CAMPAIGN for AMERICA'S WILDERNESS

BRIEFING PAPER

TOOLS AND PRECEDENTS FOR USING THE WILDERNESS ACT

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MECHANIZATION IN WILDERNESS AREAS:
MOTORS, MOTORIZED EQUIPMENT, AND OTHER FORMS OF MECHANICAL TRANSPORT

INTRODUCTION

With only very narrow exceptions, the Wilderness Act bars the use of motor vehicles, motorized equipment or motorboats, the landing of aircraft, *and* any other form of mechanical transport within wilderness areas. These prohibitions include wheeled cargo carriers, mountain bicycles, and other non-motorized forms of mechanical transportation. A special provision of law allows wheelchairs, including certain forms of motorized wheelchairs.

This Briefing Paper traces the history and meaning of these prohibitions, the agency regulations implementing them, and the narrow exceptions provided in the Wilderness Act and the Americans with Disabilities Act.

The underpinning of the prohibition on mechanization is found in the fundamental congressional policy statement of the Wilderness Act: "to secure for the American people of this and future generations the benefits of an enduring resource of wilderness." Statutory designation of wilderness areas is necessary, Congress said, "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."[1]

In the Wilderness Act, Congress asserts that the essence of wilderness as its "*contrast* with those areas where man and his works dominate the landscape."[2] As Aldo Leopold wrote:

> Recreation is valuable in proportion to the intensity of its experiences, and to the degree to which it *differs from* and *contrasts with* workaday life. By these criteria, mechanized outings are at best a milk-and-water affair.[3]

Among man's works from which this contrast is sought in preserving wilderness areas are his motors and his machinery. The prohibition of all forms of mechanization, and limited exceptions to the prohibition,

IN THIS BRIEFING PAPER …

[1] 16 U.S.C. 1131(a), emphasis added.
[2] 16 U.S.C. 1131(c), emphasis added.
[3] Aldo Leopold, *A Sand County Almanac and Sketches Here and There*, (New York: Oxford University Press, 1949), page 194, emphasis in original. Leopold was here discussing wilderness recreation, just one among the array of values and benefits secured by preserving wilderness areas.

frequently raise questions as new wilderness areas are being debated by wilderness advocates, opponents, congressional staff, and agency personnel—and as new wilderness designations are acted upon by Congress.

HISTORICAL CONTEXT: *"WE SAID 'GOODBYE' TO THE BICYCLES AND CIVILIZATION"*

The choice Congress made to use the word *mechanization* in section 2(a) of the Act, when it might have limited its reference to motors, has an essential implication. Congress understood "mechanization" and "motors" to be distinct categories, the latter a subset of the former. And Congress unequivocally prohibited both. In doing so, Congress was following the fundamental philosophy of wilderness and its use, as these had been enunciated by the earliest pioneers in developing wilderness preservation concepts and policies.

Benton MacKaye, father of the Appalachian Trail, was an enthusiastic bicyclist but believed that like any form of mechanization, bicycles did not belong in wilderness. In 1897, he and several companions biked for ten days into New Hampshire. Once there, they set off on a long backpack ramble in the White Mountains. The night before they began the hike, MacKaye wrote in his journal: "We have said 'good-bye' to the bicycles and civilization and will now pursue our way on foot through the White Mountains." It was, he wrote, his first encounter with "true wilderness."[4]

Throughout their early writings, pioneers of the wilderness preservation movement such as MacKaye, Aldo Leopold and Bob Marshall (all founders of The Wilderness Society in 1935), commonly used the broader and more inclusive words "mechanization" and "machine" to define the very antithesis of wilderness, not the more limited subset of *motors* or *motorized*.

- Marshall defined wilderness "to denote a region which … possesses no possibility of conveyance by any mechanical means."5
- MacKaye, the father of the Appalachian Trail, insisted: "Primeval influence is the opposite of machine influence."6
- For Leopold, "public wilderness areas are, first of all, a means of perpetuating, in sport form, the more virile and primitive skills in pioneering travel and subsistence. * * * We who seek wilderness for sport are foiled when we are forced to compete with mechanized substitutes.7

Leopold had been the prime mover in the establishment of the first wilderness area in 1924. As historian Paul Sutter notes, "For Leopold, the essential quality of wilderness was how one traveled and lived within its confines."[8]

The 1935 platform issued by MacKaye, Leopold, Marshall and the other founders of The Wilderness Society focused on mechanization in all its forms as the broadest threat to wilderness. It characterized wilderness as "a natural mental resource" and "a serious human need rather than a luxury and plaything,"

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[4] MacKaye's journal is quoted in Larry Anderson, *Benton MacKaye: Conservationist, Planner and Creator of the Appalachian Trail*," (Baltimore, John Hopkins University Press, 2002), pages 34-35.

[5] Robert Marshall, "The Problem of the Wilderness," *The Scientific Monthly*, Volume 30:2 (February 1930), page 141, emphasis added.

