Wilderness Case Law

This document contains a compilation of court case summaries that pertain to the Wilderness Act of 1964. These cases are divided into eight different color-coated categories: Commercial Services in purple; Cultural Resources in orange; Fish & Wildlife in golden brown; Access in pink; Minerals in grey; Motor Vehicle in yellow; Resource Protection in green; and Water Rights in blue. For accessibility purposes, the colors are for convenience and do not affect the function, labeling or navigation within the document. Each case discusses what the court held in regard to various violations that fall under the above categories.

Use the bookmarks to navigate among categories and cases within those categories. For questions about individual cases or wilderness case law, please contact the Arthur Carhart National Wilderness Training Center at 406-243-4682.

This document includes case law through May 30, 2017.

Commercial Services

Minn. Public Interest Research Group v. Butz, 358 F.Supp. 584 (D. Minn. 1973)

Background

Nonprofit corporation brought action in which it sought temporary and permanent injunction against logging in a portion of national forest that was designated as a wilderness area until the requirements of the National Environmental Policy Act and attendant regulations were complied with and in which it sought to have logging in virgin forest portion of the area permanently enjoined. The defendant paper producer counterclaimed for declaratory judgment that total prohibition of logging in area was an unnecessary restriction and for an order enjoining the interference with the producer's existing timer sales in the area. Defendant filed a cross claim against the government seeking an order determining that total proscription of logging in the BWCA Portal Zone would constitute an illegal "unnecessary restriction." Plaintiffs assert that the express requirement of § 4(d)(5) of the Wilderness Act of 1964 says that the Secretary of Agriculture should maintain the primitive character of the BWCA by imposing restrictions which are necessary. They assert specifically that the primitive character of the virgin forest areas of the BWCA can only be maintained by prohibiting logging in such areas. Plaintiffs also assert that the USFS was arbitrary and capricious in not providing an environmental impact statement before logging in the BWCA.

Holding

NEPA Violation:

The USFS acted arbitrarily and capriciously and in violation of NEPA by not preparing an EIS before logging in the BCWA. The fact that the BWCA is a Wilderness Area by the USFS, which has specific rules and regulations that recognize the importance of preparing an impact statement when dealing with wilderness areas, leads to the inescapable conclusion that an impact statement should have been prepared. The evidence showed that logging results in a high degree of ecosystem disturbance, has a irreversible impact on the BWCA, that many small actions have been taken in regard to logging in the BWCA by the USFS, that the BWCA is an important national resource, that the BWCA is a unique and a rare resource and that there has been public controversy over logging in the BWCA.

Injunctive Relief:

The court granted a preliminary injunction because:

1) The evidence clearly showed that logging destroys the primitive character of the wilderness area and the Wilderness Act mandates that the primitive character of the BWCA be maintained. Therefore, the there is a strong possibility that further logging in the BWCA will be entirely prohibited or be restricted to non-virgin forest areas under the Forest Service's new BWCA Management Plan.
2) The plaintiff has shown that many of its members use and enjoy the BWCA for its primitive recreational value, that others have used it for scientific research on various wilderness phenomena. If logging is allowed to continue in such areas pending the Forest Service's completion of its new BWCA Management Plan and the accompanying impact statement, they will be further reduced and the members of plaintiffs who intend to use the BWCA in the future will be irreparably harmed.
3) The court finds that there is little or no possibility of substantial injury to the defendants as a result of the injunction sought by plaintiff.
4) The public interest in setting aside and preserving the BWCA and other wilderness areas in their primitive states is of greater importance and thus outweighs the public interest n the economic value of the employment and income generated by the timber industry because of the evidence suggesting that none of the private defendants would go out of business or even have reduced business if logging were enjoined in the BWCA.

The court relied on *Izaak Walton League v. St. Clair*, 353 F.Supp. 698 (D.C.Minn., 1973) to hold that there is an inherent inconsistency in the Congressional Act and it falls in the lap of the court to determine which purpose Congress deemed most important and thus intended, and the Wilderness objectives override the contrary mineral right provision of the statute.

Key Language

The Secretary observed and ruled that commercial timber cutting in the BWCA will be continued in the remaining one-third of the Canoe Country, subject to strict application of the principle that there will be no cutting which will present a hazard to maintaining a desirable recreation environment adjacent to lakes and water courses. 16 U.S.C. § 1133(d)(2) within the Wilderness Act of 1964 dealing with mineral activities provides that "nothing in this chapter shall prevent within national forest wilderness areas any activity, including prospecting, for the purpose of gathering information about mineral or other resources, if such activity is carried on in a manner compatible with the preservation of the wilderness environment. The court relied on Judge Neville's conclusion to the contrary of this statute in *Izaak Walton League v. St. Clair* that "a Wilderness purpose plain and simply has to be inconsistent with and antagonistic to a purpose to allow any commercial activity such as mining within the BWCA … there can be no question but that full mineral development and mining will destroy and negate the wilderness or most of it …." (Note: that case was overruled by *Izaak Walton v. St. Clair*, 497 8.2d 849 (1974)) The

court concluded that this “pro-mining” statute is contrary to wilderness values because wilderness and mining are incompatible.

Minnesota Public Interest Research Grp. v. Butz, 541 F.2d 1292 (8th Cir. 1976)

Background

Action was brought for declaratory and injunctive relief to prohibit logging in virgin forest areas of the Boundary Waters Canoe Area of Minnesota. Plaintiffs MPIRG and Sierra club filed the present action against the secretary of Agriculture to prohibit logging in virgin forest areas of the Boundary Waters Canoe Area of Minnesota (BWCA). The BWCA is located entirely in a wilderness area governed by the Wilderness Act. At issue here is the logging in the Portal Area of the BWCA, which also encompasses the shoreline timber. Plaintiffs claim that the Wilderness Act forbids commercial logging in wilderness areas.

Holding

The Wilderness Act does not prohibit commercial logging of virgin forest timber in the BWCA because the commercial cutting was historically permitted before the area became a designated wilderness area.

Key Language

The Wilderness Act contains a provision that provides that the prohibition against commercial enterprises, including commercial logging, within any wilderness area designated in the act, is subject to existing private rights. The administrative history of the BWCA and the legislative history of the Wilderness Act conclusively show that logging was to continue as a permissible use within the BWCA’s Portal Zone under the Act. In 1964, the Wilderness Act did not prohibit logging in the virgin forest areas of the Portal Zone. Therefore, because commercial logging is an “existing private right” that allows for an exception to the Act’s prohibition on commercial logging, its continuation is not a violation of the Wilderness Act.

Nw. Indian Cemetery Protective Ass'n v. Peterson, 552 F.Supp. 951 (N.D. Cal. 1982)

Background

In two related suits, environmental organizations challenged decisions by the USFS to complete construction of the last six miles of a paved road and to adopt a forest management plan which would permit timber harvesting in the "Blue Creek Unit" of the Six Rivers National Forest. Plaintiffs allege that defendants, in violation of the Wilderness Act (16 U.S.C. § 1132(b)), failed to consider the wilderness value of the Blue Creek Unit as part of a larger potential wilderness area including roadless and undeveloped lands contiguous to Blue Creek. Plaintiffs content that "area" within the meaning of section 1132(b) means the total contiguous, undeveloped area of which Blue Creek is one part, rather than the Blue Creek Unit alone.

Holding

The court held that plaintiffs do not appear likely to prevail on this claim at trail. Completion of the final six-mile segment of the G-O road would not sever Blue Creek from other proposed wilderness areas since the existing paved sections of the G-O road already separate Blue Creek from these areas. Hence, defendants need not have considered Blue Creek as part of a larger undeveloped area when complying with the requirements of the Wilderness Act.

Key Language

Section 1132(b) provides that "the Secretary of Agriculture shall review for preservation as wilderness, each area in the national forests classified as 'primitive' and report his findings to the President. A smaller unit next to a larger potential wilderness area does not mean that it is within these larger areas.

McGrail & Rowley v. Babbitt, 986 F. Supp. 1386 (S.D. Fla. 1997)

Background

McGrail & Rowley owned a tour boat company. They applied for a permit to take tours in the Key West National Wildlife Refuge. The Fish and Wildlife Service (FWS) denied the permit. McGrail & Rowley appealed. McGrail & Rowley argued that FWS allowed another tour boat company to operate in the Refuge, so it was inconsistent that they not be allowed to operate also. FWS argued that the other tour boat company ran "passive and educational" tours that respected

the wildlife, while McGrail & Rowley were more recreational and involved picnics and kayaking and Frisbees on the beach.

FWS argued that McGrail & Rowley's tours were more likely to damage sensitive areas.

Holdings

- On whether the agency's actions were arbitrary and capricious: The court held that the agency's decision that MRI's uses were incompatible with the purposes of the refuge was not arbitrary and capricious. The refuge and wilderness within it were established to protect wildlife, birds, and their habitat. MRI's business ventures, including playing frisbee in the shallow water on the beach and kayaking around the shore, were found to have potentially negative impacts on the sensitive ecosystem of the keys. In reviewing the agency's decision, the court found that it acted appropriately.
- On whether the FWS had the authority to regulate state lands and waters: The court held that the FWS had the authority to regulate commercial use of federal lands including submerged lands and adjacent state waters. The authority was vested in the FWS through the Property Clause of the Constitution. The Property Clause states "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States …." 986 F. Supp. at 1394 quoting The Constitution, Article IV, § 3, cl. 2. In *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979), the court expanded the federal government's authority to include, "nonfederal land 'when reasonably necessary to protect adjacent federal property or navigable waters.'" 986 F. Supp. at 1394. Therefore, the court held that the FWS was acting within its authority in regulating access to state-owned waters off Boca Grande Key.

Key Language

- Commercial activities: activities that generate profit, including tours and guide services
- Special use permit: The Refuge Act authorizes the secretary to "permit the use of any area within the System whenever he determines that such uses are compatible with the major purposes for which such areas were established." Because the FWS regulation provides that "conducting a commercial enterprise on any national wildlife refuge is prohibited," a special use permit may be authorized to allow the commercial activity. The Refuge act requires the agency to determine whether the permit is compatible (a use that will not materially interfere with or detract from the purposes for which the refuge was established) with the major purposes for which the area was established.

Wilderness Watch v. Robertson, No. CIV. 92-740 (TFH), 1998 WL 1750033 (D.D.C. Aug. 31, 1998)

Background

Plaintiff Wilderness Watch brought suit against the Forest Service, alleging violations of THE WILDERNESS ACT in its management of the Frank Church Wilderness. The trial court found in favor of the plaintiffs, and the FS was required to comply with a remedial order. The order required the FS to remove any caches of goods from the wilderness area, assign camping spaces in compliance with FS regulations, and remove or disapprove permanent structures that are not "necessary to meet minimum requirements for the administration of the area." *Wilderness Watch v. Robertson*, 1998 U.S. Dist. LEXIS 14457, *3 (D.D.C. 1998). Wilderness Watch brought suit against FS again for failure to comply with the remedial order.

Holding

The D.C. District Court held that the defendants FS had adequately complied with the remedial order. First, the FS had attempted to remove all caches and had taken disciplinary action against outfitters who failed to clean up caches at their sites. Second, the FS has some discretion in locating campsites, and the location of some sites within 200 feet of trails, streams, or lakes was not a violation of the order. Third, the small permanent structures that the FS allowed did not violate either the order or the Wilderness Act. The permanent structures did not violate the order because they were small, unobtrusive structures (such as base logs, hitching posts, and stored lumber) that the FS deemed were necessary to meet the minimum requirements for area administration. Wilderness Watch argued that even if the permanent structures didn't violate the order, they violated the Wilderness Act, which forbids permanent structures. However, the court found the FS's reading of the Wilderness Act more persuasive – that the FS "may approve some permanent structures, but only as necessary for minimal management of the wilderness." *Wilderness Watch v. Robertson*, at *19. Plaintiffs argued that the permanent structures were not necessary because they were not geared towards conservation values of the Wilderness Act. However, the court held that the FS's approval of the permanent structures was reasonable because "management of wilderness areas is done with both the purpose of conservation and of ensuring that the public may use and enjoy the areas."

Key lesson

The Wilderness Act does not expressly prohibit permanent structures when they are necessary to meet the “minimum requirements” for administering the area for the purposes of the Act.

Caches of goods kept by commercial outfitters on wilderness land are prohibited.

Commercial Services | Cultural Resources | Fish & Wildlife | Access | Minerals | Motor Vehicle | Resource Protection | Water Rights

High Sierra Hikers v. Blackwell, 390 F. 3d 630 (9th Cir. 2004)

Background

The John Muir and Ansel Adams Wilderness Areas are located within the Inyo and Sierra National Forests. Each National Forest contains some portion of each wilderness area. The Forest Service regulates the usage of the wilderness areas by the issuance of permits. Commercial outfitters and guides, including those with livestock, who operate commercial services, must obtain a "special-use permit." The amount of wilderness use the commercial operators are allowed is dictated by "service day allocations." A "service day" equals "one person being assisted by an outfitter or guide and using the wilderness for one day." In 1997, the Forest Service issued a draft EIS proposing the replacement of existing Management Plans with new management plans for the Ansel Adams and John Muir Wilderness Areas. In February 1999, the Forest Service announced that it would issue a revised draft EIS, which it did in August 2000. On April 10, 2000, High Sierra brought suit in federal district court seeking declaratory and injunctive relief against the Forest Service for management practices in the John Muir and Ansel Adams Wilderness Areas. Specifically, High Sierra alleged that the Forest Service's authorization of special-use permits to commercial packstock operators violated NEPA, the Wilderness Act, the National Forest Management Act, 16 U.S.C. §§ 1600-1687, and the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706. On December 19, 2000, the Forest Service filed a motion to dismiss or alternatively for summary judgment on the grounds that: (1) High Sierra's challenges to the Forest Service's management program for the two wilderness areas amount to an impermissible programmatic challenge barred by *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990); and (2) there was no final agency action from which High Sierra could obtain relief under the APA. On December 20, 2000, High Sierra filed a motion for summary judgment. High Sierra sought declaratory relief that the Forest Service had: (1) violated the National Forest Management Act by failing to implement or meet Forest and Wilderness Standards; (2) violated the Wilderness Act by failing to determine that commercial services are necessary and proper, and by allowing services that degrade wilderness values; and (3) violated NEPA by failing to prepare environmental analyses before issuing special-use permits and other instruments that allow commercial services to be performed in the wilderness areas. On June 5, 2001, the district court

found that the final EIS and the Record of Decision, accompanying the 2001 Wilderness Management Plan, had analyzed the need for stock services and concluded that such services were necessary. The district court also found that the Forest Service was vested with broad discretion under the Wilderness Act to determine how much commercial pack use to allow and how to deal with the impacts. However, the district court granted High Sierra's motion for summary judgment on the NEPA claim. The district court found that the Forest Service was violating NEPA by issuing multi-year special-use permits and granting one-year renewals of special-use permits to commercial packers without first analyzing the impact by completing an EIS, and issued an order, granting injunctive relief and ordering the Forest Service to complete a NEPA analysis of cumulative impacts by December 31, 2005, and a site-specific analysis for each permittee by December 31, 2006. In the interim, the district court ordered a reduction in the allocation of special-use permits and limited access to areas of environmental concern. Both sides appeal.

Holding

- "We hold that the district court correctly found that the Forest Service was in violation of NEPA by failing to assess the individual and cumulative impacts of the issuance of special-use permits to commercial packstock operators in the John Muir and Ansel Adams Wilderness Areas."
- "The district court was incorrect, however, in granting a summary judgment holding that the requirements of the Wilderness Act had not been violated. We hold that the Wilderness Act imposes substantive requirements on an administering agency and that there are triable issues of fact regarding whether the Forest Service damaged the wilderness areas."
- "Until such time as the Forest Service complies with the court's order concerning the NEPA procedural requirements, and thereafter reaches a decision concerning the commercial activity permissible in the Wilderness Areas, the Court's interim injunction largely addresses the requirements of the Wilderness Act. The ultimate decision of the Forest Service will remain subject to the substantive requirements of the Wilderness Act."
- "We affirm the decision of the district court in granting the injunction, but reverse the summary judgment with respect to the Forest Service's compliance with the Wilderness Act and remand to the district court for a determination of appropriate relief under the Wilderness Act for remediation of any degradation that has already occurred."

Key language

- Commercial Services - "The issuance of multi-year special-use permits to the commercial packers constitutes 'major federal action' and requires the agency to prepare a detailed
  EIS." "It is clear that the [Wilderness Act] requires, among other things, that the Forest Service make a finding of 'necessity' before authorizing commercial services in

wilderness areas....Under the broad terms of the Act, a finding that packstock was needed to provide access to those people who would otherwise not be able to gain access for themselves or their gear, can support a finding of necessity. However, under the terms of the Wilderness Act, a finding of necessity is a necessary, but not sufficient, ground for permitting commercial activity in a wilderness area....The Forest Service may authorize commercial services only 'to the extent necessary' (emphasis added in original). Thus, the Forest Service must show that the number of permits granted was no more than was necessary to achieve the goals of the Act."

