

Mountain Biking into the Wilderness

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ABSTRACT

America's Wilderness Act of 1964* (the "Wilderness Act") dedicates unique and scenically important federal lands for protection from development. Over time, the increased acreage of federal land designated as Wilderness, and new legislative proposals to further expand Wilderness, have fueled controversy over the scope of activities that may be pursued in Wilderness areas. One of the most hotly contested debates of the 21st Century examines whether the Act allows mountain bikers to recreate in Wilderness. And, if not, the corollary question is raised of whether the Act should be amended to explicitly allow mountain bikes on Wilderness trails. For Wilderness designations to expand with minimum opposition moving forward and, to invite a new generation in to use and support Wilderness, this issue requires resolution. With recent developments for the outdoor recreation industry, both Congress and the Senate find themselves questioning the Wilderness Act and its ability to incorporate mountain bikers.

* Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (1964), codified at 16 U.S.C. §§ 1131-1136.

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I. INTRODUCTION

Imagine a remote location of the United States. Now imagine the beauty of that location is like no photograph, film, Instagram, or YouTube video you have ever seen. The beauty can only be captured through your two eyes, your deep inhalations, your connection to nature, your physical challenge of biking far away from the man-made chaos of civilization. Enjoy the beauty while it lasts, you won't be coming back, not on your mountain bike. You are in one of the locations across the country where a once much loved trail system will soon be closed off to mountain bikers due to its consideration for designation as a Wilderness area.¹

America's Wilderness Act of 1964² (the "Wilderness Act") dedicates unique and important federal lands for protection from development.³ Congress, the President, and federal land management agencies can apply various designations to federal lands to confer a range of protections.

Of such legal designations, Wilderness, with a capital "W," is the strongest and most enduring—considered the gold standard of conservation.⁴ Yet, since its inception, the Wilderness Act has fueled debates over use of these specially protected federal lands. Over time, the increased acreage of federal land designated as Wilderness, and new legislative proposals to further expand Wilderness, have added to the tension over the scope of activities that may be pursued in Wilderness areas. One of the most hotly contested debates of the 21st Century examines whether the Act allows mountain bikers to use recreate in Wilderness. And, if not, the corollary question is raised of whether the Act should be amended to explicitly allow mountain bikes on Wilderness trails. For Wilderness designations to expand with minimum opposition moving forward and, to invite a

¹ For example, in 2015, the Bitterroot National Forest agency management closed off about 102,000 acres of the Blue Joint and Sapphire Wilderness Study Areas to motorized and mechanized transport, which included mountain bike use. See Kate Whittle, *Geared up for a fight: Cyclists object to Bitterroot National Forest plan*, Missoula Independent: Indy Blog (Apr. 15, 2015), <http://missoulanews.bigskypress.com/IndyBlog/archives/2015/04/15/cyclists-object-to-bitterroot-national-forest-plan>.

² Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified at 16 U.S.C. §§ 1131-1136).

³ See RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 67 (2004); Robert L. Glicksman & George Cameron Coggins, *Wilderness In Context*, 76 DENV. U. L. REV. 383, 387-89 (1999).

⁴ A majority of Americans support Wilderness designations in their home state. See Rebecca Wittman, *American Polling on Wilderness Protection*, ZOGBY INTERNATIONAL 3 (Jan. 23, 2003), <http://www.whiteriverwild.org/public/File/Zogby%20Wilderness%20Poll.pdf>.

new generation in to use and support Wilderness, the mountain bike issue requires resolution.

Preservation of Wilderness is a desirable goal for many reasons, from ecological protection to spiritual revitalization. The thought of nature alone can inspire a sense of freedom or solitude, a feeling of transcendent connection to nature, and a perceived need to defend Wilderness.⁵ 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 and its possessions, leaving no lands designated for preservation and protection in their natural condition,” Congress declared its policy “to secure for the American people of present and future generations the benefits of an enduring resource of wilderness.”⁶ But with the desire to preserve landscapes “untrammelled by mankind”⁷ also comes the heated opposition spurred by would-be user groups who obstruct the addition of more lands to the Wilderness system.⁸

This article evaluates whether, as a matter of law or policy, mountain bikers should be allowed in designated Wilderness. Part II details the history of the passage of the Wilderness Act and the language describing the intent of this Congressional effort. Next, Part III explains the activities, or uses, not permitted within Wilderness areas. Part IV introduces a new group of would be users—the mountain bikers and Part V discusses the three options available to this group of users moving forward. In the Conclusion, the Article resolves that the best alternative for mountain bikers—and the wilderness community is to work together on federal legislation

⁵ For historical discussions on the development of wilderness as a concept in American intellectual history include: RODERICK FRAZIER NASH, *WILDERNESS AND THE AMERICAN MIND* (4th ed. 2001) and PAUL SUTTER, *DRIVEN WILD: HOW THE FIGHT AGAINST AUTOMOBILES LAUNCHED THE MODERN WILDERNESS MOVEMENT* (2002). See also MAX OELSCHLAEGER, *THE IDEA OF WILDERNESS: FROM PREHISTORY TO THE AGE OF ECOLOGY* (1991). For articles on the subject of wilderness within the legal literature, see, e.g., Michael McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288 (1966); John Copeland Nagle, *The Spiritual Values of Wilderness*, 35 ENVTL. L. 955 (2005); Patrick A. Shea, *Wilderness Act of 1964: Reflections, Applications, and Predictions*, 76 DENV. U. L. REV. 331 (1999); Sandra Zellmer, *A Preservation Paradox: Political Prestidigitation and an Enduring Resource of Wilderness*, 34 ENVTL. L. 1015 (2004).

⁶ National Wilderness Preservation System, 16 U.S.C. § 1131(a) (2006).

⁷ *Id.*

⁸ See, e.g., Sarah Krakoff, *Settling the Wilderness*, 75 U. COLO. L. REV. 1159, 1161–74 (2004) (describing and criticizing litigation settlement in the context of lawsuit over inventory of and management prescriptions for wilderness study areas in Utah); Zellmer, *supra* note 5, at 1050–81 (exploring means of Wilderness preservation through executive action).

and policies to include this new class of recreation in Wilderness on a case-by-case basis.

II. A BRIEF PRIMER ON THE WILDERNESS ACT

American appreciation of nature developed during the “Romantic Era” of the late 19th century, thanks to various contributions in art,⁹ literature,¹⁰ science and policy. Politicians on both sides of the aisle supported preservation and protection of unique landscapes in the creation of Yellowstone National Park (1872)¹¹ and Yosemite National Park (1890).¹² Early in the 20th century, however, the once collective movement for conservation of public lands began to fragment.¹³ John Muir, founder of the Sierra Club in 1892, came to represent the spiritual and aesthetic values of wilderness, which clashed with the progressive, utilitarian vision of Gifford Pinchot, the first head of the U.S. Forest Service who wished to see the nation’s resources developed efficiently for the public good, protected from private interest exploitation.¹⁴ Pinchot’s successful proposal to dam the Hetch Hetchy Valley, within Yosemite National Park, for San

⁹ Painters including Federic Church and Albert Bierstadt took on heroic landscapes and scenic wonders in painting large-scale landscapes. See Avery, Kevin J., *The Hudson River School, In Heilbrunn Timeline of Art History*, NEW YORK: THE METROPOLITAN MUSEUM OF ART, (Oct. 2004), http://www.metmuseum.org/toah/hd/hurs/hd_hurs.htm.

¹⁰ Transcendentalists—Ralph Waldo Emerson, Henry David Thoreau, and their associates—embraced the Romantic movement believing self and nature were one. See Kathryn VanSpanckeren, *The Romantic Period, 1820-1860: Essayists and Poets*, U.S. Dep’t of State: Outline of American Literature (Oct. 10, 2013), <http://iipdigital.usembassy.gov/st/english/publication/2008/05/20080512215714eaifas0.1850855.html#ixzz4CJue3Vnb>.

¹¹ Act of Mar. 1, 1872, ch. 24, 17 Stat. 32 (creating Yellowstone National Park).

¹² Act of Oct. 1, 1890, ch. 1263, 26 Stat. 650 (“An act to set apart certain tracts of land in the State of California as forest reservations.”).

¹³ See Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 964 (1998) (describing the split in the philosophy as it relates to standing for the environment). Anthropocentrism, supported by more conservative “preservationists,” like Gifford Pinchot, is a human-centered ethic where the core belief is that humans should protect and promote the well-being of humans by placing some constraints on the development and treatment of natural resources. *Id.* at 965-66. Biocentrism, developed among liberal “preservationists,” like John Muir, is a resource-based ethic where the core philosophical belief is that nature exists for its own sake and should be valued without reference to human needs or wants. *Id.* at 964-65.

¹⁴ John M. Meyer, *Gifford Pinchot, John Muir, and the Boundaries of Politics in American Thought*, 30 *Polity* 2, 267-284 (1997).

