in wilderness areas?*

The Wilderness Act itself and the court decisions interpreting the Act. Although the Act makes clear that the Act doesn't interfere with the mandates of the agencies under their other acts (e.g., the Organic Act), it also makes clear that the Act supersedes those other acts for wilderness protection. There is nothing that compels USFS to have commercial services within forests—USFS allows those activities consistent with its statutory mandates. You might read this to suggest that an agency could simply shut a wilderness down to commercial services altogether. It can, just as a particular national forest might decide to have no commercial logging anywhere within its boundaries. I'm not saying I'm for a total ban on commercial

logging in all national forests, but it is certainly within the legal discretion of the USFS, despite whatever the political blowback might be.

7. *Through the lens of the Wilderness Act, is there a difference between commercial photography and commercial filming? If so, are there any court cases supporting this difference?*

Not from the text of the Act or the regulations the agencies have promulgated to implement the Act. (By the way, nice play on words with “lens,” even if it wasn’t meant.) However, in response to P.L. 106-206, agencies have developed policies that treat commercial filming and commercial still photography differently – even though the difference between them may be as simple as the position of a dial on a camera.

8. *I believe some land managers are interpreting "to the extent necessary" to mean that the amount of guide services necessary should be determined prior to authorizing guided use. That does not seem consistent with how you are interpreting this language. Thoughts on whether or not this clause indicates a need to determine the amount of guide use that will be allowed or is "necessary?"*

I’m not sure what inconsistency you heard. The *High Sierra Hikers* case is the most informative on the point. Determining whether a particular guide service is “necessary” is a necessary, but not sufficient, prerequisite to permitting it. The agency also has to determine whether the **amount** permitted is also necessary. The decision on remand in *High Sierra* is a good case for determining what courts will find allowable.

9. *Is there a distinction in a commercial photograph or video for the purpose of promoting education and a purpose to gather media material to promote guide services or other advertising?*

Not from the terms of the Wilderness Act itself. The distinction would be made on “the extent necessary...for realizing the recreational or other wilderness purposes.”

10. *I believe the contention was that the agency would address extent necessary in a Wilderness Plan, not at the "permitting level." (Referring to the HSHA case.)*

Please see my earlier answer to question 8. An agency can conclude at the planning stage that a particular service was necessary. That will probably be the case for guide services, not, for example, for commercial photography, since guide services are things the agency would usually consider at the planning level. At the permitting level, the level of the activity (how many trips, how many animals, etc.) would also have to be considered.

11. *In the absence of up-to-date planning guidance, should the necessity determination reside at time of issuance of a permit?*

Please see my previous answer. Bottom line: Yes. If consideration did not arise at the planning level—and, of course, plans cannot predict every contingency or possibility that can arise—then the determination would have to be made at the permitting level. Of course, permits would have to be consistent with the overall plan.

12. *Fyi, in the SEKI case, the govt won on the NEPA, APA, and Organic Act claims. The Wilderness Act claim on which we lost related to the agency wanting to do the "Extent Necessary" finding in an ongoing implementation level Wilderness Stewardship Plan. So it was different than Blackwell/Weingardt. In summary, how necessary is "necessary"?*

Yes, NPS won several of the claims in the SEKI case, but it lost on the Wilderness Act claims. In that case, winning 3 out of 4 did not result in victory overall, from my standpoint or from the standpoint of the environmental advocates. I'm sure they celebrated it as a victory. I wish I could give a firm definition of how necessary is "necessary."

13. *How does a decision in the 11th Circuit bear on those of us in the 9th? (or any decision outside of one's circuit?)*

As a formal matter, a decision in the 11th Circuit is binding only on that court and the district courts within the 11th Cir. The Ninth Circuit might find an 11th Cir. decision persuasive on the issue before it, however, follow that decision, and adopt it as precedent for that circuit. As a matter of history, the circuits have not split over Wilderness Act issues. It is also unlikely that DOJ would be willing push an alternative construction of the Wilderness Act facing a very similar decision from a sister circuit, even if it is not controlling, absent compelling circumstances. DOJ would rather win cases than lose them.

14. *Commercial stock trips in the Sierras service both those visitors wanting to ride horses into the wilderness and those who just want horses to carry their gear into the wilderness, but that activity is not limited to disabled visitors who cannot carry their gear into the wilderness. Has this issue been addressed by the courts?*

Not directly, though the *High Sierra Hikers v. Weingardt* case infers important sideboards. Differentiating among visitors and incorporating that differentiation into a planning document and permit is allowable.

15. *Aside from making a necessity determination in a plan, what else would you include in the analysis on determining whether or not to permit a commercial service from a legal standpoint? What level of detail would need to be provided to ensure that the commercial service is consistent with protecting the area's wilderness character?*

I think this has been addressed in previous answers. I can't give hard and fast guidelines of what level of detail is required. The remand in *High Sierra Hikers* gives a sense of what is not adequate.