[6] Benton MacKaye, "The Appalachian Trail: A Guide to the Study of Nature," *The Scientific Monthly*, 34 (April 1932), page 330, emphasis added.

[7] Leopold, *A Sand County Almanac*, pages 192-193, emphasis added.

[8] Paul Sutter, *Driven Wild: How the Fight against Automobiles Launched the Modern Wilderness Movement* (Seattle, University of Washington Press, 2002), page 72.

concluding that "this need is being sacrificed to *the mechanical invasion in its various killing forms*."[9] Expressing their concern about any manmade intrusions that bring "into the wilderness a feature of the *mechanical* Twentieth Century world," the Society's founders defined extensive wilderness areas as "regions which possess no means of *mechanical* conveyance."

> The dominant attributes of such areas are: first, that visitors to them must depend largely on their own efforts and their own competence for survival; and second, that they be free from *all mechanical disturbances*."

Marshall had written the chapter on forest recreation in the federal government's comprehensive 1932 study of forest protection and uses. He distinguished between categories of wildlands, among them primeval areas preserving "the virginal growth conditions that have existed for an inestimable period," and wilderness areas that might or might not "contain within their boundaries much that is primeval:"[10]

> The difference between primeval and wilderness areas is that the primeval area exhibits primitive conditions of growth whereas the wilderness area exhibits primitive methods of transportation …" that "… make it possible to retire completely from the modes of transportation … of the twentieth century.[11]

The specific threat that impelled the founding of The Wilderness Society was the proposal by the National Park Service to preempt the ridgetop wilderness setting of the Appalachian Trail with motor parkways. In 1933, National Park Service director Arno Cammerer suggested that where the route of the Trail followed the same ridge as the proposed skyline drive in Shenandoah National Park, the Trail "be made wide and smooth enough that it could serve as a bicycle path."[12] Hearing this, Trail founder MacKaye was apoplectic. The Appalachian Trail was to be a "real wilderness footpath," he responded to Cammerer. As such, "*it is to be a footway and not a wheelway*."[13]

These and other pioneering thinkers and protectors of wilderness consciously distinguished *mechanization* as a broader category than just those machines powered by motors—and excluded both from their conception of wilderness areas.

THE WORDS OF THE WILDERNESS ACT: *BOTH* USE OF MOTOR VEHICLES AND *"ANY OTHER FORM OF MECHANICAL TRANSPORT"* PROHIBITED

As defined in the dictionary, and as reflected in the whole line of 20th century wilderness thinking, the term "mechanization" embraces a broader category than just the use of "motor vehicles."[14] Congress adopted this crucial distinction when it enacted the Wilderness Act.[15]

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[9] This and the following quotations are from *Reasons for a Wilderness Society*, 4-page pamphlet, January 21, 1935, emphasis added.

[10] Robert Marshall, "The Forest for Recreation," in Report of the Forest Service, *A National Plan for American Forestry,* printed as U.S. Senate Document 12 (73rd Congress, 1st Session; March 1933), Vol. 1, pages 471, 474.

[11] Marshall, "The Forest for Recreation," page 474.

[12] Cammerer to Myron Avery, December 2, 1933, quoted in Sutter, *Driven Wild*, page 185, emphasis added.

[13] MacKaye to Cammerer, December 30, 1933, quoted in Sutter, *Driven Wild*, page 185, emphasis added. "The country we are about to traverse is one, I am told, undisturbed by civilization in any form … We have said 'good-bye' to the bicycles and civilization and will now pursue our way on foot through the White Mountains."

[14] The word "mechanical" is not defined by presence or absence of a motor. *The American Heritage® Dictionary of the English Language, Fourth Edition (Copyright © 2000 by Houghton Mifflin Company)* defines this family of terms: **Mechanical**: "1. Of or pertaining to machines or tools. **Mechanism**: "A machine or mechanical appliance." **Mechanize**: "To equip with machinery." **Machine**: 1. a. A device consisting of fixed and moving parts that modifies

The focus of pioneering wilderness advocates on prohibiting "mechanized invasion in its various killing forms" was carried forward with leadership of The Wilderness Society. The Society's executive director, Howard Zahniser, drew on the concepts developed by MacKaye, Leopold, Marshall and others as he drafted the bill that ultimately became the Wilderness Act. In a nationwide radio broadcast in 1949 (when he had already begun formulating the concepts for a wilderness protection law), Zahniser emphasized that "*wilderness will not survive where there is mechanical transportation*."[16]

The broad exclusion of other forms of mechanical transport was included in the bill from the outset of the legislative process, eight years before the law was ultimately enacted. In the handwritten first draft of the Wilderness Act that Zahniser wrote in February 1956, the National Wilderness Preservation System was to comprise areas "remaining free from mechanized transportation."[17] This objective of barring not only motor vehicles but also others forms of mechanical transport was embraced by the bipartisan congressional champions who led the effort in Congress for the Wilderness Act. [18]