Francisco's municipal water and power, brought this tension to bitter conflict.¹⁵ Muir believed human needs for natural resources could be met without destroying our most beautiful scenery.¹⁶

Along with John Muir, Aldo Leopold came to be known as a founding father of the Wilderness Act. Leopold advocated for a separate classification of national forests to be preserved as roadless.¹⁷ Leopold resisted the rise of the automobile, which Muir, too, had seen as a threat to wilderness. Once manufacturers began to mass-produce the automobile, touring and camping by automobile rapidly became popular; the parks and forest recreation areas quickly filled with the roads, lodging, and shops to accommodate the masses. Leopold sought to protect some public lands from this sort of development for two reasons. First, for those who wished to pursue primitive types of recreation, including travel by canoe and simple solitude, and, second, for the protection of land and wildlife.¹⁸ As Leopold saw it, Congress needed to create protected natural areas "for allowing the more virile and primitive forms of outdoor recreation to survive the receding economic fact of pioneering."¹⁹

Philosophically, Leopold integrated wilderness appreciation with the developing scientific understanding of ecology, established new arguments for preserving wilderness, and articulated a moral vision for "human's relation to land and to the animals and plants, which grow upon it,"²⁰ He called this theory the "land ethic."²¹ Leopold increasingly emphasized the value of wilderness for science, an opportunity to study pristine

¹⁵ Nash, *supra* note 5; *See, e.g.*, Elmo R. Richardson, *The Struggle for the Valley: California's Hetch Hetchy Controversy, 1905-1913*, 38 CAL. HIST. SOC'Y Q. 249 (1959); HOLWAY R. JONES, JOHN MUIR AND THE SIERRA CLUB: BATTLE FOR YOSEMITE (1965). *But see*, ROBERT W. RIGHTER, THE BATTLE OVER HETCH HETCHY (2005).

¹⁶ JOHN MUIR, THE YOSEMITE, 262 (1912) (sarcastically calling for the building of dams not to stop there, but rather to continue with the damming of "[T]he people's cathedrals and churches, for no holier temple has ever been consecrated by the heart of man.").

¹⁷ *See generally* Aldo Leopold, *The Last Stand of the Wilderness*, 31 AMERICAN FORESTS AND FOREST LIFE 382, (1925).

¹⁸ Aldo Leopold, *Wilderness as a Form of Land Use*, in THE GREAT NEW WILDERNESS DEBATE 75 (J. Baird Callicott & Michael P. Nelson eds., 1998).

¹⁹ *Id.* at 79; *see also* Letter from Wallace Stegner (Dec. 3, 1960), as quoted in Plaintiffs-appellants' opening brief at 1, *Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024 (9th Cir. 2010) (No. 08-17406) (discussing wilderness writer Wallace Stegner encapsulated this view when he emphatically insisted that wilderness must be preserved because "[I]t was the challenge against which our character as a people was formed." In the same passage, Stegner also cited to the other experiential values of wilderness, namely its importance for "our spiritual health" due to the "incomparable sanity it can bring briefly, as vacation and rest, into our insane lives.").

²⁰ ALDO LEOPOLD, THE SAND COUNTY ALMANAC 203 (1979).

²¹ *Id.*

land and the biotic communities that have functioned within for centuries. Leopold firmly believed in the land ethic and that only a change in our ethical attitude could prevent humans from destroying pristine landscapes. Time would prove Leopold correct as his and Muir's appreciation for nature developed into the movement which ultimately led to the passing of the Wilderness Act.

A. Public Land Management Before the Wilderness Act

Early in the history of the United States Forest Service, leaders developed the concept of wilderness and recognized the need to preserve areas of national forests in a pristine and natural state.²² Policymakers, including Pinchot, viewed the national forests as a resource to be managed for the present and future needs of the public. In response, many foresters and preservationists became concerned that increased use of the national forests would eliminate the remaining pristine wilderness.²³ In 1920, a Forest Service "recreation engineer," Arthur Carhart, successfully convinced his supervisors to preserve a small area around Trappers Lake, Colorado, and parts of Superior National Forest, Minnesota, as wild areas managed exclusively for recreation and aesthetic values.²⁴ Then, in 1924, the Forest Service designated the Gila Wilderness in New Mexico after Aldo Leopold, at the time a Forest Service land manager, began a campaign to set aside more land within the national forests for wilderness.²⁵

²² See RODERICK NASH, *WILDERNESS AND THE AMERICAN MIND* 262 (3d ed. 1982); Margaret Shulenberg, *Construction and Application of Wilderness Act (16 U.S.C.A. § 1131 et seq.) providing for National Wilderness Preservation System*, 14 A.L.R. FED. 508, 510 (1973) (noting that the Wilderness Act gave recognition to objectives that "had been recognized to a certain extent in the management of the national forests for some 40 years.").

²³ See, e.g., Robert Marshall, *The Problem of the Wilderness*, in *THE GREAT NEW WILDERNESS DEBATE* 85, 87, 95 (J. Baird Callicott & Michael P. Nelson eds., 1998) ("Within the next few years the fate of the wilderness must be decided.... [T]he preservation of a few samples of undeveloped territory is one of the most clamant issues before us today. Just a few more years of hesitation and the only trace of that wilderness which has exerted such a fundamental influence in molding American character will lie in the musty pages of pioneer books and the mumbled memories of tottering antiquarians. To avoid this catastrophe demands immediate action.").

²⁴ See Peter A. Appel, *Wilderness and the Courts*, 29 STAN. ENVTL. L.J. 62, 72 (2010); Gary Bryner, *Designating Wilderness Areas: A Framework for Examining Lessons From the States*, USDA FOREST SERVICE PROCEEDINGS RMRS-P-049, 274 (2007); Nash, *supra* note 5, at 185-86.

²⁵ ROSS W. GORTE, CONG. RESEARCH SERV., *WILDERNESS: OVERVIEW AND STATISTICS* 1 (2010).

The Forest Service continued to promulgate regulations and policies to increase the protection of undeveloped areas in the national forest system.²⁶ In 1929, the Forest Service implemented Regulation L-20, which authorized the Chief of the Forest Service to classify national forests as “primitive areas” based upon recommendations from the various regional land managers.²⁷ Primitive areas limited but did not prohibit resource extraction, logging and permanent improvements and generally prohibited road building, except where essential for agency management.²⁸ The stated purpose of L-20 was “to maintain primitive conditions of transportation, subsistence, habitation, and environment to the fullest degree compatible with their highest public use with a view to conserving the values of such areas for purposes of public education and recreation.”²⁹

Ten years later in 1939, the Forest Service replaced Regulation L-20 with³⁰ U-Regulations, which created four categories of preserved land within the national forests: wilderness areas (Regulation U-1), wild areas (Regulation U-2), recreation areas (Regulation U-3), and experiment and natural areas (Regulation U-4).³¹ All U-Regulations incorporated the key limitations on forest use from the prior Regulation L-20, including prohibitions on permanent improvements, resource extraction, and non-primitive transportation.³² U-Regulations replaced L-20 with much clearer, higher-level protection for what were now to be called *wilderness areas* (and, if under 100,000 acres, *wild areas*).

These early Forest Service efforts increased both the number and size of preserved areas within the National Forests.³³ Nonetheless, the discretionary nature of Forest Service land classifications concerned preserva-

²⁶ See Brandon Dalling, *Administrative Wilderness: Protecting Our National Forestlands in Contravention of Congressional Intent and Public Policy*, 42 NAT. RESOURCES J. 385, 389 (2002).

²⁷ See Appel, *supra* note 24, at 72.

²⁸ See *id.*

²⁹ DENNIS M. ROTH, *THE WILDERNESS MOVEMENT AND THE NATIONAL FORESTS* 3 (1988) (citing Regulation L-20, Oct. 30, 1929).

³⁰ See Martin Nie, *Administrative Rulemaking and Public Lands Conflict: The Forest Service's Roadless Rule*, 44 NAT. RESOURCES J. 687, 697 (2004) (explaining the 1939 U-Regulations).

³¹ See 36 C.F.R. §§ 251.20-.23 (1939); Appel, *supra* note 24, at 73.

³² See Appel, *supra* note 24, at 73-74; Zellmer, *supra* note 5, at 1067; *McMichael v. United States*, 355 F.2d 283, 286 (9th Cir. 1965) (upholding a federal conviction under the U-Regulations).

³³ See McCloskey, *supra* note 5, at 296.

tionists, who feared that extractive industry lobbyists would convince future administrators to decrease the number and size of protected areas.³⁴ Consequently, preservationists began a campaign lobbying Congress to enact statutory protections for the nation's unique wild lands.³⁵

B. Passing the Wilderness Act

Preservationists, led by Howard Zahniser, gained steam by the 1950s and organized an influential campaign to pass a wilderness bill in Congress.³⁶ Zahniser argued that Congress needed to formally act on wilderness because the Forest Service lacked statutory authority to create wilderness areas or prohibit future mining or dam-building in wilderness or wild areas.³⁷ He criticized the Forest Service action and emphasized that, technically, only Congress had the power to designate wilderness in the national parks.³⁸

After nearly a decade of debate, Congress passed the Wilderness Act of 1964, which established a national policy of preserving wilderness areas for future generations.³⁹ The Act designated as wilderness all 9.1 million acres of existing Forest Service designated U-1 wilderness areas and U-2

³⁴ See *Id.* at 297. Some Forest Service designations of primitive and wilderness areas under the L and U-Regulations had been revoked. Before 1964, the French Pete Valley in Oregon and parts of the Gila Wilderness in New Mexico were reopened to logging. See GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 1010-11 (6th ed. 2007).