- Preserving wilderness character - "If complying with the Wilderness Act on one factor will impede progress toward goals on another factor, the administering agency must determine the most important value and make its decision to protect that value. That is what the Forest Service failed to do in this case. At best...it failed to balance the impact that that level of commercial activity was having on the wilderness character of the land. At worst, the Forest Service elevated recreational activity over the long-term preservation of the wilderness character of the land."
- Purpose of wilderness - "The Wilderness Act twice states its overarching purpose. In [U.S.C.] Section 1131(a) the Act states, 'and [wilderness areas] shall be administered for the use and enjoyment of the American people *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."* (emphasis added in original). Although the Act stresses the importance of wilderness areas as places for the public to enjoy, it simultaneously restricts their use in any way that would impair their future use as wilderness. (emphasis in original). This responsibility is reiterated in Section 1133(b), in which the administering agency is charged with preserving the wilderness character of the wilderness area."

Budlong, Boggs, & Webb, 165 IBLA 193 (2005)

Background

This is an appeal from the decision of the Field Manager, Ridgecrest, California, Field Office, Bureau of Land Management, approving the issuance of a special recreation permit. In 1996, BLM issued an SRP which authorized SSE to conduct rock-climbing adventure trips in the Owens Peak Wilderness managed by the Ridgecrest Resource Area office of BLM in California. SSE's permit would authorize it to conduct "Outward Bound" style outdoor adventure trips over the three-year period, including rock climbing, backpacking, canyoneering, initiative games, and general wilderness travel skills. Appellants assert that issuance of the permit is not in compliance with the Wilderness Act of 1964, and cite to the terms of the BLM regulations which prohibit commercial services within wilderness except where "appropriate for realizing the recreational or other wilderness purposes of the area."

Holding

The decision is affirmed. The lands within the California desert wilderness areas established by the CDPA were preserved to provide for recreational use, and the commercial services existed at the time the area was designated as wilderness. Desert lands in Southern California offer "unique education and recreational values used and enjoyed by millions of Americans for hiking and camping, scientific study, and scenic appreciation." Congress established a policy for such lands to "provide opportunities for compatible outdoor public recreation and promote public understanding and appreciation of the California desert. Section 102(28) of the CDPA established the Inyo Mountains Wilderness consistent with these findings. Additionally, the provision of section 4(d)(5) of the Wilderness Act permitting commercial services was crafted primarily for climbing, hiking, river and hunting guide services.

Key Language

Special recreation permits for instructor training in rock climbing, backpacking, canyoneering, initiative games, and general wilderness travel skills are not prohibited in wilderness areas established by the California Desert Protection Act, which authorizes commercial services in such areas.

Section 4(c) of the Wilderness Act, 16 U.S.C. § 1133(c) (2000), provides that, subject to existing private rights, "there shall be no commercial enterprise and no permanent road within any wilderness area designated by this Act;" however, it does not prohibit all commercial activity within wilderness. Section 2(c) defines wilderness to include land which provides opportunity for a "primitive and unconfined type of recreation." Section 4(b), § 1133(b), ensures that

wilderness is to be “devoted” to recreation and education purposes and section 4(d)(5) permits commercial services within the context of such recreation, stating that “commercial services may be performed within the wilderness areas designated by this Act to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.”

High Sierra Hikers v. Weingardt, 521 F.Supp.2d 1065 (N.D.Cal. 2007)

Background

First, see HSHA v. Blackwell 2004. In May 2007, Plaintiffs filed a motion for summary judgment alleging that the Forest Service, through the 2005 EIS and subsequent ROD, violated the Wilderness Act and NEPA, and seeking wide-ranging injunctive relief. The Forest Service opposed that motion and filed a cross-motion for summary judgment. The cross-motions were fully briefed and the Court held a hearing on the merits on September 5, 2007.

Holdings

Plaintiffs' Motion for Summary Judgment and Defendants' Cross-Motion for summary Judgment are granted in part and denied in part. (Note that the holdings were many and detailed. We have included a list of the items here with the understanding that they are more fully explained in the official opinion.)

- The survey methodology underlying the Needs Assessment was unreliable.
- Additional flaws in the Needs Assessment
- The extent of the finding of need in the Needs Assessment was arbitrary and capricious.
- The Destination Management strategy does not adequately address the preservation of wilderness character and improperly allows harmful spikes in use.
- The Forest Service violated NEPA by failing to take a hard look at the harm to the
- Yosemite Toad caused by commercial pack stock operations.
- The Forest Service failed to take a hard look at water quality issues in the FEIS and allowed further degradation through increased grazing in already impacted areas in violation of the Wilderness Act.
- Plaintiffs failed to show that they exhausted their administrative remedies with respect to grazing by domestic livestock.
- The Forest Service's change to the campfire policy was arbitrary and capricious in violation of the Wilderness Act and NEPA.
- The Forest Service's decision to implement a 15 person and 25 stock group sizes does not violate NEPA's requirement to consider reasonable alternatives.
- Forest Service did not act arbitrarily in concluding that the issue of motorized access on the Muir Trail is outside the scope of the FEIS.

Key language

- Preserving wilderness character - “Plaintiffs argue that the Act requires the Forest Service to preserve wilderness character, not simply maintain existing degraded conditions.

  Defendants respond that ‘maintain’ and ‘preserve’ are synonyms and that there is no general restoration requirement. While Defendants may be correct that there is no automatic restoration duty in the abstract, the Wilderness Act does impose a general requirement on the Forest Service to manage wilderness areas so as to preserve the land’s wilderness character. More importantly, [because of] the Forest Service’s demonstrated failure in the past to fulfill this mandate,...the Ninth Circuit recognized a need for remediation under the Wilderness Act.”
- Extent necessary - “[T]he Forest Service’s decision to count all persons with equipment too heavy or bulky to carry on foot as ‘in need of’ commercial pack services was arbitrary and capricious....The Forest Service’s argument that [the] items [listed] are not specifically forbidden in the wilderness area confuses the absence of a specific prohibition with the requirement of necessity; the fact that something is otherwise ‘legal’ does not make it necessary....This conclusion improperly equates ‘preference’ with ‘need.’”

Ventana Wilderness Alliance v. Bradford, 313 Fed. Appx. 944 (9th Cir. 2009)

Background

Organizations brought suit challenging Forest Service's decision to permit to grazing on public land officially designated as wilderness. The grazing in this case had occurred for over 115 years while privately owned. Although there was a temporary cessation in grazing during a transition from private to public land, this temporary cessation did not serve to discontinue the use. The grazing was "established" for purposes of the Wilderness Act.

Holding

Because the grazing in this case was "established" prior to the effective date of the Act, allowing the grazing to occur in the wilderness area after designation was not a violation of the Wilderness Act.

Key Language

The Wilderness Act specifically permits grazing of livestock where it was "established" prior to the effective date of the Act.

High Sierra Hikers Ass'n v. U.S. Dept. of Interior, 848 F.Supp.2d 1036 (N.D. Cal. 2012)

Background

This case challenges administrative actions and land management practices which allegedly impact the level of stock use in the Sequoia and Kings Canyon National Parks ("SEKI"). Plaintiff High Sierra Hikers Association ("HSHA") asserts that defendants violated both the Wilderness Act and the National Environmental Policy Act ("NEPA") by issuing a General Management Plan ("GMP") which permits the use of horses and mules in wilderness areas without conducting the proper environmental assessment of the impact of such stock use. The parties have filed cross motions for summary judgment.

Holding

1) The GMP violated the Wilderness Act:

"The courts have emphasized that the prohibition against commercial activity is 'one of the strictest prohibitions of the Act.'" Thus, if an agency determines that a commercial use should trump the Act's general policy of wilderness preservation, it has the burden of showing the court that, in balancing competing interests, it prepared the "requisite findings" of necessity. "[T]he agency's primary responsibility is to protect the wilderness, not cede to commercial needs." "[T]he fact that the NPS has committed to forego authorizing new types of commercial activities until after the [Wilderness Stewardship Plan is written] is inadequate. The NPS has issued a GMP which, programmatic or not, at the very least, provides for the continuation of stock use at its current levels. Pursuant to the Wilderness Act, a necessity finding is required. Because the NPS has yet to complete this finding, the GMP violates the Act."

2) The GMP did not violate NEPA:

NEPA is a procedural statute that "does not mandate particular results but provides the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions." Because NPS satisfied the NEPA requirement to consider reasonable alternatives, to a requisite "hard look" under NEPA, and continued to issue Packer Permits at the current level, it satisfied the procedural requirements of NEPA.

Relevance

Although the NPS did not violate NEPA in the process in which they issued the general management plan permitting the use of horses and mules in the wilderness areas of Sequoia and Kings Canyon National Parks and by issuing commercial use authorizations, the NPS failed to make the required finding of necessity that the Wilderness Act needs to allow certain commercial activities to override the primary goal of protecting the wilderness.

Commercial Services Cultural Resources Fish & Wildlife Access

Minerals Motor Vehicle Resource Protection Water Rights

Sierra Hikers Ass'n v. U.S. Dept. of Interior, No. C 29-04621 RS, 2012 WL 1933744 (N.D. Cal. May 29, 2012)

Background

Following an order granting in part and denying in part the parties' cross-motions for summary judgment, High Sierra Hikers Association ("HSHA") filed a motion for partial vacatur and injunctive relief. This motion addresses the proper remedy for defendants' Wilderness Act violation and requests the imposition of interim measures while the National Park Service ("NPS") completes the requisite necessity finding and finalizes the stock-specific Wilderness Stewardship Plan ("WSP"). NPS responded with its own briefing on remedy, agreeing that both a partial vacatur and interim order were appropriate, but disputing plaintiff's proposed terms. For the following reasons, the motion for partial vacatur and interim relief is granted in part and denied in part as explained below.

Holding

"Plaintiff's motion for partial vacatur and injunctive relief is granted under the following terms:

1. The Court hereby vacates all portions of the GMP and ROD which provide programmatic guidance regarding the type or level of commercial stock services necessary in the SEKI wilderness area or direction as to the need, appropriateness, or size of developments, structures, or facilities used completely or partially for commercial stock services. This includes all references to the future development or installation of stock facilities.
2. NPS shall complete the WSP and the specialized Wilderness Act finding no later than January 31, 2015. The WSP may consider both front-country and back-country matters as required under NEPA and other statutory guidelines. In conducting the analysis, the agency must consider imposing limits on group size, number of stock, trail suitability for various stock use types and the necessity of additional stock use facilities.
3. Pending completion of the WSP, the following interim measures shall apply:
    a. A total number of commercial stock use permits may be authorized for SUNs equivalent to 80% of 3,200 SUNs. NPS shall use its best efforts to continue to monitor and reduce use of service days.
    b. For the entirety of the interim period before NPS completes the WSP and the Wilderness Act findings, commercial stock operations cannot occur except under the terms and conditions of this order, and under any NPS directives which are consistent with this order.
    c. Nothing in this order prevents NPS from permitting new commercial outfits, such as those utilizing burro or llama packers from competing with existing permit holders to provide commercial stock services.

4. If the Sequoia and Kings Canyon National Parks Back-country Access Act is signed into law, the parties are to submit separate briefs, each not to exceed ten pages in length, within twenty days of the statute's enactment directed to the effect, if any, of such law on the terms and conditions set forth in this order.
5. The motion by BHC to file an *amicus curiae* brief is granted.
6. All other interim relief requested by HSHA is denied."

W. Watersheds v. U.S. Forest Serv., No. C 08-1460 PJH, 2012 WL 1094356 (N.D. Cal. Mar. 30, 2012)

Background

This action concerns grazing right on the Big Ridge allotment located within the Marble Mountain Wilderness in the Klamath National Forest. The U.S. Forest Service manages the nation's forests, and had issued a categorical exclusion for the Big Ridge allotment. As part of its management, the Forest Service issues grazing permits to cattle producers and ranchers, allowing them to graze their cattle on national forests under certain circumstances. On March 14, 2008, plaintiffs – comprised of various non-profit organizations concerned with environmental and wildlife protection – filed the instant suit against defendant Forest Service, challenging the Forest Service's alleged practice of reauthorizing livestock grazing on federal land without conducting the proper environmental review under the National Environmental Policy Act. Plaintiffs contend that the record is replete with reports of conflicts between cattle grazing and recreation use on the Big Ridge allotment, which established the presence of adverse effects to wilderness recreation by virtue of the proposed grazing action.

Holding

The court concluded that the evidence in the record demonstrates the presence of a wilderness resource condition that constitutes an "extraordinary circumstance" with respect to the Big Ridge allotment, and so does not adequately support the Forest Service's conclusion that there are "no conditions that would constitute a significant effect on an extraordinary circumstance related to the proposed project." Without an explanation of how the contested grazing will not adversely affect the wilderness, the Forest Service's conclusion that the permitted grazing will not have any significant effects on the wilderness is arbitrary and capricious.

Key Language

The Wilderness Act aims to provide opportunities for solitude and unconfined recreation, although it does allow for livestock grazing on wilderness land if the grazing was established on the land prior to enactment of the Act. § 1133(d) of the Wilderness Act states that "the grazing of livestock, where it was established prior to the effective date of the Act, shall be permitted to continue subject to such reasonable regulations are deemed necessary by the Secretary of Agriculture." Wilderness Act protection constitutes an "extraordinary circumstance" resource for which the Forest Service is required to conduct an EIS. Thus, if there is substantial evidence of adverse effects to wilderness recreation use in the Big Ridge allotment, the Forest Service must perform a proper EIS or EA.

Drakes Bay Oyster Company v. Jewell, 747 F.3d 1073 (2014)

Background

Oyster farmers (Drakes Bay Oyster Company) sought review of the Secretary of Interior's decision to let a special use permit for oyster farming on the Point Reyes National Seashore expire. The oyster farmers have appealed the District Court's denial of their motion for preliminary injunction to stop the expiration of the permit, which would allow them to keep farming oysters.

The Point Reyes National Seashore was established in 1962 by Congress in order to save and preserve, for purposes of public recreation, benefit, and inspiration, a portion of the diminishing seashore of the United States that remains undeveloped. Point Reyes is home to Drakes Estero, which is a series of estuarial bays. In 1976, Congress used its authority under the Wilderness Act of 1964 to establish the Point Reyes Wilderness Act, which designed certain areas within the Point Reyes Seashore as "wilderness" and "potential wilderness." These wilderness areas in the Point Reyes Wilderness are to be administered for the "use and enjoyment of the American people 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 and the preservation of their wilderness character," pursuant to 16 U.S.C. § 1131(a) of the Wilderness Act of 1964. The Act also provides that, subject to certain statutory exceptions and existing private rights, there "shall be no commercial enterprise . . . within any wilderness area." 16 U.S.C. § 1133(c).

Drakes Estero is a "potential wilderness" area that had not been designated as wilderness by Congress at that time. The decision reflected the Department of the Interior's position that commercial oyster farming operations were taking place in Drakes Estero, as well as California's reserved rights and special use permits relating to the pastoral zone, had rendered the area as inconsistent with wilderness characteristics at the time. Congress specified that this "potential wilderness" designation would become "designated wilderness" by publication in the Federal Register when the current uses in Drakes Bay inconsistent with the Wilderness Act have ceased to continue.

Charles Johnson purchased the oyster farm in Drakes Estero in the 1950's, and was in operation when Congress created the Point Reyes National Seashore in 1972. At that time, Charles Johnson sold his 5-acre oyster farm to the United States, and elected to retain a forty-year reservation of use and occupancy (RUO). The RUO provided that the Secretary may issue a renewed permit upon the expiration of the RUO, which ended on November 30, 2012. Drakes Bay purchased the assets of the Johnson Oyster Company in 2004 with full knowledge of the expiration of the permit and the understanding that it might not be renewed. It is the denial of this renewal that Drakes Bay has appealed from.

Commercial Services Cultural Resources Fish & Wildlife Access

Minerals Motor Vehicle Resource Protection Water Rights

Holding

The Court affirmed the District Court's ruling that denied the motion for a preliminary injunction, and Drakes Bay is now precluded from conducting any commercial oyster farming. Drakes Bay is not entitled to a preliminary injunction because it failed to raise a serious question about the Secretary's decision and failed to show that the balance of equities was in its favor. The District Court reasonably found that the public interest does not weigh in favor of injunctive relief. Drakes Bay knew that the permit was set to expire in 2012, and purchased the assets knowing that the Secretary had the discretion to deny the renewal of the permit.

Key Language

Because Drakes Estero Bay was subject to become designated wilderness upon the expiration of the permit, and commercial oyster farming is inconsistent with wilderness management pursuant to the Wilderness Act of 1964 and to the Point Reyes Wilderness Act of 1972, the Secretary's decision to not renew the permit was acting within her discretion.