As enacted, section 4(c) of the Wilderness Act prohibits certain uses, some absolutely and others with limited exceptions:

> Except as specifically provided for in this Act, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this Act and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this Act (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, **no other form of mechanical transport**, and no structure or installation within any such area.[19]

The plain words of the statute list five categories of mechanical transportation and equipment, including the use of motor vehicles <u>and</u> any "other form of mechanical transport," and separately prohibit them all. The canons of statutory construction require that distinct meaning be given to each item in a list of items, and do not permit the assumption that when Congress chooses to use two different words or phrases it intended these to have identical meaning.[20]

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mechanical energy and transmits it in a more useful form. b. A simple device, such as a lever, a pulley, or an inclined plane, that alters the magnitude or direction, or both, of an applied force; a simple machine."

[15] Congress well understands that the word "mechanical" has a different meaning than "motorized." Congress made the same distinction, for example, in the 1972 law establishing the Sawtooth National Recreation Area, Idaho. Section 11 of that act instructs the Secretary of Agriculture to promulgate regulations to protect the area, including "for control of the use of motorized *and* mechanical equipment for transportation over, or alteration of, the surface of such Federal land …." 16 U.S.C. 460aa-10, emphasis added.

[16] Howard Zahniser, script of radio broadcast, January 13, 1949, "Newsreel Digest" program, Mutual Broadcasting Company, page 1.

[17] Draft #1, February 1956, page 2. Copy in possession of the author.

[18] The first wilderness bill that ultimately led to the Wilderness Act was introduced in the U.S. Senate on June 7, 1956. Section 3(b) of that bill provided that "there shall be no … use of motor vehicles, nor any airplane landing field, or other provision for mechanized transportation." S. 4013, 84th Congress, 2nd session, page 15.

[19] 16 U.S.C. 1133(c), emphasis added.

[20] "It is the '"cardinal principle of statutory construction" … [that] [i]t is our duty `to give effect, if possible, to every clause and word of a statute' … rather than to emasculate an entire section.' *United States v. Menasche*, 348 U.S. 528, 538, 75 S.Ct. 513, 520, 99 L.Ed. 615 (1955) (quoting *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1, 30, 57 S.Ct. 615, 621, 81 L.Ed. 893 (1937), and *Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S.Ct. 391, 395, 27 L.Ed. 431 (1883))." Cited in *Bennett v. Spear*, 520 U.S. 154, 137 L.Ed.2nd 281 (1997).

Thus, distinct from the phrases involving motors per se, the unalloyed proscription that "there shall be no … other form of mechanical transport" must mean some class of transport other than vehicles with motors.

This prohibition on any other form of mechanical transport is, on its face, a broad and inclusive *categorical exclusion* intended to prohibit *any* form of mechanical transport, precisely to guard against the kind of later invention of new technology represented by the mountain bicycle, first developed and popularized some 20 years after the Act became law.

U.S. FOREST SERVICE MISINTERPRETATION OF "MECHANICAL TRANSPORT"

It is important to under stand that the Wilderness Act itself specifies that "no other form of mechanical transport" is permitted in any wilderness area, not simply some agency interpretation of the Act.

But initially the Forest Service (uniquely among the wilderness administering agencies) misinterpreted this provision of the law. In May 1966, the Secretary of Agriculture finalized regulations drafted by the Forest Service for implementing the Wilderness Act on the national forests. As interpreted in those 1966 regulations:

> "Mechanical transport," as herein used, shall include any contrivance which travels over ground, snow, or water on wheels, tracks, skids, or by flotation and is propelled *by a nonliving power source* contained or carried on or within the device.[21]

The Wilderness Act itself made no distinction between living or nonliving power sources, not mentioning these words at all. Beyond that, this 1966 Forest Service interpretation ignored a cardinal rule of statutory interpretation. The error was immediately spotlighted in the first authoritative legal analysis of the new Act and the regulations, published in the June 1966 *Oregon Law Review*. Commenting on the identical wording as it appeared in the draft form of the regulations published the previous year, Michael McCloskey noted:

> In its regulations to implement the act, the Forest Service has defined "mechanical transport" as "any contrivance … propelled by a nonliving power source." As a nonliving power source is the same as a motor, mechanical transport is thus defined as being the same as "motorized transport," and there is no exclusion [in the agency regulations] of horse-drawn vehicles, bicycles, or cargo carriers. The wording of section 4(c) is that there shall be "no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport …." In an effort to give meaning to each item enumerated, the rules of statutory construction would suggest that duplicate definitions should be avoided. For this reason, the Forest Service would appear to be in error in saying that the phrase "mechanical transport" means no more than the preceding phrase "motor vehicles." **The meaning of the sentence would appear to be that the final phrase refers to modes of mechanical transport that are not motor vehicles, motorboats, or motor-driven aircraft. By a process of elimination, this would seem to leave only items such as bicycles, wagons, and cargo carriers as the referent for the phrase.**[22]

[21] 36 C.F.R. 251.75(a), as promulgated by the Secretary of Agriculture, May 31, 1966, emphasis added.