³⁵ Dave Brower, a close confidant of Zahniser, advocated for the statutory protection by explaining the concept of de facto wilderness: "They are simply 'wilderness areas which have been set aside by God but which have not yet been created by the Forest Service.'" De facto wilderness, he explained, is "the wilderness that waits in death row . . . and there has been nothing like . . . a fair trial." David R. Brower, *De Facto Wilderness: What Is Its Place?*, in WILDLANDS IN OUR CIVILIZATION 103, 109 (1964) (citation omitted).

³⁶ See McCloskey, *supra* note 5, at 297-98.

³⁷ See *id.*; GENERAL MINING ACT OF 1872, ch. 152, 17 STAT. 91, (codified as amended at 30 U.S.C. §§ 22-24, 26-30, 33-35, 37, 39-43, 47 (2006)) (allowing mining claims on federal lands, including national forests); FEDERAL POWER ACT OF 1920, ch. 285, 41 STAT. 1063, (codified as amended at 16 U.S.C. §§ 792-819, 820-23 (2006)) (authorizing dam construction on federal lands, including national forests).

³⁸ See McCloskey, *supra* note 5, at 298.

³⁹ Congress held some 30 congressional hearings, and a total of 65 different wilderness bills were proposed before the final passage. See *id.* at 298-300.

wild areas⁴⁰ and called for the Secretary of Agriculture to study other existing “primitive areas” to determine which were suitable for designation.⁴¹ Congress required the Secretaries of Agriculture and the Interior to conduct reviews of all primitive areas larger than 5,000 acres in national forests, national parks, and national wildlife refuges and ranges; and to submit recommendations for wilderness designations to the president and Congress within ten years.⁴² After 1964, only a public law could designate federal land as Wilderness.⁴³

C. *The Language of the Wilderness Act*

According to the Wilderness Act of 1964, the policy of Congress is to “secure for the American people of present and future generations the benefits of an enduring resource of wilderness.”⁴⁴ “For this purpose,” the Act continues,

there is hereby established a Wilderness Preservation System to be composed of federally owned areas designated ... as “wilderness areas”, and these shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use as wilderness⁴⁵

Wilderness designations exist to protect lands where the presence of humanity is temporary and nature remains “untrammeled.” The Wilderness Act incorporates romantic ideals into legal language.⁴⁶

A Wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of Wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation

⁴⁰ See Appel, *supra* note 24, at 73; Coggins et al., *supra* note 34, at 1011. The Wilderness Act also automatically designated Forest Service “canoe” areas, which meant the Boundary Waters Canoe Area, the only area ever designated by the Forest Service as a U-3 recreation area or canoe area. 16 U.S.C. § 1132(a) (2012); 36 C.F.R. § 293 (2012); see LES JOSLIN, *THE WILDERNESS CONCEPT AND THE THREE SISTERS WILDERNESS: DESCHUTES AND WILLAMETTE NATIONAL FORESTS, OREGON* 14 (2005).

⁴¹ 16 U.S.C. § 1132(a).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ 16 U.S.C. § 1131(a).

⁴⁵ *Id.*

⁴⁶ 16 U.S.C. § 1131(c).

In the Act, Congress acknowledges that Wilderness areas are not simply be “preserved,” but instead “managed” by federal agencies to protect natural conditions.⁴⁷ The general purpose of the Act is to manage certain federal lands in “such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness.”⁴⁸

Overall, the Wilderness Act requires a delicate balance between Congress’s desire to maintain lands untrammelled by man and Congress’s recognition that such an idealistic view is subject to practical limitations—this reality is evidenced by the various exceptions built in to the Act’s statutory text discussed in further detail below.⁴⁹ Each management agency possesses independent management discretion over how to properly balance human uses with preservation of habitat and other resources of Wilderness areas in their respective jurisdiction; guided by the Wilderness Act, their enabling legislation, and the particular act designating the Wilderness.⁵⁰

D. Wilderness Over Time

Federally designated Wilderness areas exist within each major category of federal lands managed by the four land management agencies—the Forest Service (“FS”), National Park Service (“NPS”), Bureau of Land Management (“BLM”), and U.S. Fish & Wildlife Service (“FWS”) (collectively referred to in this article as “management agencies”).⁵¹ Geographically, the network of Wilderness areas established by the Act, known as the National Wilderness Preservation System, has grown from approximately 9 million acres at the time of enactment to well over 109 million acres⁵²—including lands in 44 states.⁵³ The Wilderness Act did not initially include public lands managed by BLM but, in 1976 Congress enacted the Federal Land Management Policy Act (“FLMPA”);⁵⁴ Section

⁴⁷ *Id.*

⁴⁸ 16 U.S.C. § 1133(c).

⁴⁹ *WILDERNESS WATCH V. UNITED STATES FISH & WILDLIFE SERV.*, 629 F.3d 1024, 1040 (9th Cir. 2010).

⁵⁰ *See, e.g.*, CHAD P. DAWSON & JOHN C. HENDEE, *WILDERNESS MANAGEMENT: STEWARDSHIP AND PROTECTION OF RESOURCES AND VALUES* (4th ed. 2009).

⁵¹ Bradley C. Karkkainen, *Biodiversity and Land*, 83 *CORNELL L. REV.* 1, 40 (1997).

⁵² *See* Wilderness Fast Facts, <http://www.wilderness.net> (navigate to About Wilderness, then Fast Facts).

⁵³ Connecticut, Delaware, Iowa, Kansas, Maryland, and Rhode Island are the exceptions. There is also one Wilderness area in Puerto Rico. *See* Caribbean National Forest Act of 2005, Pub. L. No. 109-118, 119 Stat. 2527 (2005) (creating El Toro Wilderness).

⁵⁴ Pub.L. 94-579, 90 Stat. 2743, 43 USC § 1701 *et seq.*

603 of FLMPA directed the agency to evaluate its lands for wilderness characteristics and report to the President by 1991. Although the Wilderness Act provides the overarching definition and direction for Wilderness, subsequent acts have added the majority of acreage to the National Wilderness Preservation System.⁵⁵ Congress may pass an act to designate an individual area of Wilderness or incorporate multiple areas, for instance the Omnibus Act of 2009 designated two million acres of Wilderness in multiple states.

Management agencies lead the Wilderness designation process, which occurs in four steps—inventory, evaluation, analysis, and recommendation—each requiring opportunities for public participation.⁵⁶ The following three criteria must each be present in order for an area to be considered for Wilderness: size, naturalness, and outstanding opportunities for either solitude or primitive and unconfined recreation. An Environmental Impact Statement must accompany all wilderness recommendations. More recently, Wilderness recommendations have been made to Congress from local, political efforts to craft a combination of land designations that identify some land as Wilderness and reserve other lands for particular types of recreation or other forms of development.⁵⁷ These efforts are designed to bring resolution to what can be an uncertain status for federal lands as quasi-wilderness and avoid the controversy that has stalled several Wilderness proposals.

For example, pursuant to FLPMA's Section 603 requirement in 1991, the BLM recommended 23 million acres—a relatively small portion of its over 245 million acres—as suitable for designation as Wilderness, which it divided into 191 “wilderness study areas” (“WSA”).⁵⁸ From this, President George H.W. Bush made his recommendations for Wilderness to Congress and, for the most part, Congress failed to act to designate the identified BLM lands as Wilderness. In the meantime, all lands identified as wilderness study areas by BLM in 1991—WSAs—are managed by

⁵⁵ Creation and Growth of the National Wilderness Preservation System, Wilderness.net, <http://www.wilderness.net/index.cfm?fuse=nlwps&sec=fastfacts>.

⁵⁶ See, e.g., Planning Regulations (36 CFR § 219.7(c)(2)(v)) and the Forest Service Handbook (FSH) 1909.12, Chapter 70 for direction and guidance for this process.

⁵⁷ See, e.g., David A. Ramsey, Wilderness Act is Key to Local Economy, Johnson City Press (Apr. 22, 2016), <http://www.tnwild.org/news/wilderness-act-is-key-to-local-economy/>.

⁵⁸ Olivia Brumfield, *The Birth, Death, and Afterlife of the Wild Lands Policy: The Evolution of the Bureau of Land Management's Authority to Protect Wilderness Values*, 44 Lewis and Clark Environmental Law Review 1, 250 (2014).