Vermonters for a Clean Environment, Inc. v. Madrid, 73 F.Supp.3d 417 (D. Vt. 2014)

Background

Environmental organization and its members brought action pursuant to Administrative Procedure Act alleging United States Forest Service's decision to issue a special use permit for a wind farm in national forest violated NEPA and the Wilderness Act. Plaintiffs oppose the Forest service decision to issue a special use permit to Deerfield Wind, LLC for the occupancy and use of an area of the Green Mountain National Forest in southern Vermont near the George D. Aiken Wilderness where Deerfield Wind plans to construct a wind farm. The seek an injunction prohibiting the Forest Service from issuing a special use permit to Deerfield Wind, LLC or a remand to the Forest Service for further environmental study. Specifically, Plaintiffs fault the Forest Service's consideration of visual and sound impacts of the Deerfield Wind project on the nearby Aiken Wilderness. They argue that if the "mechanical sound" of turbines can be heard within the wilderness, "it will no longer be a wilderness." They also take issue with the siting of the noise monitoring station on the boundary instead of within the Aiken Wilderness itself to obtain a better noise assessment in relation to other traffic and snowmobile noise.

Holding

The court determined that the Forest Service's analysis of the visual and sound impacts of the Deerfield Wind project on the nearby Aiken Wilderness was sufficient under NEPA. The Forest Service also did not violate the Wilderness Act in granting the permit due to noise disturbance in the wilderness area. Given the proximity to the nearest highway and the presence of snowmobiles during the winter season, the Court found a noise level of 32 dB – almost half the decibel level of a conversation – is not degrading to the wilderness characteristics of the George D. Aiken Wilderness. The FEIS and ROD demonstrate the Forest Service thoroughly considered the effect of the Deerfield Wind project on the Aiken Wilderness, concluding the project would not cause undue adverse impacts and therefore would not impermissibly degrade its wilderness characteristics. Defendants thus did not violate NEPA or the Wilderness Act in issuing the special use permit to Deerfield Wind, LLC.

Key Language

In *Izaak Walton League of Am. V. Kimbell*, 516 F.Supp.2d 982 (D.Minn.2007), the court noted "a per se ban on all agency activity having some impact on the adjoining wilderness area would substantially impede [agency] administration of wilderness areas, and could serve to expand the wilderness boundaries beyond the area established by Congress. An agency must take into account the fact that, at some point, the wilderness stops and civilization begins." Accordingly, the key question in deciding whether agency action violates the Wilderness act is whether that action degrades the wilderness character of a designated wilderness area. Factors to consider are: the nature of the agency activity, the existing character of the wilderness area, and the extent to

which the essential, natural characteristics of the wilderness area are changed by the agency activity.

Wilderness Watch, Inc v. Halter, Case No.: 15-CV-3734 PJS/LIB, (D. Minn. May 8, 2017).

Summary

This is a settlement agreement regarding the commercial towboat use in the Boundary Waters Canoe Area Wilderness. The parties have agreed that Defendants (Halter and USFS) will prepare a recreational commercial services needs assessment, as contemplated by 16 USC 1133(d)(5), to determine whether commercial services are necessary in the BWCAW, and if they are, they the extent to which they are necessary. Specifically, the assessment will determine if and to what extent commercial towboats are needed for activities that are proper for realizing the recreational and other wilderness purposes of the BWCAW. This determination will necessarily include ascertaining the current amount of actual towboat use in the BWCSW, and considering whether other opportunities for Wilderness access are sufficient in light of the potential impact of towboat use on Wilderness character. Defendants anticipate that they will complete the recreational commercial services needs assessment within 18-24 months, and agree that they will complete it no later than 30 months from the effective date of the agreement (May of 2017). If the defendants do not complete the recreational commercial needs assessment within 30 months, Plaintiff retains its ability to seek judicial enforcement of this agreement.

Cultural Resources

Wilderness Watch v. Mainella, 375 F.3d 1085, 1087 (11th Cir. 2004)

Background

Plaintiffs sued NPS alleging violation of the Wilderness Act for allowing motor vehicle use within a wilderness area on Cumberland, Island, GA. Specifically, NPS was allowing vans to transport tourists along an existing dirt road in the wilderness to access historic buildings adjacent to the wilderness area. NPS was using the road to access, maintain, and administer the historic sites, but had made a decision to transport tourists in the NPS vehicles being used for site maintenance and administration.

Holding

The court viewed reference to historical use in the Act as referring to natural rather than manmade features given the act's prohibition on structures in wilderness areas. The need to preserve historical structures may not be inferred from the Act and any obligation under NHPA to preserve such structures must be done in a manner consistent with maintenance of the area's wilderness character.

Regarding use of a van to transport tourists and to maintain the structures, the court held that such use of a van cannot be construed as necessary to meet the minimum requirements for administration of the area.

Key language

Cultural

- "We cannot agree with the Park Service that the preservation of historical structures furthers the goals of the Wilderness Act. The Park Service's responsibilities for the historic preservation...derive, not from the Wilderness Act, but rather from the National Historic Preservation Act (NHPA). Given the consistent evocation of 'untrammeled' and 'natural' areas, the previous pairing of 'historical' with 'ecological' and 'geological' features, and the explicit prohibition on structures, the only reasonable reading of 'historical use' in the Wilderness Act refers to natural, rather than man-made features[1]. Of course, Congress may separately provide for the

[1] However, it has not been argued in court that the structures may be part of the "historical value" that is part of wilderness character as defined in § 2(c)(4) of the Act. It is far from clear in the language of the law that such an association is not a reasonable reading of the Act. Legislative history indicates it is. When the Act was first

preservation of an existing historical structure within a wilderness area, as it has done through the NHPA."

- "Any obligation the agency has under the NHPA to preserve these historical structures [in wilderness] must be carried out so as to preserve the 'wilderness character' of the area."

Motorized vehicles

- The statute limits motor vehicle use and transport to what is "necessary to meet minimum requirements for the administration of the area." "The compromise on public transportation reached in this case cannot be squared with the language of the Wilderness Act." "In no ordinary sense of the word can transporting 15 tourists in a van through a wilderness area be considered as necessary to administer the area for the purposes of the Act."

introduced, it specifically enumerated the areas that should be designated first. While this list was later dropped, giving the agencies greater leeway in recommendation, it is important to note the list included Mesa Verde National Park. The portion to be designated would exclude only what was "required for roads, motor trails, buildings, and necessary accommodations for visitors" (S. 4103, 84th Congress). Clearly, the Mesa Verde Wilderness was to include cultural structures, many of which had been -- and were being -- preserved, long before the National Historic Preservation Act was written. It is not reasonable to think Congress intended to designate this area as Wilderness but stop the preservation of these irreplaceable treasures. See also, Crowley et al. 2012. Integrating cultural resources and wilderness character. Park Science 28(3): 29-33,38.

Olympic Park Associates v. Mainella, No. C04-5732FDB, 2005 WL 1871114, at 8 (W.D. Wash. 2005)

Background

In 1988, a portion of Olympic National Park – the Olympic Wilderness area – was formally designated under The Wilderness Act. The 1974 Environmental Impact Statement created in the process of designation allowed for the retention of several pre-existing shelters, including the Home Sweet Home and Low Divide shelters, for health and safety purposes. In addition, the EIS determined that historic properties should not be affected by the wilderness designation, and the two shelters were ultimately placed on the National Historic Register in 2001. However, the two shelters had been damaged by snow loads in 1998, and the Park rebuilt the shelters. After NEPA review involving the creation of the 2004 Environmental Assessment and notice and comment period, the Park determined that transporting the re-built shelters to their historic sites via helicopter would pose no significant environmental impact (FONSI). Plaintiffs then brought suit against the NPS, claiming that it had violated NEPA and THE WILDERNESS ACT with its plan to transport the shelters into the park.

Holdings

- The District Court for the Western District of Washington held that the NPS abused its discretion by planning to airlift rebuilt shelters into the Olympic Wilderness area. The court rejected NPS's reliance on the National Historic Preservation Act (NHPA), 16 U.S.C. § 461, et seq., for two reasons. First, the NHPA does not require rehabilitation or reconstruction of historic structures; therefore, the NPS was under no obligation to rebuild the shelters. Second, the NPS was bound in its administration of the Olympic Wilderness area by The Wilderness Act Section 2(b) (16 U.S.C. § 1133(b)), which provides that an agency must administer a wilderness area to preserve its wilderness character even if it is also administering it for other purposes.
- The court rejected the NPS's argument that the rebuilt shelters belonged in the wilderness area for public health and safety reasons because the court read the emergency exception to apply to matters of "urgent necessity" rather than "conveniences." ("The emergency exception [to the Prohibited Uses in] the Wilderness Act...most logically refers to matters of urgent necessity rather than to conveniences for use in an emergency.") The court also recognized that the shelters had previously been an important part of the uses of Olympic National Park, but it cautioned that the shelters were no longer appropriate since the uses had changed once 95% of the park became designated as a wilderness area.

Key Language

- Specific provisions – When looking at various provisions that govern an issue, statutes are usually constructed such that when there is a specific provision will take precedent over a general provision. Provisions in the Wilderness Act are specific provisions pertaining to the Olympic Wilderness, while provisions within the Historic Preservation Act are general provisions. Therefore, the National Park Service is to administer the Wilderness Act Provisions that pertain to the Olympic Wilderness before the NHPA provisions to the extent that they preserve the wilderness character.
- "Primitive and unconfined" – The Wilderness Act encourages its users to enjoy the wilderness on its own terms, providing that its recreation opportunities remain "primitive and unconfined." This means that the activities retain whatever risks they may contain, such as wildlife and weather conditions. The National Park Service management policies do not provide for any facilities in the wilderness to eliminate any of these risks. Those who enter the wilderness must do so having prepared for whatever the wilderness may bring. Shelters, therefore, are not a necessary facility for wilderness use and management because their protective purpose does not reach the level of an emergency involving the health and safety of persons within the area, but are more of a convenience for use in an emergency.

High Sierra Hikers v. U.S. Forest Serv., 436 F.Supp.2d 1117 (E.D. Cal. 2006)

Background

Several water control structures were built starting in the 1920's to develop fishery projects that had started 30 years earlier when natural, fishless lakes were planted with fish by local cattlemen. In addition, the dams were to "provide downstream benefits to fish habitat, food production, and power production." In the 1950's a major dam outside the Emigrant diminished the downstream importance of the Emigrant dams. The area became part of the Emigrant Wilderness in 1975 (which was enlarged by a second act in 1984); since the late 1980's the dams were operated primarily by the California Department of Fish and Game. Unmaintained, the dams had not been used to manipulate the streamflow since the 1990's. The Forest Service decided to maintain 11 of the 18 dams: 7 were deemed eligible for the National Register; 4 improved reproduction of the fishery, supporting the reduction or elimination of fish stocking; all 11 "are a highly valued cultural connection in the local history" and their refurbishing would be consisted with the MOU between the USFS and CDFG. High Sierra Hikers disagreed, calling the dams "non-conforming" structures not mentioned in either Emigrant Wilderness act. Various interveners on behalf of the Forest Service argued that the State's water rights compelled the Forest Service to repair and maintain the dams.

Holdings

- Plaintiffs' motion for summary judgment on their claim for relief pursuant to 5 U.S.C., section 706(2) to declare Forest Service's decision As reflected in the Report of Decision to repair, maintain and operate the several dam structures in the Emigrant Wilderness unlawful and to set aside same is hereby GRANTED. Defendant's motion for summary judgment on the same issue is correspondingly DENIED.
- Plaintiffs' motion for summary judgment on their claim for relief pursuant to 5 U.S.C.., section 706(1) to declare unlawful Forest Service's decision to not consider or adopt actions that would cause the several dam structures in the Emigrant Wilderness to be physically removed, and to compel Forest Service consider and/or adopt same is hereby DENIED. Defendant's motion for summary judgment, on the same issue is correspondingly GRANTED.
- Plaintiffs' request for injunctive relief is hereby DENIED.
- That portion of Forest Service's Report of Decision that authorizes the repair, maintenance and operation of the several dam structures, in the Emigrant Wilderness is hereby SET ASIDE pursuant to 5 U.S.C., section 706(2). Forest Service may take further action consistent with this memorandum opinion and order.

Key language

Structures

- "While the outcome of the case in *Wilderness Society [v. USFWS]* turned ultimately on the commercial nature of the fish-stocking operation, the present case turns on man-made structures whose presence in a wilderness area are no less at odds with the textual provisions of the Wilderness Act....Both 'commercial enterprises' and 'structures' are prohibited by the same sentence within the Wilderness Act and the only distinction between the two is that 'structures' may be maintained to the extent they may be 'necessary to meet minimum requirements for the administration of the area.' The court does not find...that a structure offends the Wilderness Act any less than a commercial enterprise where that exception clause is not applicable. The Wilderness Act presents no textual basis for the proposition that the prohibition against 'structures or installations', of which the dams in this case are an example, is somehow less compelling than the prohibition against "commercial activity. "
- "If one considers the overall legislative intent of the Wilderness Act to preserve 'area[s] where the earth and its community of life are untrammeled by man,' one must conclude that the sort of commercial activity...in *Wilderness Society* is no more offensive, and perhaps less so, than maintaining dams.] In *Wilderness Society*,...at issue was 'an activity with a benign aim to enhance the catch of fishermen, with little visible detriment to wilderness.'...[Dams are] permanent structures that alter the hydrological scheme of the area and alter the natural distribution of species and habitats."
- "Distinctions such as unobtrusive and harmonious with the natural environment involve subjective judgments....The Wilderness Act's prohibition against structures is categorical so far as this court can determine, allowing only those exceptions that are specifically set forth in the Act or in Congress's designation of a particular wilderness area."
- "The court must conclude the plain and unambiguous text of the Wilderness Act speaks directly to the activity at issue in this case -- repairing, maintaining and operating dam 'structures' -- and prohibits that activity."

Recreational Use

- "While fishing is an activity that is common among visitors to wilderness areas, neither fishing nor any other particular activity is endorsed by the Wilderness Act, nor is the enhancement of any particular recreational potential a necessary duty of wilderness area management. Rather, the...wilderness that the Act seeks to preserve is not defined by reference to any particular recreational opportunity or potential utility, but rather by reference to the land's status or condition as being 'Federal land retaining its primeval character and influence, without permanent improvements or human habitation.'"
- "There is no logical necessity in maintaining, repairing, or operating the dams in order to administer the area for purposes of the Wilderness Act. The area manifested

its wilderness characteristics before the dams were in place and would lose nothing in the way of wilderness values were the dams not present. What would be lost is some

enhancement of a particular use of the area (fishing), but that use, while perhaps popular, is not an integral part of the wilderness nature of that area."

Do different agencies manage wilderness differently?

- "Although [the FS] contend the NPS administers parks for purposes 'different than the Forest Service multiple use objectives,' they offer no authority for the implied contention that application of the Wilderness Act should yield different results under similar factual circumstances where the objectives of the administrating agency are different. The court can find nothing in the Wilderness Act that supports that contention and is aware of no case authority to that effect."

Deference Limit

- "The legal foundations of Forest Service's actions are due no deference because the proposed actions are contrary to the express purposes of the Wilderness Act."

Purpose

- "The Wilderness Act is as close to an outcome-oriented piece of environmental legislation as exists. Unlike NEPA, or the Clean Air or Clean Water Acts, the Wilderness Act emphasizes outcome (wilderness preservation) over procedure."
- "[T]he overall language of subdivision (d) of [U.S.C.] section 1133, along with case authority and Forest Service Policy, imply that 'when there is a conflict between maintaining the primitive character of the area and between any other use [...] the general policy of maintaining the primitive character of the area must be supreme.'"