[22] "The Wilderness Act of 1964: Its Background and Meaning," J. Michael McCloskey, June 1966, 45 *Oregon Law Review* at page 308, emphasis added. McCloskey was referring to the Secretary's proposed regulation, dated July

Earlier, in responding to the draft regulations, both The Wilderness Society and Sierra Club—the national organizations most intimately involved in the drafting and enactment of the Wilderness Act—had expressly put the Forest Service on notice of its error. In its comments The Wilderness Society pointed out:

> The definition of mechanical transport in Paragraph 5 should specifically include contrivances powered by living power sources (such as wagons drawn by horses, bicycles, and wheeled cargo carriers) as well as contrivances propelled by nonliving power sources. (See Paragraph 4(c) of the Act, which distinguishes between motor vehicles, motorboats, and "other forms of mechanical transportation."). **The use of various types of wheeled equipment should be specifically prohibited within the regulations to conform with this provision of the Act.**[23]

The Sierra Club comments highlighted four provisions in the proposed regulations that "particularly need improvement," one being:

> Mechanical Transport. Section 5 of the regulation regards mechanical transport as an inclusive term for motor vehicles and motorboats. It defines it as any traveling contrivance with a non-living power source. However, paragraph 4(c) of the Act distinguishes between motor vehicles, motorboats, and any "other form of mechanical transport." **The enumeration of these as separate items makes it clear that "mechanical transport" means something besides that denoted by the previous terms.** Most likely mechanical transport was meant to refer to traveling contrivances powered by living power sources, such as wagons drawn by horses, bicycles, and wheeled cargo carriers. There is evidence that the authors of the Wilderness Act did intend to exclude these conveyances from wilderness. Section 5 of the regulation thus should be re-drawn to implement the intended meaning [of] paragraph 4(c) of the Act.[24]

Thus, from the first emergence of the erroneous Forest Service interpretation, both the legal literature and detailed comments filed by the organizations most centrally involved in wilderness advocacy put the agency on notice of its error in statutory construction,.

Some have argued that the words of this 1966 regulation allow bicycles and that prohibition of bicycles in wilderness came only much later, after the Forest Service revised its definition. But it is the unambiguous words of the statute—not the regulations—that declare that "there shall be … no other form of mechanical transport." Agency error in interpreting the plain meaning of the words in the statute does not change that. Supreme Court precedents set down the canons of statutory construction in such matters:

- "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842 -43 (1984), *rehearing denied*, 468 U.S. 1227 (1984).

12, 1965. The portion of that draft quoted in the law review did not change in the final regulation as adopted a year later.

[23] Stewart M. Brandborg to Edward P. Cliff, Chief, Forest Service, September 28, 1965, page 3, emphasis added.

[24] Statement of the Sierra Club on Proposed Regulation of the Secretary of Agriculture Governing the Administration of National Forest Wilderness, September 30, 1965, page 3, underscoring in original, other emphasis added. It is evident that Howard Zahniser would have authoritatively addressed the Forest Service error had he lived, but he died in May 1964, months before the Wilderness Act he was central in conceiving, drafting, and pressing through Congress was signed into law.

- If an agency's "interpretation is … in conflict with the plain language of the statute, deference is [not] due." *National R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 417 (1992).

- "Where the language of the statute is clear, resort to the agency's interpretation is improper." *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2263 (1996).

CURRENT AGENCY REGULATIONS CORRECTLY APPLY THE WILDERNESS ACT

U.S. FOREST SERVICE. In view of its obvious legal error, the Forest Service ultimately corrected its regulatory definition in the section of the *Forest Service Manual* that directs implementation of the Wilderness Act.[25] In doing so the agency expanded its regulation, naming specific wheeled devices in order to clarify exactly the types of devices prohibited by the corrected interpretation of the phrase "there shall be … no other form of mechanical transport:"

> Gradually wilderness has become a cultural necessity to us, the people of America, and while it does play an important recreational role, its real function will always be as a spiritual backlog in the high-speed mechanical world in which we live. We have discovered that the presence of wilderness in itself is a balance wheel and an aid to equilibrium."
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> Sigurd F. Olson, 1948

> Mechanical Transport. Any contrivance for moving people or material in or over land, water, or air, having moving parts, that provides a mechanical advantage to the user, and that is powered by a living or nonliving power source. This includes, but is not limited to, sailboats, hang gliders, parachutes, bicycles, game carriers, carts, and wagons. It does not include wheelchairs when used as necessary medical appliances. It also does not include skis, snowshoes, rafts, canoes, sleds, travois, or similar primitive devices without moving parts.[26]

BUREAU OF LAND MANAGEMENT. Regulations governing wilderness areas administered by the Bureau of Land Management provide in essence the same definition, but do not even refer to living/non-living power sources:

> Mechanical transport means any vehicle, device, or contrivance for moving people or material in or over land, water, snow, or air that has moving parts. This includes, but is not limited to, sailboats, sailboards, hang gliders, parachutes, bicycles, game carriers, carts, and wagons. The term does not include wheelchairs, nor does it include horses or other pack stock, skis, snowshoes, non-motorized river craft including, but not limited to, drift boats, rafts, and canoes, or sleds, travois, or similar devices without moving parts.[27]

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[25] "[A]n administrative agency is permitted to change its interpretation of a statute, especially where the prior interpretation is based on error, no matter how longstanding." *Chisholm v. F.C. C.* 538 F.2d 349, 364 (D.C. Cir.), *cert. denied*, 429 U.S. 890, 97 S.Ct. 247, 50 L.Ed.2d 173 (1976); see also *Automobile Club v. Commissioner of Internal Revenue*, 353 U.S. 180, 77 S.Ct. 707, 1 L.Ed.2d 746 (1957) (commissioner may retroactively correct rule of law as to tax exempt status of automobile club); *American Trucking Ass'n. v. Atchison, Topeka and Santa Fe Railway Co*. 387 U.S. 397, 416, 87 S.Ct. 1608, 1618, 19 L.Ed.2d 947 (1967).

[26] Forest Service Manual 2320.5(3).

[27] 43 C.F.R. 6301.5. In its first version of the present language, adopted in 1985, the BLM also expressly named bicycles as prohibited forms of mechanical transport. In comprehensively refining its wilderness regulations in 2000, BLM explained its position that "we must include wheeled game carriers or wheelbarrows in the definition of mechanical transport, or it will conflict with the letter and spirit of the Wilderness Act." 65 Federal Register 78360, December 14, 2000.

MOUNTAIN BICYCLES ARE PROHIBITED IN WILDERNESS … BY THE LAW ITSELF

Mountain bicycles were not invented until the early 1980s, long after the Wilderness Act became law. It is therefore understandable that Forest Service staff who drafted the earliest regulations to implement the Act did not expressly name bicycles as a form of mechanical transport (indeed, they did not include any list of specific examples). At that time they could not reasonably have foreseen future technological developments that would adapt bicycles to mountainous terrain, both on and off trails.

As documented here, there is a long, consistent history of fundamental wilderness philosophy focused on excluding "mechanical invasion in its various killing forms." Nonetheless, some mountain bikers continue to insist that bicycles are compatible with the philosophy of the Wilderness Act. And some go on to suggest that Congress only meant to exclude "*motorized* mechanical transport"—a phrase nowhere found in the law or its legislative history. Some have alleged that the Forest Service interpretation of "mechanical transport" was only extended to include mountain bikes 20 years after the Act became law, as some kind of after-the-fact subterfuge.

However, the plain words of the statute itself are the controlling law, not the agency's interpretations (which a court would refer to only if the words of statute itself are ambiguous). A bicycle—a contrivance of wheels, gears, and brakes expressly intended to give users mechanical advantage—is obviously a *mechanical* device and, just as obviously, is a *form of transport*. The plain words of section 4(c) of the Wilderness Act bar such man-made contrivances as bicycles from wilderness areas.

The technological innovations developed in the 1980s to render new types of bicycles useable on rugged mountain and canyon terrain involved further mechanical elaborations. The prohibition on any other form of mechanical transport in section 4(c) of the Wilderness Act is self-evidently a broad and inclusive *categorical exclusion* intended to prohibit *any* form of mechanical transport, precisely to guard against the latter-day invention of new technology, such as the mountain bike.

EXCEPTIONS IN THE WILDERNESS ACT ITSELF

By its own terms, the section 4(c) prohibition of use of motor vehicles, motorized equipment, motorboats, and other form of mechanical transport is subject to three categories of exceptions:

1. "Except as specifically provided for in this Act"
2. "Subject to existing private rights"
3. "Except as necessary to meet minimum requirements for the administration of the area for the purpose of this Act (including measures required in emergencies involving the health and safety of persons within the area)"

1. EXCEPTIONS IN OTHER PROVISIONS OF THE WILDERNESS ACT

- Motors and other forms of mechanical transport may be permitted in connection with a *presidential* decision to authorize prospecting for water resources, establishment and maintenance of reservoirs, water-conservation works, power projects, transmission lines, "and other facilities needed in the public interest" within a specific wilderness area.[28]

[28] 16 U.S.C. 1133(d)(4)(1).

- Exceptions may be allowed at the discretion of the administrative agency, subject to such restrictions as the Secretary "deems desirable:"

  - ✓ Use of aircraft and motorboats "may" continue where these uses have already become established.[29]

  - ✓ Such measures may be taken as may be necessary in the control of fire, insects, and diseases.[30]

- The grazing of livestock, where established at the time a specific wilderness area is designated, "shall" be permitted to continue subject to reasonable regulations.[31] In connection with such established grazing, the permittee may utilize motorized or mechanical transport under some circumstances.