16. *Is a commercial services capacity study the same as a necessity determination?*

A capacity study is a component of making a necessity determination. The services authorized cannot exceed capacity. In *High Sierra*, the court determined that the authorized services exceeded capacity. Having said that, one should also look at whether the service authorized is for "wilderness purposes."

17. *Are there some good examples of needs assessments at different scales that are available for wilderness staff to look at?*

See the Commercial Services Toolbox for some examples of needs assessments, <http://www.wilderness.net/outfitter>.

18. *The California congressional delegation has pressured the NPS at Sequoia to issue permits for pack outfitters. Do you think these cases may end up weakening wilderness protection because the Congress may overrule the WA at some point?*

That could happen. Recently introduced legislation has included the provision that the current amount of commercial service meets the "extent necessary." In the Cumberland Island case, Congress eventually redrew the wilderness boundary to allow NPS to conduct its Lands and Legacy tour operation on the roads that were then excluded from wilderness. That possibility should not affect your decision-making processes. What Congress may or may not do is not completely irrelevant to the agencies, but the Wilderness Act and whatever particular statute has created a wilderness you manage is what's on the books. Follow the law as it stands rather than possibilities of what the law may be.

19. *Do you know of any cases related to trapping? While trapping is allowed, we believe those trappers are later selling those skins and their products.*

I'm aware of no trapping cases in wilderness. If trapping is allowed (like, e.g., fishing), then it's not a commercial activity or service. If you believe that the trappers are later selling their prey, then they would need a special use permit to authorize that activity. Without going into whether the agency should issue one (though this may be addressed in your agency's policy), if the trappers are selling their wares without a special use permit they are violating the law. Enforcement action is warranted (although, I know, it may not be the most pressing enforcement issue facing your resource). The fact that this activity takes place within wilderness is relevant to that discussion because it may be considered a more harmful activity than

trapping and selling wares from other federal lands without the appropriate permit due to the Wilderness Act's prohibition on commercial enterprise.

20. *For extent necessary, we have been looking at setting dependency, categories of need (identified by the forest but usually those with physical or mental limitations that preclude their ability to enjoy wilderness), and impact to wilderness character, and sometimes public purposes (but this can be problematic). Is there anything else we should be considering in the needs assessments?*

The factors you have identified are all excellent and relevant. I cannot think of any to add offhand, but it sounds like you are making a thoughtful consideration of the necessity problem.

21. *As a follow-up on the question regarding lack of updated planning guidance, can you please provide some more information of the necessity determination process for individual permit issuance and how to utilize NEPA in that effort?*

NEPA documentation is an excellent way of factoring in the necessity determination for an individual permit. I know that agencies frequently use NEPA documents as an umbrella means of complying with, for example, historic preservation requirements, since the considerations are often the same. If you're considering doing the determination under NEPA, obviously invoking a categorical exclusion is inappropriate. An EIS is likely not required. In the EA, you could address the specific requirements and considerations under the Wilderness Act. One nice thing about the NEPA process is that you have the opportunity for public involvement. I know that can be a pain, but you can also learn from it.

22. *What would you suggest are the most critical elements of a necessity evaluation that would result in a defensible "balance" of commercial services/wilderness character?*

I think the factors laid out in question 20 are probably good places to start. Having ongoing discussions within your agency and amongst the wilderness management agencies are also good ways of getting a longer list of things to consider. The Carhart Center is a great place as a locus for those discussions. And the people there are awesome!

23. *A recent question has emerged about whether or not the availability of Google Street View - which gives a 3--D video or image of a landscape or city - is considered a "commercial service." This is a free service, available to everyone. The question as to whether it is 'necessary' could be posed too, in light of disabled person's ability to enjoy wilderness, or promoting education. So far, the Grand Canyon has been made available for free on Google.*

Despite the fact that the service that Google offers is free for the taking, that doesn't make a difference. Google does this to make money (and they make a lot). Even if Google were a nonprofit, that also wouldn't make a difference. Whether it's Spielberg, or National Geographic, or PBS doing photography or filming, it's considered commercial. Does that mean that it's not

allowed? No, but it means that all of the considerations discussed above have to go into the decision about whether to permit the activity or not, and, if allowed, what conditions to put on it (obviously, Google's VW Beetles with the mounted cameras driving around would be verboten).

24. *Can you or your students provide us with any more insight on making the argument between strict necessity vs. reasonably necessary?*

My students can probably do a better job than I can. The distinction between strict necessity and reasonably necessary is more of a lawyer's debate. In an early case interpreting congressional power under the Constitution's "necessary and proper" clause, the Supreme Court held that necessary in that context did not mean strictly necessary. In the Wilderness Act context, the courts have not definitively interpreted the word "necessary" in the Act—and it appears many times—to mean strictly necessary. Nevertheless, they have been more parsimonious than the Supreme Court was in that early case.