BLM to preserve their eligibility for designation by Congress as Wilderness.⁵⁹

Over the last several administrations, there have been attempts to broaden or narrow the ongoing authority of BLM to identify lands suitable for Wilderness outside the Section 603 process. The Clinton administration urged the use of the FLMPA Section 202 planning authority to designate and manage “Section 202 WSAs” to preserve their eligibility as Wilderness. Extractive industry and state frustration over WSAs peaked at this time because BLM undertook a re-inventory of millions of acres of land in Utah that had, in the initial Section 603 inventory, been found to lack wilderness characteristics.⁶⁰ The re-inventory resulted in the identification of an additional 3.1 million acres of land with wilderness characteristics. During the second Bush administration, Utah filed suit, arguing that after 1991, BLM did not have authority to identify new WSAs. BLM conceded in a settlement that its authority to designate WSAs ended in 1991, effectively creating a finite amount of WSAs designated under Sections 603 or 202 but affirmed it had authority under the FLMPA Section 201 “inventory” duty to identify and manage lands with “wilderness characteristics.”⁶¹

In 2009 Secretary Salazar issued Secretarial Order No. 3310, which initiated a review of BLM policies for inventorying lands with wilderness characteristics.⁶² Secretary Salazar sought to reverse the Bush administration's policies under the Utah Settlement and renew the Clinton Administration policy of protecting wilderness characteristics on BLM lands.⁶³ Under the Salazar policy, the inventoried lands with wilderness characteristics outside of WSAs would be classified as “wild lands”—a completely

⁵⁹ *Interim Management Policy and Guidelines for Land Under Wilderness Review*, 44 Fed. Reg. 72,014 (Dec. 12, 1979); *see also* 43 U.S.C. § 1782(c).

⁶⁰ *Utah v. Norton*, No. 2:96-CV-0870 (D. Utah Sept. 20, 1998).

⁶¹ *Brunfield* at 267 (citing *Norton*, No. 2:96-CV-0870, noting that the settlement had no binding effect on BLM's duty and authority under sections 201 and 202, and that consequently BLM “remains free to inventory land for wilderness characteristics pursuant to § 201 and to protect land so as to leave wilderness character unimpaired under § 202 [.]” but without applying section 603's nonimpairment standard).

⁶² See Phil Taylor, “Wild Lands” Policy Would Allow Limited Development, BLM Chief Says, N.Y. Times (Mar. 2, 2011), www.nytimes.com/gwire/2011/03/02/02greenwire-wild-lands-policy-would-allow-limited-developm-20171.html; Sec'y of Interior, Order No. 3310, Protecting Wilderness Characteristics on Lands Managed By the Bureau of Land Management (2010), available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/public_affairs/news_release_attachments.Par.26564.File.dat/sec_order_3310.pdf [[hereinafter Wild Lands Policy].

⁶³ See Maureen O'Dea Brill, Making the Case for Wilderness: The Bureau of Land Management's Wild Lands Policy and Its Role in the Storied History of Wilderness Protection, 4 Leg. & Pol'y Brief 7, 20 (2012).

new category of public lands. The Secretarial Order required the BLM to apply a new standard: protecting the wild lands from impairment unless the agency documented reasons to exempt the area and planned mitigation measures.⁶⁴

Congressional challenge to Secretary Salazar's "wild lands" policy quickly shadowed his efforts.⁶⁵ On April 14, 2011, House Republicans attached a rider to one of the most important bills in front of Congress, the National Defense Appropriations Act.⁶⁶ The rider prohibited the Department of the Interior from implementing Secretary Salazar's Order No. 3310, thereby eliminating the BLM wild lands inventory and stalling the process of new wilderness protection across public lands.⁶⁷

Despite the rejection of Order No. 3310, Secretary Salazar later revived his attempt to identify and protect additional BLM wild lands.⁶⁸ In 2012, BLM issued two new policies as part of the agency's field guidelines manual, adopting many of the substantive requirements of the Wild Lands Policy.⁶⁹ BLM Manual 6310 directed the agency to conduct new inventories to identify additional lands with wilderness characteristics,⁷⁰ and

⁶⁴ See George Cameron Coggins & Robert L. Glicksman, 3 *Public Natural Resources Law* § 25:12 at 25-23 to 25-24 (2d ed. 2009).

⁶⁵ Secretarial Order 3310 (Dec. 22, 2010); *Western Caucus Protests DOI's Attempt to Resurrect Wild Lands Policy* (Aug. 2, 2012) <http://www.barrasso.senate.gov/public/index.cfm/news-swc?ID=e9179683-e4b0-c79b-5f94-1bbd41221d9e>; see also *Uintah County v. Salazar*, Nos. 2:10-cv-970- CW, 2:11-cv-391-CW (D. Utah) (challenging the BLM's "wild lands" designation as "de facto" wilderness management in contravention of the resource management plan).

⁶⁶ Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub. L. No. 112-10, § 1769, 125 Stat. 38 (2011). Despite the bill's importance, the White House threatened to veto the bill because of the numerous riders and provisions that House Republicans had attached. See Daniel Strauss, *White House Threatens to Veto Defense Bill*, *The Hill* (Jun. 23, 2011), <http://thehill.com/homenews/administration/168139-white-house-threatens-2012-defense-appropriations-bill-veto> (last visited Oct. 10, 2013).

⁶⁷ See Brill, *supra* note 63, at 9; see also Rocky Barker, *Budget Deal Stops BLM Wild Lands Inventory*, *Idaho Statesman* (Apr. 12, 2011), <http://www.garp.org/news-and-publications/overview/story.aspx?altTemplate=PrintYellowBrixStory&newsId=27102>.

⁶⁸ See Pub. Lands Council, 2011-2012 Annual Report: A Year in Review 19-20 (2012), available at <http://publiclandscouncil.org/CMDocs/PublicLandsCouncil/Annual%20Meeting/ANNUAL%20REPORT%2012.pdf>.

⁶⁹ See *id.*; BLM, BLM Manual, available at http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/blm_manual.html (last visited Dec. 29, 2013).

⁷⁰ See BLM, DOI, Manual 6310, *Conducting Wilderness Characteristics Inventory on BLM Lands 2-3* (2012).

Manual 6320 required BLM field staff to consider wilderness characteristics in Resource Management Plans and project-level planning.⁷¹ Consequently, BLM must now identify new areas that have wilderness characteristics and consider the effects to those wilderness characteristics before approving resource management plans or site-specific projects.⁷²

III. PROHIBITED ACTIVITIES IN WILDERNESS

Politically, every president since Lyndon Johnson has signed legislation adding acreage to the National Wilderness Preservation System,⁷³ attesting to the System's longstanding bipartisan political support. More recently, however, a battle has been waged over Wilderness designation between preservationists, who wish to expand Wilderness designations, and mountain bikers, who fight to limit such designations so that they can continue to legally access a network of trails that would be off-limits under the correct understanding of a Wilderness designation.⁷⁴

The Wilderness Act separates prohibited activities into two categories. The first contains categorically prohibited activities including commercial enterprises and permanent roads.⁷⁵ The second category includes nine specific activities: (1) temporary roads; (2) motor vehicles; (3) motorized equipment; (4) motorboats; (5) aircraft landings; (6) mechanical

⁷¹ See BLM, DOI, Manual 6320, Considering Lands with Wilderness Characteristics in the BLM's Land Use Planning Process 2-3 (2012).

⁷² BLM Manuals 6310 and 6320 implemented the requirements under FLPMA and NEPA that were recognized by the Ninth Circuit in 2010. In *Oregon Natural Desert Ass'n. v. BLM*, the court invalidated an RMP because the BLM failed to consider wilderness characteristics in the planning area. 625 F.3d at 1121. The court concluded that wilderness was among the values that Congress intended the BLM to consider in the FLPMA planning process, and therefore, NEPA required consideration of wilderness characteristics in the environmental analysis. See *id.* at 1122.

⁷³ On March 30, 2009, President Obama joined this list when he signed the Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 125 Stat. 991 (2009) (to be codified in scattered sections of 16 U.S.C. and 43 U.S.C.). That act added over 2 million additional acres to the National Wilderness Preservation System. See *Wilderness Fast Facts*, *supra* note 52.

⁷⁴ For dueling articles on this debate, see George Wuerthner, *The Mountain Bike Invasion of Wilderness Areas*, *Counterpunch* (Jan, 2015), <http://www.counterpunch.org/2015/01/01/the-mountain-bike-invasion-of-wilderness-areas/> and Vernon Felton, *The Bigotry of Wilderness: Do Bikes Belong in Wilderness?* (May 11, 2015), <http://www.bikemag.com/features/opinion/web-monkey-speaks/the-web-monkey-speaks-the-bigotry-of-wilderness/>.