Commercial Services Cultural Resources Fish & Wildlife Access Minerals Motor Vehicle Resource Protection Water Rights

Wilderness Watch v. IWAMOTO, 853 F.Supp.2d 1063 (W.D. Wash. 2012)

Background

In the years since its construction, Green Mountain lookout has been subject to a series of increasingly elaborate rehabilitation efforts, a principal purpose of which has been to keep the lookout from slipping off the summit. The first major effort occurred in the early 1950s, after heavy snowfall severely damaged the lookout, "twist[ing] the building apart." In the decades following the 1950s reconstruction of Green Mountain lookout, several key pieces of legislation were enacted. One of these was the Wilderness Act of 1964, which provided for the designation of federally-protected wilderness areas. Another was the Washington State Wilderness Act of 1984, Pub.L. 98-339, 98 Stat. 299 (July 3, 1984), pursuant to which Green Mountain lookout became part of a federally designated wilderness area (the Glacier Peak Wilderness Area), and accordingly, subject to the provisions of the Wilderness Act. During this period, Congress also passed the National Historic Preservation Act ("NHPA"), which was designed to promote

preservation of historical and archeological sites in the United States "for the inspiration and benefit of the people of the United States." In 1977, the Forest Service and the State Historic Preservation Officer considered whether the Green Mountain lookout qualified for listing on the National Register. The Forest Service found that the lookout "does not appear to meet the National Register criteria ... [t]he building is associated with important historical events, but it's a reconstruction and is not the last remaining survivor with such an association." The State Historic Preservation Officer concurred with this assessment, finding that the Green Mountain lookout "does not meet National Register Criteria." In May 1998, the Forest Service circulated internally a draft analysis of various courses of action with respect to Green Mountain lookout, including (1) dissembling the lookout and removing it from the wilderness, either by helicopter or by packstock; (2) relocating it to an area outside of wilderness; (3) burning it down; (4) leaving it alone to naturally deteriorate; and (5) stabilizing and repairing it, either with or without motorized equipment. This draft analysis was never made final or public and the Forest Service did not solicit public comment. In September 1998, the Forest Service issued a decision memo detailing its decision to repair the lookout, using a rock drill and a helicopter to transport supplies. The memo anticipated that about 25,000 pounds of material would be transported, resulting in about 8 helicopter trips. In the memo, the Service stated that the special environmental impact documentation required by NEPA was not required with respect to this decision since it fell within a categorical exclusion, namely "repair and maintenance of recreation sites and facilities." The memo did not analyze other alternatives to dealing with the lookout, though it did assert, generally, that "[a] variety of alternatives were considered for this project, including no action and reconstruct [ion] ... without the use of motorized equipment." Pursuant to the Decision Memo, a contractor and volunteers invested hundreds of hours into repairing and stabilizing the lookout. Nevertheless, despite these efforts, by June 2002, the Forest Service discovered that the lookout's foundation had failed on account of heavy snowfall during the prior winter. Forest Service personnel noted the need to take further action urgently or risk losing the lookout entirely during the next winter. After internal discussion, the Forest Service decided to: disassemble the lookout piece by piece; remove it from Green Mountain by helicopter; repair and restore the pieces at a ranger station, salvaging original materials where possible; "repair" the foundation on the peak; and then fly the pieces back in for reassembly on top of the reconstructed foundation in an internal planning document, entitled "Green Mountain Lookout Dismantle, Restoration and Reconstruction Plan 2002-2005." This document did not compare the proposed plan to any alternatives or otherwise analyze the necessity of the chosen course of action. The Forest Service did not solicit public comment on its plan. In or around August 2002, a few months after it had discovered the damage to the lookout's foundation, the Forest Service disassembled the lookout and removed the pieces by helicopter from the wilderness. In 2009, seven years after the lookout was removed from its original location, the Forest Service hired the National Park Service to construct a new foundation for a lookout on Green Mountain. After the foundation was laid, most of the disassembled pieces of the lookout — which had been restored or replaced off-site-were flown to the mountain and reassembled on site. According to Plaintiff, this work involved at least 67 helicopter turns in wilderness, an assertion which the Forest Service does not contest. Around this time, one of the members of Plaintiff Wilderness Watch became aware of the Forest Service's actions with respect to Green

Mountain lookout. In 2010, Plaintiff brought this suit, seeking a declaratory judgment (that the Forest Service's actions violated the Wilderness Act and the National Environmental Policy Act) and an injunction requiring removal of the lookout.

Holdings

- "The Court rejects the notion that the Forest Service had any affirmative obligation to preserve the Green Mountain lookout pursuant to § 110 of the NHPA that must be balanced against its obligations under the Wilderness Act. In fact, there is no conflict between the Wilderness Act and the NHPA here since neither action nor inaction toward the Green Mountain lookout would have placed the Forest Service in violation of the NHPA, for the very reason that the NHPA itself that does not compel any particular outcome."
- "The Court finds that in light of the ambiguity arising out of the Wilderness Act's reference to various uses, deference is due to the Forest Service's interpretation that historical use is a valid goal of the Act. Nevertheless, the Court's analysis does not end here. The Court must go on to determine if the actions of the Forest Service with respect to the lookout were "necessary" to meet the "minimum requirements" for administration of the area for the purpose of historical use."
- "The Court has come to the conclusion that the Forest Service's 2002 decision failed to take proper account of the mandates of the Wilderness Act. It is clear that the Forest Service went to extraordinary lengths to protect a man-made structure from the natural erosive effects of time and weather. The Forest Service went too far. Clearly, there are less extreme measures that could have been adopted, such as relocation of the lookout outside the wilderness area, which would have had less impact on the "wilderness character" of the area but still furthered the goal of historical preservation."

- "The extensive use of helicopters to carry out the Forest Service's reconstruction plan is also concerning. As other courts have observed, machinery as intrusive as a helicopter is rarely "necessary to meet minimum requirements for the administration of the area" since "[h]elicopters carry `man and his works' and so are antithetical to a wilderness experience." "The Forest Service made frequent use of helicopters not to promote wilderness values but rather to further what the Service understands to be a separate purpose of the Wilderness Act, i.e., historic preservation."
- "The Court finds that the Service abused its discretion by not conducting an EIS or EA — or, at a minimum, by not readdressing the issue of whether a category exclusion was applicable — before embarking on its dismantle, restoration, and reconstruction plan."
- "The Court finds that removal of the present lookout structure is the appropriate remedy for the Forest Service's violations of the Wilderness Act and NEPA."

Key Language

- Historical Use: The only meaning of "historical use" within the Wilderness Act refers to natural, rather than man-made, features.
- Cultural Resource Protection (regarding man-made structures in wilderness): land retaining its primitive character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions.
- Wilderness Areas [Section 2(c) of Wilderness Act]: an area of undeveloped Federal land retaining its primeval improvements or human habitation that may also contain ecological, geological or other features of scientific, educational, scenic, or historical value.

Wilderness Watch, Inc. v. Creachbaum, No. C15-5771RBL, 2016 WL 7231433 (W.D. Wash. Dec. 14, 2016)

Background

Plaintiffs, Wilderness Watch, Inc., and defendants, Sarah Creachbaum as the Superintendent of the Olympic National park, are motioning for summary judgment on the issue of whether the Park Service's decision to repair 5 historic structures (Botton Cabin, Canyon Creek Shelter, Wilder Shelter, Bear Camp Shelter, and Elk Lake Shelter) in the Olympic National Park Wilderness under the Administrative Procedure Act was arbitrary and capricious and in violation of the Wilderness Act. Wilderness Watch argues that the Wilderness Act prohibits the Park Service from preventing structures' natural deterioration, and the Park Service argues that the Act allows it to maintain "historically used" structures so long as the preservation work is the minimum necessary. For each cabin, the Park Service used an MRW to conclude the repair work was necessary. It decided the best plan of action as to disallow motorized tools and helicopter trips, and permitted the Canyon Creek crew to use a dolly to transport materials. The Park Service issued a categorical exclusion for each structure, deciding the routine maintenance exemption excused the projects from NEPA review.

Olympic National Park, created in 1938, in addition to including three ecosystems and numerous species of wildlife, also includes an array of cultural and historic sites that provide a glimpse at 200 years of exploration, homesteading, and community development in the Pacific Northwest. 44 of the 128 historic structures are in a wilderness area, and although some represent the activities of the Forest Service and National Park Service, many embody the perseverance of homesteaders and settlers and recreational development in the Peninsula. The five shelters in question are all of cultural and historical significance.

Holding

The Court agreed with the Park Service, and denied Wilderness Watch, Inc.'s motion for summary judgment, therefore allowing the maintenance of the structures to proceed. Although the Wilderness Act strives to preserve the land so that it retains its primeval character and influence, it does not require that an agency forfeit its other management values. *See* 16 U.S.C. §§ 1131(c), 1133(b). Rather, the agency must administer the wilderness in way that preserves the wilderness character but also ensures that the recreational, scenic, scientific, educational, conservation, and historical uses are not forgotten. The Eleventh Circuit has noted that "historical use" refers to former uses of the land, not as a preservation of man's presence. However, wilderness preservation does not mandate a "museum diorama." The Court here deferred to the Park Service's conclusion that historic preservation furthers a goal of the

Wilderness Act, and the Park Service's actions were appropriate if they were the minimum necessary. Because these five structures are historically and culturally significant, they "contain ecological, geological, or other features of scientific, educational, scenic, or historical value" per § 1133(a) and (c), they fall within the Wilderness Act's protection of "recreational, scenic, scientific, educational, conservation, and historical use" purposes under § 1133(b).

Even if the court did disagree with the Park Service's ultimate conclusions, it must defer to the agency decision where the agency took a "hard look" at the proposed action, and it cannot say that the agency acted arbitrarily and capriciously when it determined what tools and teckniques constituted the minimum necessary. Here, the Park Service considered the positive and negative affects of multiple alternatives and selected the option that in its exert opinion would affect wilderness the least. It relied on only factors that Congress intended it to consider, and it evaluated all important aspects of the problem.

The Park Service also correctly applied the routine maintenance categorical exclusion. An agency may adopt a categorical exclusion for a category of actions that "do not individually or cumulatively have a significant affect on the human environment." Specifically, the Park Service applied the exclusion to the Botton Cabin, Wilder Shelter, and Bear Camp Shelter because the roof repair and replacement of logs falls withing the routine maintenance exclusion. The Canyon Creek and Elk Lake structures required replacement of logs, rafter tails, and post ends and chimney flues, which also fell within the routine maintenance category.

Key Language

The Wilderness Act prohibits structures in Olympic National Park's wilderness unless they are the minimum necessary for administering the area in accordance with the Act's purpose. 16 U.S.C. § 1133(c). The Court therefore must determine if historical preservation is unambiguously contrary to the Act, and it if contradicts the Act's mandate to preserve wilderness or frustrates its underlying congressional policy.

The Park Service must engage in a two-part analysis: (1) determine whether the structures are necessary to preserve historic values; and if they are, then (2) determine the minimum amount of work necessary to rehabilitate them, including the use of motorized equipment and transportation.

Minerals Motor Vehicle Resource Protection Water Rights

Fish & Wildlife

Hunt v. U.S., 278 U.S. 96 (1928)

"The power of the United States to...protect its lands and property does not admit of doubt,...the game laws or any other statue of the state to the contrary notwithstanding." The United States had jurisdiction over two government officials who, under the direction of Congress, killed deer

Commercial Services Cultural Resources Fish & Wildlife Access

within the federal reserve to solve the overpopulation issue. The state of Arizona sought to prosecute and enjoin the hunters from killing the deer, but the federal government retained jurisdiction because it was on federal land and ordered by government.

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Kleppe v. New Mexico, 426 U.S. 529, (1976)

“Congress’ complete authority over the public lands includes the power to regulate and protect the wildlife living there....Federal legislation necessarily overrides conflicting state laws under the Supremacy Clause....Where those state laws conflict with...other legislation passed pursuant to the Property Clause, the law is clear: The state laws must recede.”

“Unquestionably the States have broad trustee and police powers over wild animals within their jurisdictions. But...those powers exist only ‘in so far as [their] exercise may not be incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution.’”

The Wild Free-Roaming Horses and Burros Act in this case was a constitutional exercise of congressional power under the property clause, meaning that it correctly prohibited the New Mexico Livestock Board from entering public lands of the United States and removing the wild burros under the New Mexico Estray Law, which was attempting to regulate federally protected animals.

Hughes v. Oklahoma, 441 U.S. 322 (1979)

“Time has revealed the error of the result reached in *Geer [v. Connecticut]* through its application of the 19th century legal fiction of state ownership of wild animals....Geer is today overruled.”

Sierra Club v. Block, 614 F.Supp. 134 (E.D. Tex. 1985)

(Also applies to: Resource Protection)

Background

Environmental interest group sought preliminary injunction to halt all timber cutting in five Texas wilderness areas pending trial in action involving effectiveness of cutting pine trees to control the spread of Southern Pine beetles in such areas. Plaintiffs contend that: the Forest Service did consider in an EIS all of the potentially adverse environmental implications that could result from the control of Southern Pine beetles in what were then RARE II Recommended Wilderness and Further Planning areas; that continued timber cutting to control the Southern Pine beetle infestation will mean the loss of thousands of pine trees in Texas Wilderness Areas for no valid reason; and that this loss of trees is greater than the loss of trees if the Forest Service let the Pine beetles run their course and destroy the pine trees. Specifically, the restrictions on pest control in wilderness areas are more severe than other national forest areas. Because the Southern Pine beetle is a part of nature, it should be allowed to run its course pursuant to the Wilderness Act.

Holding

A preliminary injunction against any type of tree cutting for Pine beetle control could lead to irreparable losses far in excess of those that will occur if the government's cutting program continues. Therefore, the court issued a court-ordered relief, which allowed the Forest Service's control method to continue with some court-ordered adjustments. Plaintiff's affidavits and hearing testimony demonstrated that the defendants are going beyond their own prescribed control policies in at least some beetle control spots, such as cutting down hardwood trees that the beetles do not infest. The court ordered that: 1) all cutting of hardwood trees must cease where absolutely essential to control operations; 2) control activities shall only be exhibited where necessary in the Texas Wilderness Area to protect existing Red Cockaded Woodpecker Colonies or to prevent the spread of Pine beetles to lands bordering the wilderness areas; 3) Pine Trees must be cut a certain way to prevent further infestation; 4) the government must take advantage of naturally occurring buffer zones, such as rivers and roads, that may prove as effective as cutting to obviate Pine beetles; 5) only minimal steps shall be taken to control Southern Pine beetles in Texas Wilderness Areas; and certain other procedural requirements for trial.

Commercial Services Cultural Resources Fish & Wildlife Access

Key Language

Pest control can be examined on a case-by-case basis, and where not controlling the pests has a potentially greater harm than not controlling the pests, minimally sufficient actions may be taken in Wilderness Areas to control such pests.

McDaniel v. U.S., 899 F.Supp. 305 (E.D. Tex. 1995)

Background

Landowners filed suit under Federal Tort Claims Act (FTCA) seeking damages for Forest Service's failure to prevent the spread of southern pine beetle (SPB) infestation onto their property from an adjacent wilderness area, the Indian Mounds Wilderness Area (IMWA). Filing suit under the FTCA requires that a plaintiff allege a duty owned to them by the United States under state law. The Record of Decision supporting alternative four to control pine beetle infestation proposed by the USFS is pursuant to, among other federal laws, the Wilderness Act. Therefore, the chosen alternative must allow the natural process of most SPB infestations to occur uninterrupted in wilderness; thus, by employing control action only under the most stringent conditions, the Forest Service is managing each wilderness to insure that wilderness character and values are dominant and enduring. Alternative four permits, but does not require, the control the SPB infestations only when they cause unacceptable damage to specific resources adjacent to the wilderness.

Holding

Although the landowners alleged a sufficient duty owed to them under state law to maintain the FTCA claim by alleging that the Forest Service violated a duty under the Texas Pest Control Act to control forest pests on land owned by it or under its direction, the proposed alternative issued by the Forest Service was not issued until after the damage had already occurred to plaintiff's property. Additionally, the discretionary exclusion under FTCA precluded the claim in light of the fact that the Forest Service policy at the time required consideration of numerous factors before deciding whether and how to control infestation.

Forest Guardians v. Animal & Plant Health Inspection Serv., et. al., No. CV 99-61-TUC-WDB, 2000 WL 34510092 (Nov. 14, 2000); Forest Guardians v. Animal & Plant Health Inspection Serv., 309 F.3d 1141 (9th Cir. 2002)

Background

In 1984, Congress designated an area of the Coronado National Forest in Arizona as the Santa Teresa Wilderness. *See* Arizona Wilderness Act of 1984, Pub.L. No. 98-406, § 101(a)(23), 98 Stat. 1485. In May 1997, the Regional Forester delegated authority to APHIS to perform

predator control in wilderness areas, including the Santa Teresa Wilderness, to "prevent serious losses of domestic livestock." The Regional Forester defined "serious loss" as "a determination made by APHIS or State Game and Fish after investigations, historical evidence and patterns of loss show the habitual nature of kills." APHIS killed six mountain lions between July 18, 1997, and March 22, 1999, at the request of a rancher who grazed cattle within the Santa Teresa Wilderness. A coalition of conservation organizations and one individual ("Forest Guardians") sought to enjoin this practice on the ground that it violates the Wilderness Act. Forest Guardians also claimed that APHIS and the Forest Service failed to conduct adequate environmental studies — as required by the National Environmental Policy Act ("NEPA") — before deciding to kill the mountain lions.

Holding

The Circuit Court affirmed the District Court's decision, which ruled that NEPA was not violated when the Forest Service elected to kill mountain lions within the Santa Teresa Wilderness.

Key language

“The district court did not err in concluding that the Forest Service may authorize APHIS to perform lethal predator control of mountain lions in the Santa Teresa Wilderness in order to protect private livestock. Nor did it err by allowing predator control in areas where it had not been used in the past. The Wilderness Act of 1964 and the Arizona Wilderness Act of 1984 do not expressly prohibit predator control in wilderness areas. 16 U.S.C. §§ 1131-1136; Arizona Wilderness Act § 101(a)(23), (f)(1); H.R.Rep. No. 96-617, at 10-13 (1979). They do, however, allow pre-existing grazing operations to continue in areas later designated as wilderness. *See* Arizona Wilderness Act § 101(f)(1). We agree with the Forest Service that ‘private livestock grazing implicitly includes operations to support that grazing, such as lethal control of predators.’” “We therefore defer to the Forest Service's conclusion that the Act authorizes predator control as one of the "flexible opportunities to manage grazing in a creative and realistic site specific fashion."