Because of a history of persistent agency misinterpretation, the Congress has spelled out very detailed grazing guidelines and specified by statute that these be followed by the agencies. The Forest Service has incorporated these congressional grazing guidelines, word for word, into the Forest Service Manual. These guidelines include:

> 2. The maintenance of supporting facilities, existing in the area prior to its classification as wilderness (including fences, line cabins, water wells and lines, stock tanks, etc.), is permissible in wilderness. Where practical alternatives do not exist, maintenance or other activities may be accomplished through the occasional use of motorized equipment. **This may include, for example, the use of backhoes to maintain stock ponds, pickup trucks for major fence repairs, or specialized equipment to repair stock watering facilities.** Such occasional use of motorized equipment should be expressly authorized in the grazing permits for the area involved. The use of motorized equipment should be based on a rule of practical necessity and reasonableness. For example, motorized equipment need not be allowed for the placement of small quantities of salt or other activities where such activities can reasonably and practically be accomplished on horseback or foot. On the other hand, it may be appropriate to permit the occasional use of motorized equipment to haul large quantities of salt to distribution points. Moreover, under the rule of reasonableness, occasional use of motorized equipment should be permitted where practical alternatives are not available and such use would not have a significant adverse impact on the natural environment. Such motorized equipment uses will normally only be permitted to those portions of a wilderness area where they had occurred prior to the area's designation as wilderness or are established by prior agreement.
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> 5. **The use of motorized equipment for emergency purposes such as rescuing sick animals or the placement of feed in emergency situations is also permissible.** This privilege is to be exercised only in true emergencies, and should not be abused by permittees.[32]

- The 1964 Act provided certain exceptions concerning the Boundary Waters Canoe Area, including that "nothing in this Act shall preclude the continuance within the area of any already established use of

[29] 16 U.S.C. 1133(d)(1).
[30] *Ibid.*
[31] 16 U.S.C. 1133(d)(4)(2).
[32] The portions quoted here are from *Forest Service Manual* 2323.22, Appendix 1, emphasis added.

motorboats." Congress repealed this provision of the Act in 1978.[33] [Management of the renamed Boundary Waters Canoe Area Wilderness is subject to the Wilderness Act, the provisions of the 1978 Act, and related statutes.]

2. Exceptions for Private Rights

Certain private rights may have existed at the time a particular wilderness area was designated and the Wilderness Act protects these. In making use of those rights, the holder may be permitted to use motor vehicles, motorized equipment, and other forms of mechanical transport.

- Owners of private (or state) land completely surrounded by federal wilderness are assured by the Act itself of "such rights as may be necessary to assure adequate access" and this may include use of motor vehicles or other forms of mechanical transport.[34]

- Holders of valid mining claims "or other valid occupancies" that are wholly within a designated wilderness area are assured by the Act of "ingress and egress to such surrounded areas by means which have been or are being customarily enjoyed with respect to other areas similarly situated.[35]

3. Exceptions Necessary to Meet Minimum Requirements for Administration

The administrators of a wilderness area may use motor vehicles, motorized equipment, motorboats, and other forms of mechanical transport, and may land aircraft in wilderness areas. But this exception for potential administrative use is constrained:

> except as necessary to meet minimum requirements for the administration of the area for the purpose of this Act (including measures required in emergencies involving the health and safety of persons within the area)[36]

The decision-making process for applying this exception is set forth in detail in the *Minimum Requirement Decision Guide* published to guide personnel of the four wilderness administering agencies.[37] This booklet further explains the minimum requirement provision of the Act:

> In [this] language, Congress acknowledged that even though certain activities are prohibited, there are times when exceptions to these prohibitions will need to be made for administration of the area. However … it is clear that the wilderness management agencies should not view the language in Section 4(c) as blanket approval to conduct projects or allow activities without an analysis of (1) whether the project or activity is necessary to meet the minimum requirements for the administration of the area, and (2) which tool or method should be used to complete the project that results in the least impact to the physical resource or wilderness values.[38]

In general, the decision to allow agency personnel to proceed with otherwise prohibited uses or equipment is exercised at a fairly high level within each agency hierarchy, but the agencies differ in the stringency of this approval. (For example, one agency very seldom authorizes the use of chainsaws to deal with large

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[33] This provision, found in paragraph 4(d)(5) of the 1964 Act, was codified as 16 U.S.C. 1133(d)(5), but the repeal struck that entire paragraph and renumbered the subsequent paragraphs accordingly.
[34] 16 U.S.C. 1134(a).
[35] 16 U.S.C. 1134(b).
[36] 16 U.S.C. 1133(c).
[37] This decision guide booklet is available from the Campaign for America's Wilderness at http://www.leaveitwild.org/reports/stewardship.html
[38] *Minimum Requirement Decision Guide*, page 2.