⁷⁵ 16 U.S.C. § 1133(c);

transport; (7) structures or installations; (8) permanent roads; and (9) commercial enterprises.⁷⁶ These prohibitions rely on the congressional delineation that in Wilderness no “permanent improvements or human habitation” would be allowed.⁷⁷ All nine activities are generally prohibited except determined by a management agency to be “necessary to meet minimum requirements for the administration of the area for the purpose of this Act.”⁷⁸

Notable applications of this exception include: motorized travel for search and rescue;⁷⁹ grazing;⁸⁰ and the management of fire, disease, and insects.⁸¹ Management agencies appear to liberally apply the “minimum requirements” exception, taking advantage of this inherently subjective determination. For example, the NPS concluded that the use of helicopters to install structures to upgrade the telecommunications network in Denali National Park satisfied the minimum requirements exception.⁸² The NPS acknowledged that “[t]hese actions are not legally necessary and do not insure the preservation of wilderness character,” but emphasized, “they do support the public purposes of recreation, science, education, . . . conservation, and public safety.” Courts, on the other hand, have taken a much narrower view of the exception.⁸³

⁷⁶ 16 U.S.C. § 1133(d); see also Frank Buono, *The Wilderness Act: The Minimum Requirement Exception*, 28 *George Wright F.*, 2011, at 307, 308 (listing the prohibitions and exceptions).

⁷⁷ *Id.* § 1131(c).

⁷⁸ 16 U.S.C. § 1133(c).

⁷⁹ *Wilderness Watch, Inc. v. Bureau of Land Mgmt.*, 799 F. Supp. 2d 1172, 1184 (D. Nev. 2011).

⁸⁰ 16 USC § 1133(d)(4).

⁸¹ 16 USC § 1133(d)(1); *Sierra Club v. Lyng*, 694 F. Supp. 1260, 1275 (E.D. Tex. 1988) (holding that tree cutting to treat insect infestation is acceptable in Wilderness so long as it is not for timber interest).

⁸² U.S. Dep’t of the Interior, Nat’l Park Serv., Denali National Park & Preserve, Environmental Assessment for Telecommunications and Climate Monitoring Improvements in Denali National Park and Preserve 62–64 (2013).

⁸³ See, e.g., *Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1032, 1049 (9th Cir. 2010) (holding that, while sheep conservation was a legitimate purpose within the Kofa Wilderness area, the FWS had failed to establish that the water tanks placed by FWS for sheep threatened by drought and high temperatures were a necessary minimum requirement for Wilderness administration); *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1089–90, 1095–96 (11th Cir. 2004) (rejecting the Park Service’s argument that transporting tourists in a passenger van across the Cumberland Island Wilderness in order to provide public access to historical structures was “necessary” for administration because they made access more convenient and had “no net increase” in impacts to the land); *Californians for Alternatives to Toxics v. United States Fish & Wildlife Service*, 814 F. Supp. 2d 992, 1019 (E.D. Cal. 2011) (finding that the agencies improperly elevated the conservation of the Paiute cutthroat trout over the preservation of

Congress too has built in exceptions to many of its Wilderness Acts, with examples ranging from motorized vehicles to climatological devices. The Arizona Desert Wilderness Act of 1990 authorizes border enforcement activities within the Wilderness lands of the Cabeza Prieta National Wildlife Refuge in Southern Arizona.⁸⁴ Motorboats are permitted on Little Beaver and Big Beaver Lakes in Michigan's Beaver Basin Wilderness.⁸⁵ The management agencies have the obligation "to manage maintenance and access to hydrologic, meteorologic, and climatological devices, facilities and associated equipment" in some of the new wilderness areas.⁸⁶ Also, military overflights are allowed in several of the new Wilderness areas.⁸⁷

Although the Wilderness Act explicitly furthers the purpose of preserving areas in which "the imprint of man's work [is] substantially unnoticeable,"⁸⁸ it also provides that Wilderness is an important venue for recreation: "An area of Wilderness is further defined . . . [as] undeveloped Federal land . . . [containing] outstanding opportunities for solitude or a primitive and unconfined type of recreation"⁸⁹ Indeed, many preservation leaders have effectively argued that appropriate recreational uses are essential for the continued protection of Wilderness areas in American society.⁹⁰

A brief comparison of two recreational activities—one allowed, horses, and one disallowed, mountain biking—illustrates the subjectivity of "exceptions" to Wilderness management. Wilderness advocates and land management policies support horse-enabled recreation with seeming blind nostalgia. Supporters of horses in Wilderness areas point to the Act's

other endemic species, and enjoining the eradication program because it would "impede progress towards preserving the overall wilderness character."

⁸⁴ Arizona Desert Wilderness Act of 1990, Pub. L. No. 101-628, § 301(g)(1), 104 Stat. 4469, 4479 (1990).

⁸⁵ Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 1653(b), 123 Stat. 991, 1043 (2009).

⁸⁶ *Id.* § 1103(c)(1), 123 Stat. at 1004.

⁸⁷ *See id.* § 1503(b)(11)(A), 123 Stat. at 1036 (Owyhee Public Land Management); *see also id.* § 1803(g)(1), 123 Stat. at 1056 (Eastern Sierra and Northern San Gabriel Wilderness, California); *id.* § 1972(b)(5)(A), 123 Stat. at 1078 (Washington County, Utah).

⁸⁸ 16 U.S.C. §1131(c).

⁸⁹ 16 U.S.C. §1131(c).

⁹⁰ Ira Spring, *If We Lock People Out, Who Will Fight to Save Wilderness?*, 7 INT'L J WILDERNESS 17 (Apr. 2001).

specific mandate that Wilderness areas be managed consistent with “historic” uses.⁹¹ Likewise, the Forest Service and National Park Service understand the use of horses for recreation and transportation as historic and, therefore, appropriate in Wilderness areas.⁹² Simply because the managing agencies have determined horses to be a historical use, the four-legged beasts carrying heavy supplies or passengers are permitted in Wilderness areas. Certainly, the use of mountain bikes could arguably be considered as historic as the use of horses, especially where mountain bikers have traditionally used trails that are only now under consideration for Wilderness designation.⁹³

Horses are not native to the United States,⁹⁴ nor is their existence older than man’s invention of the wheel.⁹⁵ In terms of disruption, horses can diminish the Wilderness experience in ways similar to opponents’ views on mountain bikes: they travel at a faster speed, create more noise, and can dominate the trail. In terms of impact, horse trails are significantly more degraded by use than biking trails.⁹⁶ This raises doubts as to whether the preservationists’ resistance to mountain biking is actually based on the

⁹¹ 16 U.S.C. § 1133(b) states that Wilderness areas “shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservative and historical use.”

⁹² Letter from R. Max Peterson, Chief of the Forest Service, to Glenn Odell, President, National Off-Road Bicycle Association, and all foresters within the USFS (Nov. 8, 1983); Letter from Chester L. Brooks, Superintendent, Rocky Mountain National Park, to Nat Boswick (Nov. 29, 1982).

⁹³ See, e.g., the Blue Joint and Sapphire Wilderness Study Areas, *supra* note 1.

⁹⁴ For discussion on this point, see Jay F. Kirkpatrick, Ph.D, Are North America’s Wild Horses Native?, The Science and Conservation Center, Billings, Montana (Oct. 7, 2014); cf. Animal rights groups asserted that, unlike the history retold in scientific textbooks, horses are actually native to the United States and “an integral part of the environment” *In Def. of Animals v. U.S. Dep’t of Interior*, 737 F. Supp. 2d 1125 (E.D. Cal. 2010) (declining to address whether horses are native but denying injunctive relief that would stop BLM’s scheduled round-up of wild horses and burros from herd management area).

⁹⁵ Megan Gambino, *A Salute to the Wheel*, Smithsonian.com (Jun. 17, 2009).

⁹⁶ A 2006 study by the National Park Service stated that “horse and ATV trails are significantly more degraded than hiking and biking trails . . . [T]he proportion of trails with severe erosion is . . . 24% for ATV trails, 9% for horse trails, 1.4% for hiking trails, and .06% for bike trails.” *Assessing and Understanding Trail Degradation: Results From Big South Fork National River and Recreation Area, National Park Service: Final Research Report at 34-35*, http://www.pwrc.usgs.gov/prodabs/pubpdfs/6612_marion.pdf; but see Eden Thurston and Richard Reader, *Impacts of Experimentally Applied Mountain Biking and Hiking on Vegetation and Soil of a Deciduous Forest*, 27 *Environmental Management* 3, 397-409 (2001) (“We’ve found that hikers have the same effect as bikers do, regardless of the number of trips along the path. In reality, both are equally damaging to the environment, but there is increased trail wear because twice the number of people are now using the trails.”).

Act or simply a desire to shut out a user group preservationists see as disruptive to its own Wilderness experience. As discussed in detail below, the management agencies take on bicycles may be flawed.

The Wilderness Act makes no explicit mention of bicycles. However, preservationists read “mechanical transport” to simply mean a broader category of transport other than motorized vehicles.⁹⁷ True, both mechanized and motorized transports are plainly excluded. But the contemporary debate over use of mountain bikes in Wilderness looks into the extent and meaning of mechanized transport and whether Congress clearly intended to prohibit bicycles as a form of mechanical transport. Did the Act intend to prohibit low-impact, human-powered bicycle transport, considering that other forms of similar recreation tools aiding humans in accessing Wilderness including snowshoes, backcountry skis, and rafts with oarlocks are presently permitted by management agencies in Wilderness?⁹⁸ Perhaps not.