Nat'l Audubon Soc'y v. Davis, 307 F.3d 835 (9th Cir. 2002)

"Because National Wildlife Refuges are federal government land, Congress has the authority under the Property Clause to preempt state action with respect to NWR management and has done so through the National Wildlife Refuge System Improvement Act. We therefore hold that the NWRSIA preempts [the state of California's] regulation of federal trapping on NWRs in California because the ban on leg hold traps conflicts with FWS's statutory authority on those federal reserves."

Wyoming v. U.S., 279 F.3d 1214 (10th Cir. 2002)

"Historically, States have possessed "broad trustee and police powers over the...wildlife within their borders, including...wildlife found on Federal lands within a State." 43 C.F.R. § 24.3 (policy statement of the USDI). But those powers are not constitutionally-based."

"State jurisdiction over federal land does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use, and to prescribe in what manner others may acquire rights in them."

"Federal legislation, together with the policies and objectives encompassed therein, necessarily override and preempt conflicting state laws, policies, and objectives under the Constitution's Supremacy Clause."

"In view of [*Kleppe*], we believe the point painfully apparent that the Tenth Amendment does not reserve to the State of Wyoming the right to manage wildlife."

"The National Wildlife Refuge System Improvement Act (NWRSIA) concludes with an opaque provision termed 'State authority: Nothing in this Act shall be construed as affecting the authority, jurisdiction, or responsibility of the several states to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System.'...Viewed in isolation,[this] seems to support [the State's contention] that...the State retains the absolute right to manage wildlife on the [Refuge]....Such an interpretation of the saving clause, however, simply is not feasible in light of established rules of construction requiring us to consider the NWRSIA in its entirety, mindful of congressional purposes and objectives....By establishing a system 'to administer a national network of lands and waters...' Congress undoubtedly intended a preeminent federal role....If we construed the NWRSIA to grant the State of Wyoming the sweeping power it claims, the State would be free to manage and regulate the [Refuge] in a manner the FWS deemed incompatible with the [Refuge's] purpose....We find highly unlikely the proposition that Congress would carefully craft the substantive provisions of the [law] to grant authority to the FWS to manage the [Refuge] and promulgate regulations thereunder, and then essentially nullify those provisions and regulations with a single sentence."

Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051 (9th Cir. 2003), amended by 360 F.3d 1374 (9th Cir. 2004)

(Also applies to: Commercial Services)

Commercial Services Cultural Resources Fish & Wildlife Access
Minerals Motor Vehicle Resource Protection Water Rights

Background

In 1975, the Alaska Fish & Game Department (AFGD) started a sockeye salmon project in Tustumena Lake on Kenai National Moose Range. They would collect eggs from a tributary, incubate the eggs at a hatchery (outside of the refuge), and return the eggs to the lake. In 1980, ANILCA made the Range a NWR, and designated 1,354,000 acres of wilderness on the refuge. The salmon project (now occurring in designated wilderness) was allowed to continue as a research project. An MOU between the refuge and AFGD allowed them to obtain a Special Use Permit for a temporary camp each year, with 10 million eggs collected and 6 million fry stocked into Tustumena Lake to study the effect of stocking on native lake fish and on disease incidence. In 1993, ADFG entered into a contract with Cook Inlet Aquaculture Association (CIAA), a private, non-profit corporation "comprised of associations representative of commercial fishermen in the region" as well as "other user groups interested in fisheries within the region" "organized for the purpose of engaging in salmon enhancement work throughout the Cook Inlet Region," to staff and run the salmon hatchery program. The refuge completed an Environmental Assessment and a Compatibility Determination, both of which allowed the salmon project to continue. Since 1987, about 6 million fry have been released annually
In 1999 the Wilderness Society and the Alaska Center for the Environment sued the FWS for violation of the Wilderness Act and the NWRSAA of 1966.

Holdings

- The district court concluded that designated wilderness is not off limits to all human interference and thus, FWS had discretion in managing the area to preserve its natural conditions, including authorizing the stocking project. The District Court found that the Enhancement Project was not a commercial enterprise that Congress prohibited within the designated wilderness.
- On appeal, the Ninth Circuit reversed. "We conclude that the district court erred in finding that the Enhancement Project is not a "commercial enterprise" that Congress prohibited within the designated wilderness. We reverse and remand so that the final decision of the USFWS may be set aside, the Enhancement Project enjoined, and judgment entered for Plaintiffs."

Amended in 2004

"On remand, the scope of immediate injunctive relief is submitted to the discretion of the District Court. The District Court shall have discretion, upon an adequate showing of justification, to fashion the injunction so as to accommodate a resolution with respect to this year's batch, and this year's batch only, of six million sockeye salmon fry from Bear Creek that are currently in the CIAA's Trail Lakes hatchery. *See Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 740 (9th Cir.2001).

Key language

The court noted of THE WILDERNESS ACT that, "there shall be no commercial enterprise ... within any wilderness area." 16 U.S.C. § 1133(c). The court used the plain meaning of "commercial" as "occupied with or engaged in commerce or work intended for commerce; of or relating to commerce." *Wilderness Society v. U.S. Fish & Wildlife Service*, 353 F.3d at 1061. The project was designed primarily to promote the commercial interests of fishing interests in the Cook Inlet, not wilderness values. The court held that the project constituted a commercial enterprise prohibited by THE WILDERNESS ACT. THE WILDERNESS ACT requires that the lands and waters duly designated as wilderness must be left untouched, untrammeled, and unaltered by commerce. "Congress spoke clearly to preclude commercial enterprise...regardless of whether it is aimed at assisting the economy with minimal intrusion on wilderness values." "Even non-profit entities may engage in commercial activity."

Key lessons

- Both the purpose and the effect of challenged activities may be reviewed in determining whether an activity constitutes prohibited commercial enterprise.
- Even if there is only minimal intrusion on the wilderness area, activities which are pursued for the purposes of a commercial enterprise are prohibited by THE WILDERNESS ACT.
- A fish stocking program in a wilderness area constituted a prohibited activity intended for commercial use even when the actual collection of the salmon would occur outside of the wilderness area.

Cal. Wilderness Coalition, et al., 176 IBLA 93, (2008)

Background

This is an appeal from a Decision Record and Finding of No Significant Impact approved by the Field Manager, Needles (California) Field Office, Bureau of Land Management, authorizing a subterranean artificial water source (AWS, catchment, drinker, or guzzler) for desert bighorn sheep within the Sheephole Valley Wilderness. Appellants assert that installation of the guzzler would violate the intent of the Wilderness Act to preserve wilderness areas as being "untrammeled by man" and the CDPA to inhibit human inference in areas designated as wilderness, and that the project is unnecessary for preservation of endemic bighorn sheep population.

Holding

The finding of No Significant Impact by the Field Manager is affirmed. While appellants fundamentally disagree with BLM's premise that the persistence of bighorn sheep cannot be assured without supplemental artificial water sources, they have not demonstrated that construction and operation of the fixture as designed in the DR and supporting documents will

permanently impair the unique wilderness character of the landscape. Since the purposes of the project are to increase the distribution and dispersal of the sheep throughout the Sheep Hole Mountains, enhance population stability across ranges, and sustain viable population demographic parameters, the project is consistent with the goals of the Wilderness Act. BLM is correct in saying that "the survival and human sightings of desert bighorn sheep are important supplemental wilderness values. Desert bighorn sheep have played an intricate role in the lives of ancient people, based upon their numerous representations in Native American rock art. Today's wilderness experience is enhanced by viewing bighorn sheep. . . The proposed action has been determined to meet BLM guidelines for the minimum necessary requirement to administer the wilderness because the persistence of bighorn sheep cannot be assured without the supplemental water." Although the construction and maintenance of these water sources would impair wilderness naturalness and solitude during the initial construction, the actual guzzlers once in place would maintain a low visible profile underground. This, along with the remote location, would allow the landscape to retain its natural and unaltered–by–human–activity condition after the impacts associated with initial constructed have faded.

Key Language

"Notwithstanding the definition of wilderness as an area "untrammeled by man," 16 U.S.C. § 1131(c) (2000), the Wilderness Act does not prohibit active management of wilderness areas. Rather, it charges managing agencies with preserving their "wilderness character," while at the same time administering them for "such other purposes for which they may have been established." 16 U.S.C. § 1133(b) (2000). In furtherance of preserving wilderness character, it generally prohibits commercial enterprise, permanent roads, motorized equipment, mechanical transport, and structures and installations within wilderness areas, but expressly recognizes that otherwise prohibited activities may be "necessary to meet minimum requirements for the administration of the area for the purpose of this chapter." 16 U.S.C. § 1133(c) (2000). It also contemplates that wilderness areas may be used for multiple public purposes not solely devoted to wilderness character: "except as otherwise provided in this chapter, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use." 16 U.S.C. § 1133(b) (2000)."

Wilderness Watch v. U.S. Fish & Wildlife Serv., 629 F. 3d 1024, 1039 (9th Cir. 2010)

(Also applies to: Resource Protection)

Background

The Kofa National Wildlife Refuge and Wilderness in southwest Arizona contains a desert ecosystem that is home to, among other species, bighorn sheep. After an unexpected decline in the population of the sheep, the United States Fish and Wildlife Service ("Service") built two water structures (the Yaqui and McPherson tanks) within the wilderness area. Plaintiffs Wilderness Watch, Inc., Arizona Wilderness Coalition, Grand Canyon Wildlands Council, Western Watersheds Project, and Grand Canyon Chapter of the Sierra Club brought suit against the Service. Plaintiffs allege that the Service's actions violated the express prohibition on the development of structures in the Wilderness Act, 16 U.S.C. §§ 1131-1133.

Holding

The district court granted summary judgment to the Service, and Plaintiffs timely appeal. Reviewing de novo, *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 638 (9th Cir. 2004), we reverse and remand.

Key language

- "But a *generic* finding of necessity does not suffice...; the Service must make a finding that the structures are "necessary" to meet the minimum requirements for the administration of the area" (emphasis in original).
- "...many other strategies could have met the goal of conservation without having to construct additional structures within the wilderness area (for example, eliminating hunting, stopping translocations of sheep, and ending predation by mountain lions)...[as well as] temporary trail closures. Importantly, in contrast to the creation of new structures within the wilderness, the Wilderness Act does not prohibit any of those actions....Indeed, the [FWS's] report concluded that "[n]ew water developments can likely be constructed outside of wilderness," which would not require a finding of necessity."
- "Unless the Act's "minimum requirements" provision is empty, the Service must, at the very least, *explain* why addressing one variable is more important than addressing the other variables and must *explain* why addressing that one variable is even necessary at all, given that addressing the others could fix the problem just as well or better" (emphasis in original).

Commercial Services | Cultural Resources | Fish & Wildlife | Access | Minerals | Motor Vehicle | Resource Protection | Water Rights

Follow-up

Following the December 2010 Ninth Circuit decision, several hunting-related groups, including the National Rifle Association and Safari Club International, intervened in support of the FWS. The groups submitted a petition to the Ninth Circuit Court asking for a rehearing en banc. In March 2011 their petition was denied.

Wolf Recovery Found. v. U.S. Forest Serv., 692 F. Supp. 2d 1264 (D. Idaho 2010)

(Also applies to: Motor Vehicle Trespass)

Background

In 1978, the gray wolf was declared to be an endangered species under the Endangered Species Act (ESA). In an attempt to reintroduce the wolf to the Rocky Mountain area, the Fish and Wildlife Service released 35 gray wolves into the Frank Church Wilderness in 1995 and 1996. As the reintroduction became successful, and wolf numbers grew, the Idaho Legislature approved a Wolf Conservation and Management Plan in 2002. It states that "[m]onitoring wolf populations is the cornerstone of a management program." Tasked with managing the wolf population, the Idaho Fish and Game Commission prepared a Wolf Population Management Plan for the years 2008 to 2012 with the goal of "ensur[ing] the long-term viability of the gray wolf population." In 2009 the gray wolf was taken off the ESA endangered species list in Idaho. Both the ESA and the Wolf Population Management Plan required Idaho to monitor wolves for 5 years after delisting. To fulfill these duties, the Idaho Department of Fish and Game (IDFG) requested authorization from the Forest Service to use helicopters to dart and collar wolves in the Frank Church Wilderness. The Forest Service proposed to issue a special use permit to the IDFG for this purpose and took public comments. The Forest Service then issued a Decision Memorandum finding that the permit would issue and explaining its decision as follows:

Because of the importance of wolf recovery to enhancement of wilderness character, the high public interest in the recovery of wolves and the desire for knowledge about wolves in central Idaho, it is important that IDFG obtain accurate wolf population data for central Idaho wilderness. In issuing the special use permit, the Forest Service did not prepare an Environmental Assessment or other NEPA analysis, but instead relied on two categorical exclusions. The first was established by the Secretary of Agriculture for "[i]nventories, research activities, and studies, such as resource inventories and routine data collection when such actions are clearly limited in context and intensity." *See* 7 C.F.R. § 1b.3(a)(3). The second was from the Forest Service's own regulation providing a categorical exclusion for "[a]pproval, modification, or continuation of minor special uses of [National Forest System] lands that require less than five contiguous acres of land." *See* 36 C.F.R. § 220.6(e)(3). Plaintiffs seek to enjoin the Forest Service from using helicopters in the Frank 1266*1266 Church Wilderness to dart and collar wolves. Plaintiffs claim that the use of aircraft violates NEPA and the Wilderness Act.

Wilderness Act Holding

“Helicopters carry "man and his works" and so are antithetical to a wilderness experience. It would be a rare case where machinery as intrusive as a helicopter could pass the test of being "necessary to meet minimum requirements for the administration of the area. However, this case may present that most rare of circumstances. Here, the helicopters are used to collect data on wolves. The wolves were released in the Frank Church Wilderness to restore the area's

wilderness character. Currently, there is a "lack of data . . . on denning sites, wolf movement patterns and distribution, rendezvous sites, numbers of packs and breeding pairs, and other behavior patterns . . . ." *AR 008566*. Of the 14 or so wolf packs in the Frank Church Wilderness, 8 to 10 have no wolves with radio collars. That data gap is specifically why the helicopters are being used. Their use will be limited to a two-week period, during which the IDFG is already flying to conduct its annual big game survey, and only 20 landings are authorized. The Court is faced with a very unique circumstance here. It was man who wiped out the wolf from this area. Now man is attempting to restore the wilderness character of the area by returning the wolf. As the numbers have grown, and delisting occurred, the goal is no longer simply restoration but now focuses on long-term viability and a balance among prey and predator. The collaring project and its use of helicopters is sufficiently limited and focused on restoring the wilderness character of the area that it falls within the phrase "necessary to meet minimum requirements for the administration of the area." *See* 16 U.S.C. § 1133(c).

NEPA Holding

“Clearly the use of helicopters in a wilderness area is highly intrusive and controversial, and must be deemed "intense" as that term is defined above. And yet, at the same time, it appears to be properly "limited" so that it falls within the terms of the categorical exclusion. The fly-overs are restricted to 20 landings over a two-week period during which fly-overs for the annual big game survey will occur. This would be a much different case if the collaring operation was being done at a different time than the big game survey fly-overs.”

Additional Key Points Made by the Court

“The plaintiffs described their version of the Forest Service's argument: "We must destroy the wilderness in order to save it." Plaintiffs make a telling point here. The Frank Church Wilderness must "retain its primeval character and influence" and provide "outstanding opportunities for solitude." *See* 16 U.S.C. § 1131(c). A helicopter ruins these opportunities. At the same time, the helicopter can be necessary to restoring the wilderness character of the area.

This is a conundrum, and its answer depends on the vision of the Wilderness Act. That Act could have directed that the area remain entirely wild and unmanaged, but it did not take that path. Instead, the Act contemplates some management "necessary to meet minimum requirements for the administration of the area." The Court finds above that the proposed activity meets this definition.