numbers of trees blown down across trails; another is more likely to approve such a request.) These decisions require case-by-case assessment of whether a particular exception is "necessary" and, if so, whether the means involved constitutes the "minimum requirements." The minimum requirement refers to choosing among alternative means of accomplishing the necessary step in order to have minimum impact on the wilderness.[39]

EXCEPTION FOR TYPES OF WHEELCHAIRS (INCLUDING MOTORIZED MODELS) REAFFIRMED IN THE 1990 AMERICANS WITH DISABILITIES ACT

Section 507 of the Americans with Disabilities Act clarified the proper construction of the Wilderness Act concerning the use of wheelchairs within wilderness areas:

> (c) SPECIFIC WILDERNESS ACCESS
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> (1) IN GENERAL- Congress reaffirms that nothing in the Wilderness Act is to be construed as prohibiting the use of a wheelchair in a wilderness area by an individual whose disability requires use of a wheelchair, and consistent with the Wilderness Act no agency is required to provide any form of special treatment or accommodation, or to construct any facilities or modify any conditions of lands within a wilderness area in order to facilitate such use.
>
> (2) DEFINITION- For purposes of paragraph (1), the term `wheelchair' means a device designed solely for use by a mobility-impaired person for locomotion, that is suitable for use in an indoor pedestrian area.[40]

The Forest Service has published a *Wilderness Access Decision Tool*, a booklet to help wilderness administrators in all four agencies make appropriate, objective, and consistent decisions regarding use of wheelchairs in wilderness areas by persons with disabilities as defined by the Americans with Disabilities Act.[41] This booklet provides illustrations of various types of wheelchairs, including motorized models, and offers detailed case studies of actual decisions about their use in wilderness areas, including:

- The decision to deny use of a gasoline-powered motorized wheelchair (since a gasoline engine would not be suitable for use in an *indoor* pedestrian area as specified in paragraph 507(c)(2) of the Act) in the wilderness of Organ Pipe Cactus National Monument, Arizona.

- The decision to approve use of a battery-powered motorized wheelchair in the Mount Zirkel Wilderness, Colorado.[42]

[39] An unusual example occurred in February 2003, when the Forest Service authorized use of four-wheel-drive vehicles in the 12,000-acre Indian Mounds Wilderness in east Texas if needed in their emergency search for debris from the space shuttle "Columbia." The Associated Press quoted a Forest Service spokesman saying: "With an event of this magnitude, we have to look at the laws and make exceptions to make the right choice in a difficult situation."

[40] 42 U.S.C. 12207.

[41] This decision tool booklet is available from the Campaign for America's Wilderness at http://www.leaveitwild.org/reports/stewardship.html

[42] These case studies are at pages 10 and 11 of the Wilderness Access Decision Tool.

CONGRESS REAFFIRMS EXCEPTIONS FOR USE OF MOTOR VEHICLES AND OTHER FORMS OF MECHANICAL TRANSPORT IN POST-1964 WILDERNESS DESIGNATION LAWS

1. FOR WILDLIFE MANAGEMENT

Use of mechanical equipment and access by motor vehicles, aircraft or other forms of mechanical transport for certain wildlife and fisheries management activities may be permitted within wilderness areas. Congress has reemphasized that wilderness managers may use these normally prohibited devices, and has spelled out the limitations that apply when deciding whether these will be used. Here, too, the "minimum tool" analysis is the key.

For example, in 1976 Congress provided general guidance on this question in the case of a cooperative State/federal bighorn sheep trapping/transplanting program in what is now the Fitzpatrick Wilderness on national forest land in Wyoming. The Forest Service had recommended against wilderness designation for the Whiskey Mountain portion of the area because of potential future expansion of the trapping and transplanting program already occurring on nearby lands not involved in the wilderness issue. The House Interior Committee voted to overrule the Forest Service and to designate this area as wilderness, explaining in its formal report on the bill that:

> the Wilderness Act provides ample flexibility for managers to initiate and carry out such a temporary program. Section 4(a) provides that wilderness designation be supplemental to the purposes for which National Forests are established and administered. The primary purpose for which the Whiskey Mountain unit is administered is preservation of bighorn sheep habitat and, in cooperation with the Wyoming Game and Fish Department, regulation of herd size. Therefore, the Forest Service … is permitted by section 4(c) to utilize motorized vehicles temporarily if found to be the "minimum necessary" to accomplish that purpose. Section 4(c) does not state categorically that vehicles cannot ever be used in a wilderness because of the disclaimer *"... except as necessary to meet minimum requirements for the administration of the area for the purposes of this Act…. There shall be no ... use of motor vehicles ...."* Of course, temporary use of a vehicle to transport bighorns which have been trapped in a temporary enclosure must be conducted in a fashion so as to meet the management requirements of section 4(b) which charge the agency with preserving the wilderness character of the area.[43]

This approach applies to motorized vehicle use for such things as wild horse removal, animal transport for herd reduction, and restocking and reintroduction of native species. It covers use of aircraft, including helicopters (which may also be used for animal census and tracking).