IV. A NEW RECREATION MOVEMENT SEEKS TO ENTER THE WILDERNESS

Mountain biking—an almost unknown sport when the Wilderness Act was passed in 1964—has exploded in popularity to over 40 million individuals participating in the activity.⁹⁹ Participation numbers are not the only growth for the sport, the cyclists’ political voice is becoming louder and stronger too. Arguing that this class of public land users should be allowed into the Wilderness to experience naturalness, solitude, challenge and inspiration, mountain bikers dispute preservationists’ understanding of mechanical transport.¹⁰⁰

Following the ideals of Muir, Leopold, Zahniser and the like, preservationists believe that Wilderness areas are unique “windows,” in that they allow visitors “to see our past, present, and . . . future” and, therefore,

⁹⁷ See, e.g., Statement of the Sierra Club on Proposed Regulation of the Secretary of Agriculture For Governing the Administration of National Forest Wilderness, Sept. 30, 1965, p.3, “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.”

⁹⁸ U.S. Dep’t of Agric. Forest Serv., *Forest Service Manual* § 2320.5(3) (1990); 43 CFR § 6301.5.

⁹⁹ Outdoor Industry Foundation, 2015 Mountain Biking Activity Report (Aug.25, 2015).

¹⁰⁰ For a full discussion on competing, conflicting demands for Wilderness, see Jan G. Laitos & Rachael B. Gamble, *The Problem with Wilderness*, 32 Harv. Env’tl. L. Rev. 503, 504 (2008).

should remain untouched in pristine condition.¹⁰¹ Preservationists value Wilderness specifically for the lack of human use.¹⁰² In support of solitude, preservationists assert that pristine areas should be protected because Wilderness areas are sources of aesthetic pleasure, serve important symbolic functions, are necessary in order to maintain ecosystem stability, and these areas offer opportunities for individuals to engage in personal growth through reflection.¹⁰³ Most preservationists want to keep Wilderness areas completely off-limits to mountain bikers.¹⁰⁴

From another perspective, mountain bikers argue that the Wilderness areas should be open to whatever form of quiet, non-motorized recreation people prefer.¹⁰⁵ Biking advocates point to various scientific studies as support for the position that mountain biking is no more damaging to the environment and wildlife than hiking, and much less damaging than horseback riding.¹⁰⁶ To mountain bikers, one scientific truth is clear: all forms of outdoor recreation—including canoeing, backcountry biking, hiking and horseback riding—cause some degree of impact to the environment, so their low-level recreational impact is not a viable reason to exclude the activity.¹⁰⁷ Mountain bikers rightly insist that their human-powered bicycles must not be confused with motorized dirt bikes or other high-impact off-road motorcycles.

¹⁰¹ Nathan L. Scheg, *Preservationists vs. Recreationists in our National Parks*, 5 HASTINGS W.-NW J. ENVTL. L. & POL'Y 47 (Fall 1998) ("Preservationists see the national parks as unique windows.... They claim we are able to see what our planet was like thousands of years ago, what it is like today, and what it is likely to become.").

¹⁰² Jan G. Laitos & Rachel B. Reiss, *Recreation Wars for our Natural Resources*, 34 ENVTL. L. 1091, 1099 (2004) (recognizing dramatic change in natural resource use).

¹⁰³ See Scheg, *supra* note 101, at 51-52 (discussing reasons preservationists give for the need to protect "natural areas").

¹⁰⁴ Joseph L. Sax, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS 115 (1980) ("By preservationists, I mean those whose inclinations are to retain parklands largely (though not absolutely) as natural areas, without industrialization, commercialized recreation, or urban influences."); *id.* at 14 ("The preservationist is like the patriot who objects when someone tramples on the American flag. It is not the physical act that offends, but the symbolic act.").

¹⁰⁵ See Scheg, *supra* note 101, at 47 ("Recreationists ... see the national parks as areas that should be open for everyone to use as they see fit.... [and that] the forms of recreation in which people choose to engage are irrelevant.").

¹⁰⁶ See Gary Sprung, *Natural Resource Impacts of Mountain Biking*, *International Mountain Biking Association*, <https://www.imba.com/resources/research/trail-science/environmental-impacts-mountain-biking-science-review-and-best-practices> (discussing various scientific studies finding that mountain bikes do not cause more impact on natural resources than other trail users).

¹⁰⁷ A. W. Bjorkman, *Off-road Bicycle and Hiking Trail User Interactions: A Report to the Wisconsin Natural Resources Board*, Wisconsin, Wisconsin Natural Resources Bureau of Research (1996).

Moving past the two sides of the public argument, agency interpretation has not consistently taken a position rejecting bicycles. In 1966, the Forest Service wrote formal regulations to implement the Wilderness Act, and defined "mechanical transport" to mean a cart, sled, or other wheeled vehicle that is "powered by a non-living power source."¹⁰⁸ This initial agency interpretation reflects agency focus on the impact of the power, noise, and emissions of motor vehicles; under this regulation, bicycles are not excluded from Wilderness. The Forest Service later reversed course by issuing a declaration banning bicycles in 1977,¹⁰⁹ providing in relevant part: "[t]he following are prohibited in a National Forest Wilderness: . . . (b) [p]ossessing or using a hang glider or bicycle."¹¹⁰

Another regulation, still in effect for other purposes, guided permissible bicycle operation in Wilderness from 1981 to 1984, providing that individual National Forest officers could use discretion to permit or deny bicycle use on a case by case basis. "When provided by an order, the following are prohibited: . . . (h) [p]ossessing or using a bicycle, wagon, cart, or other vehicle."¹¹¹ The Forest Service flipped one last time in 1984, after various groups, including the Sierra Club and Wilderness Society, successfully convinced the agency to remove the reference to bicycles in the discretionary 1981 regulation.¹¹² The practical effect of this change was to conclusively eliminate bicycling in National Forest Wilderness.

With respect to the other management agencies, a National Park Service,¹¹³ regulation prohibits "[p]ossessing a bicycle in a Wilderness area established by Federal statute."¹¹⁴ Likewise, the Bureau of Land Management explicitly defines "mechanical transport" as "any vehicle, device, or contrivance for moving people or material in or over land, water, snow, or air that has moving parts. This includes . . . bicycles"¹¹⁵

Though the management agencies lack unified regulations defining the activities that may take place within Wilderness, each individual

¹⁰⁸ 36 CFR § 293.6(a).

¹⁰⁹ 36 C.F.R. §261.16; *see* Prohibitions, 42 Fed. Reg. 2956, 2959 (Jan. 14, 1977).

¹¹⁰ *Id.*

¹¹¹ 36 C.F.R. §261.57(h); *see* Prohibitions and Rewards and Impoundments, 46 Fed. Reg. 33518, 33521 (June 30, 1981).

¹¹² *See* Special Uses; Prohibitions, 49 Fed. Reg. 25447, 25448, 25450 (June 21, 1984) (to be codified at 36 C.F.R. pts. 251, 261).

¹¹³ The first three agencies clearly prohibit bicycle use in Wilderness, but by contrast, the U.S. Fish & Wildlife Service does not have any regulation that governs bicycle use generally. 50 C.F.R. §35.5 (prohibiting use of 'mechanized transport' in Wilderness areas administered by the U.S. Fish & Wildlife Service).

¹¹⁴ 36 C.F.R. §4.30(d)(1).

¹¹⁵ *Id.* §6301.5.

agency regulation contains the same blanket prohibition of mountain bikes.¹¹⁶

As a result, mountain biker coalitions consistently express concern that each new proposal to enlarge the nation's Wilderness inventory means loss of trails they have historically ridden. This resistance has made it more difficult for Congress to pass legislation creating new Wilderness Areas.¹¹⁷ This tug-of-war has reached an impasse and it is time for mountain bike supporters to take more proactive steps than battling Wilderness designations.

V. THREE TRAILS: OPTIONS TO RESOLVE THE WILDERNESS MOUNTAIN BIKE CONTROVERSY

To ensure the right to mountain bike, supporters have three options: (1) work to establish companion designations adjacent to Wilderness areas; (2) argue in court that Congress intended to allow bicycles through the plain language of the Wilderness Act; or (3) lobby Congress to amend the Act.

A. *Companion Designations*

The International Mountain Bicycling Association ("IMBA"), the leading mountain biking advocacy group, has focused its efforts on pushing for boundary changes or alternative designations that still allow bikes. IMBA is recognized as the foremost group fighting for better mountain biker access,¹¹⁸ and its approach can be summed up in two words: strategic compromise. To limit restrictions on mountain biking as a result of a Wilderness designation, IMBA works with environmental groups, management agencies, and legislatures to create "companion designations." These congressional designations, such as National Conservation Areas, National Recreation Areas, National Protection Areas, and National Monuments offer similar safeguards to Wilderness designation but without the bike ban.¹¹⁹ As examples, the Lewis and Clark Mount Hood Wilderness

¹¹⁶ Appel, *supra* note 24, at 87–88.

¹¹⁷ Theodore J. Stroll, *Congress's Intent in Banning Mechanical Transport in the Wilderness Act of 1964*, 12 Penn St. Envtl. L. Rev. 459, 460 (2004).