1270*1270 *“Still, the Court shares plaintiffs' concerns that this decision could be interpreted wrongly as a stamp of approval on helicopter use. It is not for two reasons. First, the decision is limited by its facts: This proposed activity is designed to aid the restoration of a specific aspect of the wilderness character of the Frank Church Wilderness that had earlier been destroyed by man. The use of helicopters for any other purpose would be extremely difficult to justify under*

the Wilderness Act, NEPA, or any categorical exclusion. Second, the next helicopter proposal in the Frank Church Wilderness will face a daunting review because it will add to the disruption and intrusion of this collaring project. The Forest Service must proceed very cautiously here

because the law is not on their side if they intend to proceed with further helicopter projects in the Frank Church Wilderness. The Court is free to examine the cumulative impacts of the projects, and the context of the use. Given that this project is allowed to proceed, the next project will be extraordinarily difficult to justify." (emphasis added)

Commercial Services | Cultural Resources | Fish & Wildlife | Access | Minerals | Motor Vehicle | Resource Protection | Water Rights

Maughan v. Vilsack, No. 4:14-CV-0007-EJL, 2014 WL 295256 (D. Idaho Jan. 27, 2014)

Background

Plaintiffs are individuals and organizations interested in conservation and preservation of the wilderness character of the Frank Church-River of No Return Wilderness in Idaho. Defendants are the relevant state and federal individuals and agencies responsible for managing the Frank Church Wilderness. Plaintiffs have brought this action under the APA against the Defendants alleging the IDFG's program for "wolf extermination" (the Program) is unlawful under NFMA and the Wilderness Act, among others. The conduct challenged in this action is IDFG's hiring of a hunter-trapper in mid-December of 2013 to completely eradicate two of the resident wolf packs in the Frank Church Wilderness. On the Wilderness Act claim, Plaintiffs assert the Defendants have failed its statutory and management duties to preserve the wilderness character of the Frank Church Wilderness and to protect the resident wildlife that contribute to that character and to follow its own process for reviewing proposals to remove "problem animals" from the wilderness. Specifically, Plaintiffs change the USFS' authorization allowing the IDFG to utilize the USFS' cabin and airstrip for purposes of carrying out the Program. Plaintiffs seek an injunction to protect the wolves from further extermination. Plaintiffs claim they are suffering an ongoing, irreparable injury from the Program because it impairs the wilderness character of the Frank Church Wilderness. Plaintiffs argue that the wolf packs are an intrinsic attribute of the wilderness character of the Big Creek/Middle Fork area of the Frank Church Wilderness, and represent that so far the hunter has killed at least seven wolves and will likely kill the remaining wolves in the packs before the Plaintiff's claims are resolved. Further, Plaintiffs assert that the Defendant's failure to review the program prior to its implementation deprives them of the procedural protections afforded by NEPA.

Holding

No final agency action has been taken in regards to the Wilderness Act. From the current record, it appears the USFS has not yet determined whether or not IDFG's activities at issue here are in conflict with other resource use or wilderness values. The Court can therefore not issue a ruling as to the Wilderness Act claim. As it pertains to Plaintiff's request for injunctive relief, the Court found that the growth of the wolf population since their reintroduction into Idaho and the number of wolves presently living in Idaho cuts against a finding of a irreparable injury to the Plaintiffs. The evidence in the current record shows that the IDFG program for hunting wolves will not result in the loss of the species as a whole. Further, for the reasons stated above as to the substance of the claims, it does not appear that Plaintiffs have suffered an irreparable injury due to the defendants' failure to undertake any mandatory environmental review. As such, the Court did not find that irreparable injury is likely if there is not an injunction.

Key Language

A ruling on a Wilderness Act violation requires that the agency took a “final agency action.”

CALIFORNIANS FOR ALTERNATIVES v. U.S. Fish & Wildlife Serv., 814 F. Supp. 2d 992 (E.D. Cal. 2011)

Background

The USFWS, the CDFG and the USFS (sometimes collectively, the "Agencies") have proposed the Paiute Cutthroat Trout (PCT) Restoration Project which would require using rotenone to poison eleven miles of Silver King Creek to eradicate non-PCT and then stock this area with pure PCT from established populations in the upper portions of the watershed. Silver King Creek is within the Carson-Iceberg Wilderness of the Humboldt-Toiyabe National Forest in California's Sierra Nevada Mountains. The eleven-mile project area includes a six-mile stretch of the mainstream of the river downstream of Llewellyn Falls to Silver King Canyon, sometimes referred to as lower Silver King Creek, and five miles of tributaries. Currently six populations of PCT inhabit eleven and one-half miles of Silver King Creek, including above Llewellyn Falls. In 2010, the Agencies published the EIR/EIS for the Project at issue in this case. The EIR/EIS analyzes three alternatives: the No Action Alternative ("Alternative One"); the Proposed Action Alternative ("Alternative Two"); and the Combined Physical Removal Alternative ("Alternative Three"). Alternative One continues current management of existing PCT populations in Silver King Creek, without introducing new populations or efforts to eradicate non-native trout; the EIR/EIS concluded that this alternative would not result in direct environmental benefits. On May 20, 2010, both the USFS and the USFWS issued Records of Decision ("ROD") adopting Alternative Two, the Proposed Action Alternative. The Forest Supervisor explained that she chose Alternative Two over Alternative Three because the CDFG and the USFWS had determined that the application of rotenone to Silver King Creek was "the most effective method to remove non-native trout within PCT historic habitat." As the representative of the agency mandated to manage lands protected under the Wilderness Act, the Forest Supervisor concluded that "the short term negative effects to the `natural' Wilderness character through introduction of a chemical pesticide were balanced by the improved long term natural conditions of Wilderness character through restoration of a native species." On June 15, 2010, plaintiffs filed this case. By their instant motion for summary judgment, plaintiffs seek an order for declaratory and injunctive relief. Specifically, plaintiffs ask the court to find a violation of NEPA and/or the Wilderness Act and enjoin implementation of the Proposed Action Alternative under the EIR/EIS. Defendants oppose plaintiffs' motion and cross-move for summary judgment.

Holdings

- “Plaintiffs' motion for summary judgment is GRANTED in part and DENIED in part. Plaintiffs have not demonstrated a violation of NEPA and therefore, their motion on that claim is DENIED. However, plaintiffs have shown a violation of the Wilderness Act

because in choosing one competing value (the conservation of the PCT) over the other (preservation of the wilderness character), the Agencies left native invertebrates species

out of the balance, and thus improperly concluded that authorization of motorized equipment will comply with the Act by achieving the purpose of preserving wilderness character. Having shown a violation of the Wilderness Act, plaintiffs are entitled to a permanent injunction, enjoining implementation of the Paiute Cutthroat Trout Restoration Project because: (1) through the expert declaration of Nancy Erman, they have demonstrated that the rotenone treatment will kill sensitive macroinvertebrate species and that recolonization will not occur for some species because they cannot adapt to the Project area habitat; (2) the balance of equities tips in their favor as no exigency exists to begin the Project now; and (3) the public interest favors preservation of the unimpaired wilderness." ○ The use of motorized vehicles to conduct the PCT Restoration project is a violation of the prohibition of motorized vehicles in wilderness areas because the agency did not show that it was the only necessary action as opposed to other alternatives that could have met the goal of conserving the target species.

- "Accordingly, IT IS HEREBY ORDERED that defendants, and each of them, and their respective agents, partners, employees, contractors, assignees, successors, representatives, permittees and all persons acting under authority from, in concert with, or for them in any capacity, including in a volunteer capacity, are enjoined from allowing to be conducted or conducting any component of the Paiute Cutthroat Trout Restoration Project, including specifically any application of rotenone formulations and potassium permanganate to Silver King Creek and its tributaries in the Carson-Iceberg Wilderness in Alpine County, California. Defendants' cross-motion is accordingly DENIED with respect to plaintiffs' Wilderness Act claim."

Key Language

- "Competing values" – "The Ninth Circuit has emphasized that if complying with the Act on one factor impedes progress towards another in the Act, the Forest Service must determine the most important value and then justify their decision to implement that value when deciding whether the extent of the project is necessary. This process involves both a comparative and qualitative analysis where the values are considered in relation to one another and the interests at stake are weighed." The Forest Service failed to do so in this case.

CALIFORNIANS FOR ALTERNATIVES v. U.S. Fish & Wildlife Serv., 814 F. Supp. 2d 992 (E.D. Cal. 2013)

Background

See the case summary above for the background to this case. This is an order to dissolve the injunction placed on the defendants in that case.

Holding

"Defendants move to dissolve the permanent injunction issued on September 6, 2011, which enjoined Defendants from "implementation of the Paiute Cutthroat Trout Restoration Project," based on the finding that Defendants violated the Wilderness Act of 1964, 16 U.S.C. § 1133(c), by "failing to consider the potential extinction of native invertebrate species as a factor relevant to the decision of whether the extent of the [use of prohibited motorized equipment] was necessary." Cal. For Alts. to Toxics v. U.S. Fish & Wildlife Serv., 814 F. Supp. 2d 992, 1024, 1019 (E.D. Cal. 2011). Plaintiffs have filed a statement of nonopposition in response to the motion. Defendants explain in their motion that since this injunction issued, Defendants have issued a revised Minimum Requirements Decision Guide that addresses what should have been considered. Defendants' unopposed motion reveals that Defendants have met the requirements of Federal Rule of Civil Procedure 60(b)(5) for relief from a final judgment by showing that the injunction should be dissolved. Therefore, Defendants' motion is granted, and the injunction is dissolved.

Dated: May 13, 2013"

Access

St. of Minnesota Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981)

(Also applies to: Motor Vehicle)

Background

The State of Minnesota, joined by the National Association of Property Owners (NAPO) and numerous individuals, businesses, and organizations brought suit against the United States, challenging the constitutionality of the BWCAW Act as applied to lands and waters that the federal government does not own. A group of organizations concerned with the environmental and wilderness aspects of the boundary waters intervened in support of the United States. The challenged portion of the statute, section 4, prohibits the use of motorboats in the BWCAW in all but a small number of lakes. The Act also limits snowmobiles to two routes. The United States owns ninety percent of the land within the borders of the BWCAW area. The State of Minnesota, in addition to owning most of the remaining ten percent of the land, owns the beds of all the lakes and rivers within the BWCAW. Appellants assert that Congress had no power to enact the motor vehicle restriction as applied to nonfederal lands and waters.

Holding

“We reject this contention and conclude that Congress, in passing this legislation, acted within its authority under the property clause of the United States Constitution and that such action did not contravene the tenth amendment of the Constitution. Accordingly, we affirm.”

Key language

“Having established that Congress may regulate conduct off federal land that interferes with the designated purpose of that land, we must determine whether Congress acted within this power in restricting the use of motorboats and other motor vehicles in the BWCAW. In reviewing the appropriateness of particular regulations, "we must remain mindful that, while courts must eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress." Kleppe v. New Mexico, supra, 426 U.S. at 536, 96 S.Ct. at 2290. Accord, United States v. San Francisco, 310 U.S. 16, 29-30, 60 S.Ct. 749, 756, 84 L.Ed. 1050 (1940); United States v. Brown, supra, 552 F.2d at 822. Thus, if Congress enacted the motorized use restrictions to protect the fundamental purpose for which the BWCAW had been reserved, and if the restrictions in section 4 reasonably relate to that end, we must conclude that Congress acted within its constitutional prerogative.”

Zumwalt v. U.S., 712 F.Supp. 1506 (D. Kan. 1989)

Background

Hiker brought suit to recover for personal injuries sustained when he fell while visiting the Pinnacles National Monument in California located in a wilderness area. Plaintiff injured himself in the Balconies Caves located on a two-mile segment of the Monument's 35 miles of trails called the Balconies Trails. The trail was marked with twenty markers that were only numbers corresponding a point of scenic interest described in a NPS pamphlet, which also warned about the cave section of the trail. Plaintiff fell near Marker 13, which was without a handrail and unmarked, aside from a sign by the entrance indicating the need for flashlights. Plaintiff alleges the defendant negligently maintained, managed, controlled, operated and inspected the Monument.

Holding

The alleged negligence of the National Park Service in marking the trail fell within the discretionary function exception of the Federal Tort Claims Act. The discretionary function exception is applicable via the Wilderness Act's "minimum tool" policy, which allows for the placement of signs where they are necessary for visitor safety, management, or resource protection.

Key Language

Congress called upon various respective agencies (in this case, the National Park Service (NPS)) to administer wilderness areas in a manner that would preserve their wilderness character pursuant to the Wilderness Act. The mission of the NPS, set forth in 16 U.S.C. § 1, confers broad discretion to the NPS to promote and regulate the parks and monuments so as to preserve the natural scenery and wildlife for the present and future generations. Visitors are informed that they must accept and enjoy the wilderness largely on its own terms, meaning that "modern conveniences are not provided for the comfort of the visitor; and the risks of wilderness travel, of possible dangers from accidents, wildlife, and natural phenomena must be accepted as part of the wilderness experience." Management actions in the wilderness cave area would be kept to a minimum due to the "minimum tool" policy, which states that the service must use the minimum too necessary to successfully, safely and economically accomplish its management objectives.

Williams and Brown, 124 IBLA 7 (1992)

Commercial Services Cultural Resources Fish & Wildlife Access
Minerals Motor Vehicle Resource Protection Water Rights

Background

Williams and Brown held a parcel of private land inside the Big Butte addition to the Yolla Bolly – Middle Eel Wilderness. The BLM offered a lease on the existing road accessing their property which "contained major restrictions on the use and enjoyment of the roads," including prohibiting traffic "during periods of 'wet road conditions,' i.e., when tires would leave ruts in excess of 1-1/2 inches." Williams and Brown argued the lease was improper as they had used the road prior to the enactment of the Wilderness Act; the use restrictions were discriminatory; and, in any event, the rental fee assessed was too high.

Holdings

- Granting an access to the inholding located within wilderness area while restricting the use and enjoyment and requiring a reasonable annual fee of $700 was a permissible balance between the access rights in section 5(a) and the wilderness preservation requirements in 4(b). Plaintiffs lose.
- "When Congress…guaranteed the right of reasonable access to owners of private inholdings, it did not mandate that the access was to be unrestricted.…If BLM grants reasonable access to private inholdings, it is entitled to limit that access to preserve the wilderness character of the land."
- "Williams and Brown object to the lease, but there is nothing in section 5(a) of the Wilderness Act or section 1323(b) of ANILCA that either precludes BLM from granting access through the use of a lease or requires the use of some other mechanism, such as a special-use permit."
- The restrictive terms of the lease were upheld, but "the appraisal [setting the rental fee for the lease] should have considered the reduced value of the right-of-way resulting from the imposition of these stringent restrictions."

Key Language

- "Reasonable use and enjoyment need not necessarily require the highest degree of access, but could be some lesser degree of reasonable access." Congress did not intend for the right of reasonable access to owners in the Wilderness Act to be completely unrestricted; rather, the BLM is only required to construct "routes and modes of travel which will result in impacts of least duration and degree on wilderness characteristics while serving the reasonable purposes for which the lands are held or used." ○ Therefore, the extent of the reasonable access to private inholdings that is expressly granted in section 5(a) is limited by section 4(b) of the Wilderness Act to preserve the wilderness character.

Clouser v. Espy, 42 F.3d. 1522 (9th Cir. 1994)

(Also applies to: Minerals)

Background

Clouser owned an unpatented mining claim in an area that became the Kalmiopsis Wilderness in 1964. In 1990, Clouser filed a plan of operations, including the use of motor vehicles to access the claim. The Forest Service approved the plan with the stipulation that non-motorized means such as pack animals would have to be used to access the claims. Clouser claimed this restriction devalued his claim to the point that it affected the yet-to-be-determined validity of the claim.

Holdings

- "There can be no doubt whatsoever that the Forest Service enjoys the authority to regulate means of access" to a mining claim.
- Section 5(b) gives an "unambiguous instruction to the Secretary of Agriculture…to determine what means are being or have been 'customarily enjoyed' in like areas."
- "Although Forest Service decisions regarding access may indeed affect whether a claim is found to be 'valid,' that fact in no way alters [Section 5(b)'s] unequivocal delegation of authority to the Secretary of Agriculture" even though Interior adjudicates claim validity. The Forest Service's restriction was upheld.

Key lesson

The Forest Service can regulate access to valid mining claims on wilderness inholdings even though the Department of the Interior determines whether the claims are valid.

Stupak-Thrall v. U.S., 843 F. Supp. 327 (W.D. Mich. 1994); (Quist, J.), aff'd, 70 F.3d 881 (6th Cir. 1995), vacated, 81 F.3d 651 (6th Cir. 1996), aff'd by an equally divided en banc court, 89 F.3d 1269 (6th Cir. 1996)

(Also applies to: Motor Vehicle)

Commercial Services | Cultural Resources | Fish & Wildlife | Access | Minerals | Motor Vehicle | Resource Protection | Water Rights

Background

Plaintiffs own land on the northern shore of Crooked Lake, in Michigan's Upper Peninsula near the Wisconsin border. Because of their ownership, plaintiffs possess "riparian," or "littoral," rights under Michigan law--i.e., common property interests in Crooked Lake's surface.2 Plaintiffs have the right to make reasonable use of the entire surface, which includes, at core, those uses "absolutely necessary for the existence of the riparian proprietor and his family, such as to quench thirst and for household purposes." Thompson v. Enz, 379 Mich. 667, 154 N.W.2d 473, 483 (1967). Additional, though less fundamental, riparian uses include "those which merely increase one's comfort and prosperity ... such as commercial profit and recreation." Id., 154 N.W.2d at 484. The United States is also a riparian owner. In fact, the vast majority of Crooked Lake's shoreline, about 95%, lies within the Sylvania Wilderness Area, a national wilderness administered by the Forest Service, and private riparian ownership such as plaintiffs' exists only along a tiny bay jutting out to the north of the wilderness. Nevertheless, the nature of riparian ownership is such that each owner shares rights to the whole lake, so long as his or her land touches the lake waters. Rice v. Naimish, 8 Mich.App. 698, 155 N.W.2d 370, 373 (1967). At issue are certain management prescriptions of the Forest Service relating to the portion of Crooked Lake lying within the Sylvania Wilderness Area. Amendment No. 1, adopted by the Forest Service in 1992 to amend its national forest land and resource management plan governing the Sylvania Wilderness, prohibits, among other things, the use of "sail-powered watercraft," "watercraft designed for or used as floating living quarters," and "[n]onburnable disposable food and beverage containers" in the wilderness. (Admin.Rec.36, 38.) Land and resource management plans are prepared under the guidelines of 16 U.S.C. Sec. 1604 and 36 C.F.R. Sec. 219, which provide for notice and opportunity to comment on proposed plans and amendments, and Amendment No. 1 was properly adopted pursuant to this framework. Notably, Amendment No. 1 has no effect on the small bay outside the wilderness area on which plaintiffs' properties lie. But because plaintiffs have riparian rights in the whole surface of Crooked Lake, they claim that Amendment No. 1's restrictions on sailboats, houseboats, and food containers are an unauthorized infringement of their rights to unrestricted use of the entire lake.