Congress has emphasized this existing authority for wildlife management activities by including express language in some individual wilderness designation laws. For example, when the Whiskey Mountain area was ultimately added to the Fitzpatrick Wilderness in 1984, Congress included this statutory language applying just to that particular area:

> *Provided*, That within the area referred to in this subparagraph, occasional motorized access for administrative purposes and related activities as determined necessary by the Secretary

[43] *Designating Certain Lands as Wilderness*, House Report 94-1562, September 15, 1976, page 11, emphasis in original.

> for habitat management, trapping, transporting and proper management of the area's bighorn sheep population may be allowed ….[44]

Note that this special language is limited, using the phrases "occasional motorized access," and "for … activities as determined *necessary* by the Secretary …." In a report that same year, the House Interior Committee provided further guidance and detail:

> A final concern of the Committee relates to the use of aircraft, motorboats or motor vehicles in conjunction with wildlife management activities. Section 4(c) of the Wilderness Act permits the use of motorized equipment if found to be "necessary to meet minimum requirements for the administration of the area for the purposes of this Act." **The Committee views this language as permitting the occasional, temporary use by Federal and State officials of motor vehicles, helicopters, aircraft and the like, in furtherance of the purposes of a specific wilderness area.** However, the Committee believes that this language means that any such use should be occasional and temporary (example: transporting animals which have been trapped in a temporary enclosure to a release point outside the wilderness); that no roads should be built to accommodate vehicles; and that such use must be determined by wilderness managers to be the minimum necessary to accomplish the task.[45]

2. FOR FIRE CONTROL

The Wilderness Act provides that the managing agency may take whatever steps are deemed desirable in the control of fire. This includes the use of motor vehicles, motorized equipment, motorboats, and other forms of mechanical transport, and landing of aircraft. And it applies both to the control of going fires and to fire presuppression activities.

The Congress has clarified and reaffirmed this since 1964. For example, in its report on the Endangered American Wilderness Act of 1978, the House committee specified:

> *Fire, Inserts, Disease*.—Section 4(d)(1) of the Wilderness Act permits *any measures necessary to control fire*, insect outbreaks or disease in wilderness areas. This includes the use of mechanical equipment, the building of fire roads, fire towers, fire breaks or fire pre-suppression facilities where necessary, and other techniques for fire control. In short, anything necessary for the protection of the public health and safety is clearly permissible.[46]

Because of concern that several of the California wilderness areas designated in this law are located in particularly fire-prone areas in the coastal range, Congress went one step further. It included in the sections of the law designating each of these areas special statutory provisions about fire protection and control. One of these provisions reads:

> In order to guarantee the continued viability of the Santa Lucia watershed and to insure the continued health and safety of communities served by such watershed, the management plan for the Santa Lucia area to be prepared following designation as wilderness shall authorize the Forest Service to take whatever appropriate actions are necessary for fire prevention and

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[44] Subparagraph 201(a)(11), Wyoming Wilderness Act of 1984; Public Law 98-550; 98 Stat. 2809.
[45] *California Wilderness Act*, House Report 98-40, page 46, emphasis added.
[46] *Designating Certain Endangered Public Lands*, House Report 95-540, July 27, 1977, page 6.

watershed protection including, but not limited to, acceptable fire presuppression and fire suppression measures and techniques.[47]

In its formal report, the House Interior Committee explained that this special provision was not to be construed as precluding any of these same fire presuppression and control techniques in other wilderness areas for which such special language is not provided. This is that explanation in full –

> Due to the extreme hazard of forest fires in the Los Padres National Forest, and at the request of local citizens and two of the region's Congressmen, the committee added special management language to the Santa Lucia and Ventana Wilderness subsections authorizing the Forest Service "to take whatever appropriate actions are necessary for fire prevention and watershed protection included but not limited to, acceptable fire pre-suppression and fire suppression measures and techniques." As discussed in the "background and need" section of this report, the Committee feels that all necessary fire pre-suppression and suppression measures (including fire roads) are clearly permissible in wilderness areas under sections 4 (a), (b), (c), and (d) of the Wilderness Act. **The uses authorized by such special management language should not be construed by any agency or judicial authority as being precluded in other wilderness areas, but should be considered as a direction and reaffirmation of congressional policy.**[48]

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This is one in a growing series of Briefing Papers documenting the legislative history and essential precedents on topics that arise as agency personnel, Congress, and activists work on wilderness designation and stewardship issues. Each Briefing Paper is updated frequently as new information arises. The author welcomes questions and suggestions, including for other topics for which such information would be helpful.

[47] Subsection 2(c), Public Law 95-237; 92 Stat. 41. Identical language was included in subsection 2(d) designating additions to the Ventana Wilderness.
[48] *Designating Certain Endangered Public Lands*, House Report 95-540, page 11, emphasis added.