¹¹⁸ Jamie Hale, *Do Mountain Bikes Belong in the wild? Battle brewing over bike access to federal land*, The Oregonian (Apr. 7, 2016) http://www.oregonlive.com/travel/index.ssf/2016/04/do_mountain_bikes_belong_in_th.html.

¹¹⁹ For example in 2009 IMBA partnered with Oregon Wild on a bill to designate 34,000 acres of National Recreation Area within a new 127,000-acre Wilderness. John

Act in Oregon protects traditional bicycling trails under a strong National Recreation Area designation¹²⁰ and the Rocky Mountain National Park Wilderness Act in Colorado employs a boundary adjustment to allow the completion of a 16-mile trail along the Park's western boundary where bikers and hikers share the trail.¹²¹

To be sure, even companion designations are hard fought when preservationists believe that the designation lacks rules sufficient to protect preservation values. IMBA is lobbying Congress to amend the Act and working with agencies to write better, more robust regulations so that mountain bike friendly companion designations will protect wilderness qualities on federal lands while concurrently promoting outdoor recreation that includes mountain biking.

B. Statutory Interpretation

Review of the statutory text raises two interdependent questions: (1) what is the best interpretation of the act given its structure, language, and history, and (2) even if the best interpretation would allow bicycles, would courts find that under the statute, agencies must unambiguously allow bicycles or will courts defer to agency interpretation.

Preservationists argue that bicycles are forms of "mechanical transport" unambiguously banned by the terms of the Wilderness Act itself. Under the rules of statutory construction, courts must give each term used by Congress a distinct meaning, since Congress would not have spelled out each term separately if it did not intend the terms to have somewhat different meanings.¹²² Preservationists look to the treatment of aircraft and motorboats to find the intended meaning. Those forms of transportation are enumerated as banned devices.¹²³ Aircraft and motorboats fit within the general term "motor vehicles," yet Congress saw fit to specifically list aircraft and motorboats. According to preservationists, it follows, then, the term "mechanical transport" logically includes uses that are not motor-powered because Congress treated motor vehicles and motorized equipment separately.

Bradley, *Mountain Bikes Should Be Allowed in Wilderness Areas* (Feb. 16, 2010) <http://www.outsideonline.com/1848481/spurning-rubber>.

¹²⁰ Lewis and Clark Mount Hood Wilderness Act, S. Rep. No. 110-172 (2007).

¹²¹ Rocky Mountain National Park Wilderness Act part of the Omnibus Public Land Management Act, H. Rep. No 146 (2009).

¹²² See, e.g., *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (explaining "reluctance to treat statutory terms as surplusage").

¹²³ 16 U.S.C. § 1133(c).

The text of the Act itself implies that Congress's concern was the prohibition of heavy, bulky, or scarring equipment—it intended to keep Wilderness areas “in their natural condition.”¹²⁴

At least one court, the Ninth Circuit Court of Appeals, has noted potentially conflicting directives embedded in the Wilderness Act.¹²⁵ On one hand, Congress directed the land management agencies to *preserve*¹²⁶ Wilderness character, but on the other it required that Wilderness areas be *used*,¹²⁷—“devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.”¹²⁸ The court concluded,

We cannot discern an unambiguous instruction to the Service. Rather, those competing instructions call for the application of judgment and discretion. We may be able to identify violations at the margins but, in this case, the Act is not so clear that we can identify precisely what the Service must do and must not do. We conclude that the purpose of the Wilderness Act with regard to conservation is ambiguous.¹²⁹

Despite this noted ambiguity between the dual “preservation” and “use” language in the Act, management agencies have decided that long-term conservation of Wilderness does not include mountain biking.

Legislative history informs the mechanical transport issue and reveals that Congress “meant to prohibit mechanical transport, even if not motorized, that (1) required the installation of infrastructure like roads, rail tracks, or docks, or (2) was large enough to have a significant physical or visual impact on the Wilderness landscape.”¹³⁰ Statements that the Act sought to stop modern infrastructure—including roads, mines, recreational facilities, and commercial establishments that would permanently deprive a unique area of its primitive character—fill both the House and Senate reports.¹³¹ In response to a question on what a primitive and unconfined

¹²⁴ 16 U.S.C. §1131(a) (italics added).

¹²⁵ *Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1033–34 (9th Cir.2010).

¹²⁶ 16 U.S.C. §1133(b) (2006) (emphasis added).

¹²⁷ *Id.* at §1131(c) (emphasis added).

¹²⁸ *Id.* at §1133(b).

¹²⁹ *Wilderness Watch*, 629 F.3d at 1033 (quoting *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 647–48 (9th Cir. 2004)).

¹³⁰ Stroll, *supra* note 117 at 477 (2004); Tim Lydon, *Biking in Wilderness? It Aint Gonna Happen*, High Country News (Mar. 21, 2016).

¹³¹ 110 Cong. Rec. 17427, 17430, 17434, 17435, 17437–39, 17442, 17444, 17446–48, 17453, 17454–56 (1964).

type of recreation might be,¹³² the chairperson of the House Committee on Interior and Insular Affairs, Representative Wayne N. Aspinall, responded, "it just simply means that there will not be any manmade structures about in order to embarrass and handicap the enjoyers of this particular area."¹³³ By passing the Act, Congress wanted to "slow down the relentless process of development."¹³⁴

Other key House and Senate backers of the Act thought that Wilderness was meant to develop physical fitness and adventurous habits of mind and they quoted President-elect John F. Kennedy regarding the virtues of the "traditional bike to school that helped to build young bodies"¹³⁵ and concluded that Wilderness areas give us a chance to "develop physical fitness and adventurous habits of mind, as well as find relief for jaded minds, tense nerves, and soft muscles."¹³⁶ Based on this discussion, it seems unlikely that the forefathers of the Act would have thought mountain biking unsuitable for Wilderness.

Further review of legislative debate reveals that the House wanted to preclude mechanical transport, whether or not motorized, that would require an artificial infrastructure and permanent alteration of the physical environment. Following subcommittee and committee hearings in June 1964, the House of Representatives reduced "nor any other mechanical transport or delivery of persons or supplies" to "no other form of mechanical transport," the language now found in Section § 1133(c) of the Act. The legislative record establishes that this amendment did not widen the prohibition. Congress amended the clause "solely for the purpose of clarification. The substance and intent of the original language and of the substitute language are the same."¹³⁷ The phrase "mechanical transport or delivery of persons or supplies" suggests the carrying of groups of human beings as passengers, or the conveyance of supplies as cargo, on a road in

¹³² 110 Cong. Rec. 17443 (1964).

¹³³ *Id.*

¹³⁴ *Id.* at 17439 (statement of Rep. Cohelan).

¹³⁵ Wilderness Preservation System: Hearings Before the Subcomm. on Public Lands of the Comm. on Interior and Insular Affairs, House of Representatives, 87th Cong., 2d Sess. (1962) 1050, 1097 (statement of Sen. Anderson, one of two Senate sponsors of the Act, sought to be placed in the record by Rep. Saylor, House author of the Wilderness Act).

¹³⁶ *Id.*

¹³⁷ Statement of Representative Baring, on June 18, 1964, in the unpublished hearing To Establish a National Wilderness Preservation System etc., House of Representatives, 88th Cong., 2d Sess. (1964) 121, 131. The committee was considering amendments to the House version of the Wilderness Act, H.R. 9070, recommended on June 3, 1964, in a committee print. See Subcomm. Amendments to H.R. 9070, 88th Cong., 2d Sess. (Comm. Print No. 23) (1964) 14, lines 9-25, 15, lines 1-6.

a mechanical conveyance like a wagon. Congress intended to prohibit the mass transport of passengers—not exploring Wilderness under one's own power. Non-motorized mechanical transport used to carry people or material, requiring an artificial built-up infrastructure and causing damaging alteration of the physical environment is prohibited, but exploring Wilderness by mechanically aided human-powered transport is not.

The Senate passed a substantively identical version of the Act. Like the House, the Senate wanted to preclude mechanical load-bearing conveyances and other mechanical transport that would require an artificial infrastructure or alteration of the physical environment.¹³⁸

Whether or not “mechanical transport” encompasses bicycles is a continuing debate. However, arguing interpretation is an uphill battle. Even if the term “mechanical transport” in the Wilderness Act does not include bicycles as a matter of law, the management agencies have the discretion to ban them, as they explicitly have.¹³⁹

C. Congressional Action

Congress has entrusted the management of Wilderness areas to administrative agencies. These agencies are required to protect and manage¹⁴⁰ the areas “in such manner as will leave them unimpaired for future use and enjoyment as Wilderness, and so as to provide for the protection of these areas, the preservation of their Wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as Wilderness.”¹⁴¹ In managing these areas, the agencies must exercise their discretion to determine the best policy directives for the long-term preservation of Wilderness in light of the legislatively prohibited and permitted activities. That mandate requires them to construe the terms of the Wilderness Act to ensure that their actions comport with its directives.