Holding

“The extent and validity of federal power under the Wilderness Act of 1964 and the Michigan Wilderness Act of 1987 form the central issues of this appeal. Plaintiffs are possessors of surface rights to a lake, held in common with the United States. They challenge certain United States Forest Service restrictions on activities on the lake, claiming that they are beyond the Forest Service's statutory and constitutional authority. The district court upheld the restrictions, finding them to be within the power granted by the Property Clause of Article IV, Section 3, Clause 2, and finding that plaintiffs' property rights were subject to reasonable regulation under Michigan

law. Because we conclude that the Property Clause gives Congress the power to regulate the lake, that Congress has delegated authority to the Forest Service to regulate the lake, and that regulation of the lake does not exceed the wilderness acts' express limitations deferring to state law property rights, we affirm."

Wright v. U.S., 82 F.3d 419 (6th Cir. 1996)

Background

Plaintiffs sued the United States under the Federal Tort Claims Act on account of a tree falling on plaintiff in the Nantahala National Forest in North Carolina. Some of the trails pass through wilderness areas in the National Forest. Key to the dispute is whether a particular regulation of the National Park Service requires park service rangers to cut down rotten trees such as the one that fell on plaintiffs. The regulation states: "Fell only trees likely to fall on or across trail. Fell away from trail. Remove any slash from corridor. No hazard tree removal in wilderness. FREQUENCY: 2 years or less depending on timber type." Plaintiffs contend that the regulation means that the rangers must cut down all trees that are likely to fall on the trail, while the U.S. maintains that the rangers are forbidden to cut down trees not likely to fall on the trail, thus letting them chose whether to cut down trees that might. Plaintiffs also contend that the "wilderness" provision only pertains to the areas around the trail and not the trail itself.

Holding

The court found in favor of the U.S. and affirmed the district court's ruling. The regulation does not require the rangers to cut down all hazardous trees in the National Forest Area, especially in the wilderness areas. Therefore, the choice of whether to go out and look for trees to cut is a policy decision and the discretionary function applies.

Key Language

The discretionary function relieves the government of liability when its employees are given a certain amount of leeway in performing their work duties if a plaintiff is injured on account of the employee acting within that window. A section in the Wilderness Act of 1964, 16 U.S.C. § 1131(c), defines wilderness as being untrammeled by man, making humans visitors in a still-wild area. Visitors are encouraged to welcome a wilderness experience that has not reduced personal risks associated with adverse weather conditions, isolation, natural physical hazards, and primitive travel and communication. Key to retaining a wilderness area's primeval character that is without permanent improvements or human habitation as defined in the Wilderness Act is leaving wilderness area trails in their natural state. See also *Zumwalt v. U.S.*, 928 F.2d 951. The Act (applied via the regulation found in the Land and Resource Management Plan for the Nantahala and Pisgah National Forests) displays a policy interest in keeping the forest wild and to a certain extent, dangerous. Additionally, the language in the Plan implies that trails in wilderness areas are to be managed as part of the area through which they wind.

Alaska Wildlife Alliance v. Jensen, 108 F.3d 1065 (9th Cir. 1997)

(Also applies to: Motor Vehicle and Commercial Services)

Background

Plaintiff groups challenged National Park Service (NPS) regulations that allowed commercial fishing in designated wilderness areas and non-wilderness areas of Glacier Bay NP. Fishing industry group intervened against Plaintiffs. The fishermen argued that under a statutory exemption, motorized use in Glacier Bay National Park predated the Wilderness Act and was thus allowable.

Holding

The court responded that commercial fishing was at issue, not motorized use. On appeal, the Ninth Circuit affirmed lower court's decision that The Wilderness Act and the Alaska National Interest Lands Conservation Act 16 U.S.C. §§ 3101 et seq., (ANILCA) (the Act establishing the Glacier Bay National Park's Wilderness areas) prohibit commercial fishing in the Park's wilderness areas. The Ninth Circuit also affirmed lower court decision deferring to NPS' interpretation of its Organic Act and ANILCA, wherein the agency has discretion to permit or to prohibit commercial fishing in non-wilderness areas of the Park.

Stupak-Thrall v. Glickman, 988 F. Supp. 1055 (W.D. Mich. 1997)

(Also applies to: Motor Vehicle)

Background

The plaintiffs owned property along the shores of Crooked Lake, which lies within the Sylvania Wilderness, a part of the National Wilderness Preservation System, in the Ottawa National Forest. The plaintiffs argued that Amendment No. 5 of the Ottawa National Forest Land and Resource Management Plan, regulating the use of gas-powered motorboats on parts of Crooked Lake, was beyond the authority of the Forest Service.

Holding

The court found that motorboat restrictions on Crooked Lake constituted an unlawful act by the Forest Service and a taking under the Fifth Amendment. However, the ruling applied only to Crooked Lake because it has the unique situation of private citizens inhabiting its shoreline who

depend on motorboat access for business. The court granted the plaintiffs' motion for summary judgment and denied the defendants' motion for summary judgment. Finally, Amendment No. 5 was declared null and void in that it was beyond the authority of the Forest Service as granted by the Michigan Wilderness Act of 1987 (MWA).

Erik & Tina Barnes Nat'l Wildlife Fed'n, Et Al., 151 IBLA 128 (1999)

(Also applies to: Motor Vehicle)

Background

In the first appeal (IBLA 97–150), plaintiff appeals from a decision by the Arizona State Director, Bureau of Land Management, adopting the Wilderness Inholding Access Arrastra Mountain Wilderness Environmental Assessment. The assessment states that the BLM's chosen alternative allows for bulldozer, truck and/or backhoe access to complete initial repairs to about 1,000 feet of the 2.4-mile route, as staked by BLM and determined on a case-by-case basis. Pickup truck, all terrain vehicle and trailer access is permitted for initial pump and pipeline installation and maintenance on the Barnes' parcel, and this traffic is permitted only as is necessary to active grazing operations, estimated at 120 days annually. The Barnes assert that these restrictions are too narrow, and essentially that they should have unlimited access to their parcel.

The Barnes operate the Santa Maria Ranch, which is located outside and partially within the Arrastra Mountain Wilderness. They also own a 40–acre parcel within the wilderness area that they purchased in 1990, which they had requested to utilize motorized vehicles to reach their private property inholding within the designated wilderness area. The Santa Maria Ranch allotment is a BLM grazing allotment within the wilderness, meaning that livestock grazing that was authorized prior to the passage of the Arizona Desert Wilderness Act is permitted to continue within the wilderness. Access to this parcel is by a partially overgrown and eroded jeep trail established more than 50 years ago (Prior to the Act) that crosses 2.4 miles of the wilderness between the wilderness border and the private property, and was closed to motorized traffic at the time of designation of the wilderness.

A second appeal (IBLA 97–151) was filed by the NWF, Wilderness Society, Yuma Audubon Society, and Sierra Club Palo Verde Group, contending that the Barnes should not be entitled to access at all because they have refused a fair and adequate offer of exchange. They cite to section 5(a) of the Wilderness Act (§ 1134(a)), which provides for either the assurance of "adequate access" to privately owned land completely surrounded by a wilderness area or for the exchange of the privately owned land for Federally owned land of approximately equal value. NWF

contends that because the BLM offered no access or exchange, it discharged its legal obligation under 5(c).

Holding

As to the first appeal, the decision by the Arizona State Director is affirmed, and the restricted access to the parcel will remain in effect. When Congress incorporated language in the California Wilderness Act of 1984 and the Wilderness Act of 1964 that guaranteed the right of reasonable

access to owners of private inholdings, it did not mandate that the access was to be completely unrestricted. BLM is required to "prescribe routes and modes of travel that will result in impacts of least duration and degree on wilderness characteristics and at the same time, serve the reasonable purposes for which the lands are held or used." Specifically, reasonable use and enjoyment need not necessarily require the highest degree of access; rather, they could be some lesser degree of reasonable access.

As to the second appeal, the NWF's argument claiming that the Barnes have no access because the BLM offered no exchange or right of access is without merit because the Barnes are legally and factually holders of access rights that predate the wilderness designation. Therefore, it is unnecessary to proceed to the "option of adequate access or land exchange," because the first prong of the "landowner having no prior existing right to access" is not satisfied, as the Barnes' clearly are holders of access rights.

Key Language

The Wilderness Act, 16 U.S.C. §§ 1133(c) and 1134(a) (1994), preserves existing access rights of private inholders. If a landowner has no prior existing right to access, he must be given the option of adequate access or of a land exchange. If an inholder is offered an exchange, the statutory requirements are met, and he then has no right of access.

A BLM decision to allow maintenance of a segment of an access route to a private inholding within a recently designated wilderness area to facilitate limited and reasonable vehicle access consistent with the pre-wilderness grazing use is not contrary to the Wilderness Act, 16 U.S.C. § 1133 (d)(4)(2) (1994), and will be upheld on appeal absent a showing of compelling reasons for modification or reversal.

Section 4(d)(4) of the Wilderness Act, 16 U.S.C. § 1133(d)(4)(2) (1994, provides that "the grazing of livestock, where established prior to September 3, 1964, shall be permitted to continue subject to such reasonable regulations as are deemed necessary by an agency administering an area designated as wilderness."

Nelson v. U.S., 64 F.Supp.2d 1318 (N.D. Ga. 1999)

Background

Nelson purchased a 69 acre parcel that could be accessed by two different routes: the Brasstown Wagon Road, and the Yewell Cove Road. The purchase was made with the knowledge that the Brasstown Wagon Road would be closed due to the 1986 designation of the Brasstown Wilderness. At the time the property was purchased, it was not surrounded by National Forest wilderness, but was within the boundary. A previous court found that Section 5(a) of the Wilderness Act did not apply because the property was not surrounded by wilderness, but the

issue could be revisited when or if the Forest Service acquired additional lands that resulted in the property becoming completely surrounded. Five years later the Forest Service did, indeed, acquire additional lands in the wilderness boundary resulting in the property becoming completely surrounded. Nelson then submitted a Special Use Application seeking adequate access including the removal of a gate on the Brasstown Wagon Road to allow for permanent public use, and requested permission to improve the road to make it passable by non-four wheel drive vehicles, and a utility easement to provide lighting for the road.

The Forest Service denied Nelson's application because the inholding could be accessed via the Yewell Cove Road. Because of the topography of the property, the Yewell Cove Road provided access to less than 4 acres of the inholding. Nelson had permission to use the Brasstown Wagon Road outside the National Forest boundary, but did not have permission to use the Yewell Cove Road outside the National Forest boundary. The Forest Service did not take this into account, reasoning that it is up to the landowner to gain access over private property. Nelson appealed the Forest Service's decision.

Holdings

The court vacated the Forest Service's decision as arbitrary and capricious because "the Forest Service failed to consider whether the Yewell Cove Road constituted adequate access." The Forest Service had only considered the portion of the route that was within the Forest boundary. The court found the Forest Service's position to be untenable because"[u]nder the Forest Service's reasoning, landlocked parcels are considered to have adequate access as long as a right of access exists over adjoining Forest Service land, even if the landowners cannot access the Forest Service's purported right of way over adjacent private property." The court said that Section 5(a) requires adequate access be provided, which is a higher standard than the "any access" test the Forest Service is relying upon.

Legal Use of the Route

The Forest Service failed to determine whether Nelson had a legal right to use the Yewell Cove Road crossing private property prior to reaching the Forest boundary. Under federal regulations at 36 C.F.R. § 251.114(f)(1) and the mandates of Section 5(a), if a landowner is seeking access, the agency must consider whether the landowner has demonstrated a lack of adequate access. Signs on the road warning trespassers suggested the private property owners would assert their rights to prevent Nelson from using the road.

Physical Condition of the Route

The Forest Service also failed to determine whether the portion of the Yewell Cove Road that descended into the creek bed provided adequate access. The Forest Service did not consider the environmental effects on the creek from having vehicles drive in it, nor did it consider the possibility of diverting the creek because that portion of the road was on private property.

Key lesson

Section 5(a) only applies to lands that are completely surrounded by wilderness. An inholding may not meet this requirement at the time of designation, but if the parcel later becomes completely surrounded by wilderness through subsequent agency land acquisitions, Section 5(a) then applies.

In considering a choice between two potential routes of access, a federal agency must consider the entirety of each access route, including portions that lay outside of federal property, when determining which route provides adequate access.

U.S. v. Gotchnik, 222 F.3d 506 (8th Cir. 2000)

(Also applies to: Motor Vehicle and Cultural)

Background

The Chippewa Indian tribe challenged convictions for using motor vehicle use in a wilderness area on the basis that their treaty with the United States preserved their right to use evolving and modern methods for hunting. Appellants thus clearly possess the right to hunt and fish in the ceded territory encompassed within the Boundary Waters Area. The question, then, is whether the Boundary Water Act's prohibition of the use of motorboats and motor vehicles in this area, and the government's prosecution of appellants under this prohibition, offends appellants' rights under the Treaty. Appellants argue that the Treaty, by securing their right to hunt and fish, also secures their right to use modern transportation methods to move about the ceded territory whenever they are exercising their hunting and fishing rights. To support their position, appellants cite cases involving treaties with similar usufructuary right provisions in which courts held that tribal members were not confined to the use of hunting and fishing implements that existed at the time of the Treaty signing. The government, in response, concedes that the Treaty protects appellants' right to use modern hunting and fishing techniques, but asserts that it does not similarly authorize the use of modern means of transportation to reach the most desirable hunting and fishing locations.

Holding

- "We agree with the government that there is a consequential distinction between appellants' use of evolving hunting and fishing implements and their use of modern means of transportation. The Treaty secures appellants' right to subsistence hunt and fish in the ceded territory. The use of modern gaming instruments and techniques goes to the very essence of these protected activities, whereas the use of the most advanced means of transportation to reach desired hunting and fishing areas is merely peripheral to them."
- "A motorboat, all-terrain vehicle, or helicopter for that matter, may make it easier to reach a preferred fishing or hunting spot within the Boundary Waters Area, but the use of such motorized conveyances is not part and parcel of the protected act of hunting or fishing, as is the use of a rifle, ice augur, or other hunting or fishing instrument. Thus, we conclude that although the use of evolving hunting and fishing implements may have been within the understanding of the signatory Bands, the same cannot reasonably be said of the use of modern modes of transportation to reach desired hunting and fishing areas."
- The reserved Treaty right to hunt and fish in wilderness areas includes the right to use motorized fishing equipment necessary to execute the fishing right; therefore, using modern fishing mechanizms to fish does not violate the Wilderness Act. The reserved Treaty right to fish does not include the right to use motorized boats and vehicles to access the fishing, however, because the prohibition does not prevent the tribe from

fishing. The use of motorized vehicles and boats violates the Wilderness Act without offending the Treaty and is thus prohibited in the wilderness area.

Isle Royale Boaters Ass'n v. Norton, 154 F.Supp.2d 1098 (W.D. Mich. 2001), aff'd by 330 F.3d 777 (6th Cir. 2003)

(Also applies to: Motor Vehicle)

Background

The National Park Service announced plans to remove or relocate many docks on the island in order to provide separate motorized and non-motorized areas on a wilderness area island. The plaintiffs for this case alleged that the removal of docks and a portage trail violated the Wilderness Act and accompanying regulations by being contrary to the Wilderness Act's stated purpose of "preserving [the wilderness area's] character for the use and enjoyment of the American people."

Holdings

- The court found that NPS' removal or replacement of four docks was not arbitrary and capricious. The court cited the Wilderness Act, 16 U.S.C. § 1133(c), noting the Act's provision that there should generally be no motorboats allowed in wilderness areas except as necessary to meet the minimum requirements of the administration of the area. THE WILDERNESS ACT further provides that where motorboat uses have already been established within an area that becomes wilderness, such use may be permitted to continue "subject to such restrictions as the Secretary of Agriculture deems desirable." 16 U.S.C. § 1133(d). The court noted that "while in this case it is the Secretary of the Interior, or the NPS, that regulates Isle Royale, there is no reason that 1133(d) should not apply to their regulation of the Park. Even if it did not, the NPS maintains the ability under 16 U.S.C. §§ 1131(b) and 1133(a)(3) to regulate the Park. The court upheld NPS' general ability to zone the Park and replace particular docks as part of the agency's ability to regulate the Park. *Isle Royale Boaters Ass'n v. Norton*, 154 F.Supp.2d 1098 at 1117-8."
- "Zoning involves regulating use either within or outside of Congressionally approved wilderness areas. Unless the zoning violates the Wilderness Act, it is permissible. Id. at 1119." The court found that Section 4(d)(1) specifically granted to the Secretary of Agriculture the power to permit motorboat usage in areas where the use had already been established. Because this case involved the Secretary of the Interior through the NPS, the court held that the statute should extend to the NPS, enabling it to regulate the park. Within the authority to regulate exists the ability to replace particular docks. The court found the arguments of the plaintiffs particularly not compelling because many of the docks were simply being moved to another section of the island. Therefore, the NPS plans to remove or relocate docks did not violate the Wilderness Act.