A national mountain biking group called Sustainable Trails Coalition has drafted a bill—the Human-Powered Wildlands Travel Management Act of 2015¹⁴²—that would give local land managers, such as U.S. Forest Service supervisors, the ability to decide whether riders can use sections of trail in designated Wilderness, either for recreational biking or for trail maintenance or other work employing wheeled tools. The draft legislation

¹³⁸ 109 Cong. Rec. 5945 (1963).

¹³⁹ See Stroll, *supra* note 117 at 481–82.

¹⁴⁰ See 16 U.S.C. § 1131(c) (providing that wilderness “is protected and managed so as to preserve its natural conditions”).

¹⁴¹ *Id.* § 1131(a).

¹⁴² Sustainable Trails Coalition, FAQ, <http://www.sustainabletrailscoalition.org/faq/>.

does not seek universal acceptance for bikes; rather, it would allow management agencies to work with local constituents and consider portions of Wilderness where biking would be appropriate, such as historically used bike trails. Although arguments to amend the Wilderness Act have been unsuccessful in the past,¹⁴³ the Human-Powered Wildlands Travel Management Act could bestow clarity on managing agencies and recreation groups seeking better direction in Wilderness areas.¹⁴⁴

As the bill awaits Congressional action, 116 conservation organizations from across the United States published a letter asking lawmakers to reject any proposed changes allowing mountain bikes in Wilderness.¹⁴⁵ Perhaps more revealing of the political difficulty of amending the Wilderness Act is the fact that not all mountain bikers agree— IMBA has also publically opposed the bill.¹⁴⁶

VI. CONCLUSION

Time changes everything. Fifty years after the enactment of the Wilderness Act, a new generation of users, the mountain bikers, passionately seek to participate in the Wilderness experience. Recreation and conservation are the fastest growing uses of federal lands and, arguably, these two uses are now surpassing extractive industries to become the dominant uses of public lands.¹⁴⁷ Importantly, recreation users are also one of the most

¹⁴³ A sign of unsuccessful proposals is the fact that the Act itself never has been significantly amended so its basic structure remains the same. *See* 16 USC § 1131 *et seq.*

¹⁴⁴ As an example of those seeking better direction, in 2015 a group of snowmobile organizations sued the Forest Service claiming it lacks clear rules or guidelines for defining potential wilderness areas, especially in an area that has historically allowed snowmobiling and mountain biking. *See Ten Lakes Snowmobile Club et. al v. the U.S. Forest Service, et. al*, 15-cv-00148 (filed Nov. 12, 2015).

¹⁴⁵ Brett Haverstick, *116 Conservation Groups Tell Congress: Keep Bikes Out of Wilderness*, *The Wildlife News* (Mar. 23, 2016) <http://www.thewildlifeneeds.com/2016/03/23/116-conservation-groups-tell-congress-keep-bikes-out-of-wilderness/>.

¹⁴⁶ IMBA sees the bill as a bad idea and is concerned that an amendment invites risk that others will seek to change the Wilderness Act into something they want to suit their needs. *See* Vernon Felton, *Are Mountain Bikers About to Get Their Day in the Wilderness?*, Nov. 30, 2015, <http://www.outsideonline.com/2038461/mountain-bikers-could-get-their-day-wilderness>.

¹⁴⁷ Jan G. Laitos, *The Transformation on Public Lands*, 26 *Ecology L.Q.* 140, 160 (1999) (discussing the rise in support for public lands and reduced commodity development on or near these lands).

economic producing uses of public lands.¹⁴⁸ Public interest lies in combining these ideals: protecting an environment worth experiencing.

Of the three options discussed, the most effective route to incorporate active agency management allowing mountain bikers in Wilderness while simultaneously protecting the Act's values is to support the Human-Powered Wildlands Travel Management Act. A clarifying amendment to the Wilderness Act is the ideal option for two reasons: (1) it will fall in line with the original low impact recreational use intent of Congress evidenced by the text of the Act and legislative history and (2) it will reverse the falling support that new wilderness area designations currently suffer as a result of mountain bikers opposition to designations that would prevent them from riding. Congress can strengthen the Act while simultaneously compromising to limit mountain bikes by defining the meaning of mechanical transport and the authority of the land management agencies to interpret the Act to allow for flexible management of mountain bike users in specifically designated Wilderness areas. The agencies managing Wilderness must understand the proposed amendment to the Act as change to allow representation of diverse non-motorized quiet user interests and foster increased public support for Wilderness protection. As it stands, the future of the Wilderness Act is uncertain.¹⁴⁹

With current rates of population growth, metropolitan development, and the rising popularity of mountain biking, it is difficult to imagine a future where individuals will continue to support Wilderness designations if they are limited from experiencing those lands on a mountain bike.¹⁵⁰ Moreover, Wilderness areas are only worth protecting if the American public says they are.¹⁵¹ But if preservationists continue to resist mountain bikers' efforts to gain access, they risk a public perception shift against

¹⁴⁸ Dr. Daniel J. Stynes, *Economic Significance of Recreational Uses of National Parks and Other Public Lands*, NPS Social Science Review, Vol. 5, No. 1 (2005), https://www.nature.nps.gov/socialscience/docs/archive/SSRR_7.pdf.

¹⁴⁹ Martin Nie & Christopher Barns, *The Fiftieth Anniversary of the Wilderness Act: The Next Chapter in Wilderness Designation, Politics, and Management*, 5 *Ariz. J. Env'tl. L. & Pol'y* 237 (2014).

¹⁵⁰ Douglas O. Linder, *New Direction for Preservation Law: Creating an Environment Worth Experiencing*, 20 *Env'tl. L.* 49, 68 (1990) ("The argument that natural areas ought to be preserved because of their experiential potential goes far beyond aesthetics and environmentalism.").

¹⁵¹ Thomas A. More, et al., *How Valid are Future Generations' Arguments for Preserving Wilderness?*, USDA Forest Service Proceedings RMRS-P-15-VOL-2. 2000, pp. 81-85, http://www.fs.fed.us/rm/pubs/rmrs_p015_2/rmrs_p015_2_081_088.pdf.

Wilderness designations altogether. And for a Congress plagued by polarization and stalemate, any proposed Wilderness bill must be supported by a broad base of interests with strong local support.¹⁵²

At this time in history, when technology and devices increasingly consume human existence,¹⁵³ land management agencies are concerned about new generations getting outdoors.¹⁵⁴ These agencies are working to build continuing support for federal lands and it simply does not make sense to keep mountain bikes off all the uniquely beautiful Wilderness lands; restrictions should be site-specific decisions. Perhaps surprisingly, even wilderness icon Aldo Leopold recognized the practical limitations of designating stagnant Wilderness. In 1925 he wrote,

Wilderness is a relative condition. As a form of land use it cannot be a rigid entity of unchanging content, exclusive of all other forms. On the contrary, it must be a flexible thing, accommodating itself to other forms and blending with them in that highly localized give-and-take scheme of land-planning which employs the criterion of "highest use."¹⁵⁵

It is in the best interest of both preservation advocates and mountain bikers who value Wilderness to settle the question of human-powered mountain bicycle transport cooperatively. Mountain bike coalitions will bring additional support and resources to trail maintenance to prevent negative impacts to Wilderness including erosion and degradation of existing trails. More importantly, this currently alienated group will instantly transform into supporters rather than fighters of Wilderness designation. Managing federal lands in a way that balances recreational use with the purpose of Wilderness designations is within reach. Congress should carefully consider this opportunity to strengthen the Wilderness Act by once and for all clarifying management agencies' ability to allow mountain bikers on the trails on a case-by-case basis.

¹⁵² For discussion on compromise and collaboration, see Martin Nie & Christopher Barns, *supra* note 149 at 278–90 (2014).

¹⁵³ See, e.g., Aaron Smith, *The Best (and Worst) of Mobile Connectivity*, Pew Research Center (Nov. 30, 2012), <http://www.pewinternet.org/2012/11/30/part-iv-cell-phone-attachment-and-etiquette/>.

¹⁵⁴ For example, Every Kid in the Park, <https://www.everykidinapark.gov/>; Youth Initiative, <https://www.doi.gov/youth/about>; Lets Go Outside, <https://www.fws.gov/letsgooutside/>; More Kids in the Woods, <http://www.fs.usda.gov/detail/conservationeducation/home/?cid=STELPRDB5340044>; Lets Move Outside, <http://www.letsmove.gov/lets-move-outside>.

¹⁵⁵ Aldo Leopold, *Wilderness As a Form of Land Use*, 1 J. Land & Pub. Util. Econ. 398, 399 (1925).

In the words of Howard Zahniser, the primary author of the Wilderness Act, “[w]e have a profound, a fundamental need for areas of [W]ilderness—a need that is not only recreational but spiritual, educational, scientific, essential to a true understanding of ourselves, our culture, our own natures, and our place in all Nature.”¹⁵⁶ Now, more than ever, humans need Wilderness. It is time to support access to Wilderness on mountain bikes, too.

¹⁵⁶ Howard Zahniser “Wildlands, A Part of Man’s Environment,” in *A Place to Live, The Yearbook of Agriculture, 1963* (Washington, DC: United States Department of Agriculture, 1963).