Commercial Services | Cultural Resources | Fish & Wildlife | Access | Minerals | Motor Vehicle | Resource Protection | Water Rights

Key lesson

The Secretary has the power to regulate motorboat use in Wilderness Areas, and this authority extends to the removal and replacement of docks.

Stupak-Thrall v. Glickman, 346 F.3d 579, 584-85 (6th Cir. 2003)

Background

Plaintiffs-Appellants, seeking a declaration that Crooked Lake is not part of the Sylvania Wilderness area and therefore is not within the regulatory authority of the United States Forest Service, appeal the district court's decision dismissing as time-barred their claim against the United States.

Holding

“Because we find that the plaintiffs' claims are untimely and that the government did not waive its right to raise a statute of limitations defense, we will AFFIRM the district court's grant of summary judgment to the plaintiff.” See Stupak-Thrall v. Glickman 988 F. Supp. 1055 (W.D. Mich. 1997).

Commercial Services Cultural Resources Fish & Wildlife Access
Minerals Motor Vehicle Resource Protection Water Rights

Barnes v. Babbitt, 329 F. Supp.2d 1141 (D. Ariz. 2004)

Background

Barnes owned a 40-acre inholding in the Arrastra Mountain Wilderness. In 1940 a jeep access to the property was bulldozed in, but by 1980 the route had become impassable. Before Barnes bought the inholding in 1990, the previous owner accessed the area by foot or horseback. The BLM authorized development of the route sufficient to permit a four-wheel-drive pickup truck to pass as necessary only for maintaining grazing developments on the inholding. Barnes was not satisfied with the restrictions; environmental groups were not satisfied with any access being allowed. Both appealed to IBLA, which affirmed the BLM decision. Still not satisfied, both then sued in District Court.

Holdings

- "IBLA concluded that [the old route to the inholding meant] that the Act's prohibition against roads does not apply. Since the wilderness designation was determined by Congress, however, the IBLA was without authority to make a contrary determination."
- Congress's designation meant "the Arrastra Mountain area must have been 'roadless,' meaning that it lacked roads that had been improved or maintained by mechanical means for relatively regular and continuous use."
- "In 1996, when the Access Decision was issued, 'adequate access' meant 'the combination of routes and modes of travel to non-Federal inholdings that will, as determined by the authorized officer, serve the reasonable purposes for which the nonFederal lands are held or used, and at the same time cause impacts of least duration and degree on their wilderness character.' The IBLA decision was based at least in part on an improper evaluation of the wilderness character of the area…and is contrary to the law."

Further development

The BLM has since further defined approved access to inholdings as the combination of routes and mode of travel that existed on the date the wilderness was designated. See the BLM Regulations elsewhere in this Toolbox.

Key lesson

Improvements made to existing routes to allow motorized access to an inholding may violate THE WILDERNESS ACT's prohibition on roads in wilderness areas.

Johnson v. U.S. Forest Serv., No. 00 Civ. 217 (D. Mont. Apr. 2, 2002), aff'd, 93 F. App'x 133 (9th Cir. 2004)

(Also applies to: Minerals)

Background

The Absaroka Trust, of which Johnson was a trustee, owned a 1245 acre inholding in the Absaroka-Beartooth Wilderness that consisted of 6 mining claims. The Trust planned to conduct exploratory mining activities and construct a lodge and cabins for recreational activities on the inholding. To access the property for those purposes, the Trust applied for a special use permit to build a 6 mile long gravel road through the wilderness area to the property, which was accessible only by foot, horseback or helicopter at the time. The Forest Service rejected the proposal as inconsistent with the Wilderness Act, finding that "traditionally access had been by foot or horseback or, more recently, by helicopter," and that this level of access was sufficient. The Trust sued, claiming that requiring construction materials be hauled to their land by horse or helicopter was so expensive as to be impracticable.

Holding

The court affirmed the Forest Service's conclusion that the Trust's right to access the inholding via a newly constructed road did not outweigh the damage that road would cause to the wilderness character of the area. In reaching this decision, the Forest Service determined that no road had ever reached the inholding and that historically, prior to the area being designated as the Absaroka-Beartooth Wilderness subject to the Wilderness Act, access to the inholding was only by foot or horseback. Additionally, no road had been constructed in the wilderness area since it was designated and access by foot, horseback, or helicopter was consistent with similarly situated properties In the Absaroka-Beartooth Wilderness. Further, of the roughly 100 cases nationwide where motorized access had been granted to wilderness inholders, only one had allowed the construction of a new road. The Forest Service also found that the low mineral potential of the inholding did not justify the construction of a road for exploration. Thus, the court held that limiting the Trust to access by foot, horseback, and helicopter provided adequate access for the Trusts' stated purposes of recreation and mining exploration while still protecting the wilderness resources of the surrounding area.

Key language

"The Trust challenges the finding that access by foot, horseback, and helicopter was adequate for reasonable use and enjoyment of the property. The Trust contends that helicopter access is

expensive and impracticable. ANILCA, however, does not guarantee the cheapest access, only adequate access."

Congress recognized that a private landowner must have a right of adequate access to their property that is located in wilderness areas; however, there are special provisions of access for holders of mining claims located within the wilderness areas. These provisions require that this access be in accordance with what is customarily enjoyed by similarly situated properties and the reasonable regulations consistent with wilderness preservation.

"The Wilderness Act and ANILCA provide [the inholder] a right of access adequate for the reasonable use and enjoyment of its property….ANILCA vests the Secretary with the discretionary authority to determine what type of access is adequate, and…the Wilderness Act directs [that this is] the same kind of access that has been or is being customarily enjoyed by other similarly situated areas."

"Adequate access" – "a route and method of access to non-Federal land and that minimizes damage or disturbance to National Forest System lands and resources." The preservation of wilderness character predominates other values in a resource use conflict.

In determining similarly situated lands, "the Forest Service found that motor vehicles were allowed only on roads that existed prior to an area's wilderness designation. With only one exception [there was no permission] to construct new roads for motorized use."

"Where a conflict in resource use exists, the preservation of wilderness predominates over other values."

Alleman v. U.S., 372 F.Supp.2d 1212 (9th Cir. 2005)

(Also applies to: Minerals)

Background

Plaintiff was the owner of an inholding and sought motorized access through federally designated wilderness. Plaintiff moved for quiet title citing the Quiet Title Act and The Wilderness Act. In 1988 the U.S. Government issued Plaintiff a patent (under the 1872 Mining Law) granting title to some 60 acres of surface and sub-surface estate within Oregon's Kalmiopsis Wilderness. The lands had previously been unpatented mining claims. Plaintiff had been using and maintaining forest roads in wilderness and violating other laws relating to wilderness and forest administration. Plaintiff and FS had been in communications about access issues. Plaintiff filed suit for quiet title ten years later.

Holding

"The court finds that the land in question is National Forest System land as defined in 16 U.S.C. § 1609(a), and as such plaintiffs' common law easement claims are preempted by ANILCA and FLPMA. *Adams*, 255 F.3d at 794 (citing *Adams v. U.S.*, 3 F.3d 1254, 1259 (9th Cir.1993))." The Court dismissed Plaintiff's claims and re-affirmed the rule that Plaintiff's predecessors and Plaintiff knew or should have known when the WSA was designated that there were to be no public roads within a WSA.

Key Language

"The passage of the Wilderness Act put plaintiffs' and their predecessors in interest on notice that the government did not believe there were roads within the wilderness area; that the government claims a title interest in the trails in question in this dispute; and that motorized vehicles could not be used in a wilderness area."

Stuart Dow v. United States, CV 02-2185-PCT-SMM (D. Ariz., Jan. 20, 2005)

Background

The Dow family owned 640 acres that had been patented under the Stock Raising Homestead Act in 1922 and surrounded by the Hells Canyon Wilderness designation in 1990. The Dows filed a Land Use Application to blade a road for regular use in accessing the property for residential development which they hope to build on it. The route entering the property is a wash, and there is no indication that the route was receiving appreciable use at the time of wilderness designation. The BLM allows Dow to drive the route, but does not allow for blading, maintaining, or upgrading the route. The Dows filed a lawsuit seeking to quite title to an easement they claim exists by necessity, by implication, by express authorization, and by estoppel.

Holding

Common law doctrine pertaining to easements may be claimed against federal government, unless preempted by another law. 1) For an easement by necessity to exist, the property must have been severed from the dominant estate, and an easement was reasonably necessary across the dominant estate for beneficial use of the severed estate. When the land was severed from the dominant estate through patent in 1922, no easement was necessary because no act of government impeded access across the dominant estate to the severed estate. 2) An easement by implication may exist where needed to realize the purpose of the granted property. However, such an easement exists only for the purpose of the grant, not for purposes in excesses of the grant. In the Dow case, the land was granted for stock raising and raising crops, not for residential development; there is not a right to the greater degree of access that residential development would require, and which Dow is seeking. 3) No evidence in an expressly granted easement exists either in the patent, or as a function of an appurtenance to the property (the grant included appurtenances) because appurtenances only apply to existing features, and no access route existed upon patent. 4) An easement by estoppel does not exist because there is no evidence the government acted to make the grantee of the patent to believe that an easement exists. For all of these reasons, the Dows are not entitled to access greater than an exercise of access that they enjoyed at the time of wilderness designation.

Key language

“It is undisputed that [Dow has] a right of access to the Dow Property pursuant to BLM authorization; what they seek is a greater right of access in the form of a property interest.”

Commercial Services | Cultural Resources | Fish & Wildlife | Access | Minerals | Motor Vehicle | Resource Protection | Water Rights

Wilderness Watch, Et Al., 168 IBLA 16 (2006)

(Also applies to: Motor Vehicle)

Background

This is an appeal from a decision record and finding of no significant impact issued by the Field Manager, Kingman Field Office, Bureau of Land Management, approving construction of a road for motorized access to an inholding in the mount Tipton Wilderness. Brian Siefker and Valerie Schunn are the owners of the private property within the boundaries of Mount Tipton Wilderness, and they have requested motorized access (backhoe tractor, 2-ton flatbed truck, fourwheel drive pickups, various trailers) to their 40-acre parcel of private land in Marble Canyon within the Mount Tipton Wilderness, on which they intend to develop a horse-breeding ranch. Mount Tipton Wilderness was designated as wilderness on November 28, 1990, and it did not ultimately include a motorized road across it in order to access the inholding parcel. Siefker and Schunn purchased the property in 1998. Wilderness Watch contends that this case is governed by section 5(a) of the Wilderness Act, 16 U.S.C. § 1134(a) (2000). It contends that there are no private rights in this case because Siefker and Schunn purchased their inholdings as undeveloped parcels of land years after the Mount Tipton Wilderness was established, and because no evidence exists that anyone associated with the subject property was using the contested route for motorized access at the time of the wilderness designation, and that BLM failed to provide evidence concerning the level and type of access at the time of wilderness designation in 1990.

Holding

To the extent that the DR concluded that the access authorized was consistent with the use of the route at the time of wilderness designation, it is reversed. Without any proof of any historic right of access to the land acquired by Siefker and Schunn and available (and in use) at the time of wilderness designation, the Wilderness Act does not preserve any right of access to their inholding. BLM bears the burden of developing the record sufficient to justify its approval of motorized access to the Siefker/Schrunn parcels through a wilderness area based on a finding of a legal right of such access at the time of the wilderness designation.

Key Language

Access to wilderness inholdings is governed by sections 4 and 5 of the Wilderness Act, 16 U.S.C. §§ 1133 and 1134 (2000). Section 4 ensures that roads are not allowed unless authorized by "existing private rights." Section 5 provides that, otherwise, the inholder "shall be given such rights as may be necessary to assure adequate access." The Department implements the statutory requirement that access be provided to inholdings at 43 CFR 6305.10. The rule establishes that, once a wilderness area is created, motorized access is provided to inholders with existing private

rights to such access as was existing and in use on the date of the designation. Without such prior use, the inholder will receive BLM's approval only for a mode of access that is "non-motorized."

Oregon Chapter of the Sierra Club, 172 IBLA 27 (2007)

(Also applies to: Motor Vehicle)

Background

Owners of 4 connected inholdings in the Steens Mountain Wilderness had traditionally accessed their property via the 17-mile Ankle Creek Route, a primitive route that was difficult in places for a four-wheel-drive vehicle to navigate and that in other places was fading and becoming revegetated. After considering a number of possible alternatives, the BLM authorized "reasonable motorized use of the Ankle Creek Route . . . for landowners, lessees, guests or agents . . . to the extent that the route does not improve to a condition more highly developed than that which existed at the time Congress designated the area as wilderness. If monitoring indicates that motorized use is causing the route to become more obvious, use would be reduced in order to return the route to the desired condition. Access to the Ankle Creek Route . . . would be authorized during the period of time, generally May 15 to November 15, when damage [to the route] . . . would not occur." The inholders appealed the BLM decision to the IBLA, claiming the authorized access was too restrictive. Environmental groups also appealed, claiming the authorized access harmed the wilderness character of the area.

Holdings

Route and Mode of Access

BLM regulations state that only a combination of routes and modes of travel to inholdings that (1) existed on the date Congress designated the area surrounding the inholding as wilderness, (2) serve the reasonable purposes for which the inholding is used, and (3) have the least impact on the wilderness character of the area will be approved. Because the inholders regularly accessed their property by motorized vehicle via the Ankle Creek Route prior to the wilderness designation, **the IBLA upheld the BLM access decision regarding the route and mode of access**.

Degree of Access

BLM regulations also state that once a route and mode of access have been authorized, BLM is within its discretion under the Wilderness Act as long as the degree of access authorized is no greater than that enjoyed prior to the wilderness designation. In this case, **the IBLA upheld the BLM decision because the "BLM determined the level of motorized access previously enjoyed by these inholders, expressly limited access to predesignation levels, prohibited**

route improvements, and imposed requirements to ensure that the approved Ankle Creek route does not become more obvious than at the time of wilderness designation."

Preservation of Wilderness Character

The environmental groups claimed allowing motorized vehicles on the Ankle Creek Route harmed the wilderness character of the area. **The IBLA rejected that claim, holding that the BLM was required only to preserve the wilderness character as it existed at the time of the wilderness designation, which included motorized use of the Ankle Creek Route by the inholders.**

Access Roads

The IBLA held that "[s]ince section 5(a) of the Wilderness Act specifically provides for access to inholdings, it follows that access approved under that provision and its implementing regulations is necessarily excepted from the road and motorized use prohibition of section 4(c). It is irrelevant whether the approved route is road-like or appears to be a road, so long as it existed at the time of wilderness designation and is not improved thereafter."

1. The BLM did not exceed its authority under regulations implementing the Wilderness Act;
2. All roads are not prohibited within Wilderness Areas due to Section 5(a) of the Wilderness act that allows access to inholdings;
3. The BLM did not fail to preserve the area's wilderness character because the access roads were there prior to the wilderness designation. Therefore, having the BLM improve the conditions beyond those that existed prior to wilderness designation at the expense of the inholders' property access rights would surpass the Wilderness Act requirements in wilderness preservation.
4. BLM did not improperly facilitate motorized use by a commercial enterprise because the inholding access provision in Section 5(a) specifically allows prior use access that preempts the general commercial use prohibition under Section 4(c).
    a. *"[e]xcept as specifically provided for in this chapter[…]"*

Key lessons

As long as the degree, route, and mode of access are the same as they were prior to the wilderness designation, the access is adequate and the wilderness character of the area is not harmed.

A road used for access to an inholding does not violate the Wilderness Act's prohibition on roads in wilderness areas.

Commercial Services Cultural Resources Fish & Wildlife Access
Minerals Motor Vehicle Resource Protection Water Rights

Izaak Walton League v. Kimbell, 516 F.Supp.2d 982 (D. Minn. 2007), aff'd, 558 F.3d. 751 (8th Cir. 2009)

(Also applies to: Motor Vehicle)

Background

In 2003, the Forest Service identified an unlawful snowmobile route-Tilbury Trail-located in the Superior National Forest, which connected McFarland Lake in the west to South Fowl Lake. South Fowl Lake, along with North Fowl Lake, is the easternmost lake in a chain of lakes along the border between northeast Minnesota and Canada. The Forest Service closed Tilbury Trail because it encroached on Royal Lake and Royal River, located within the BWCAW along the northern edge of the trail. Following the trail's closure, the only available snowmobile access route to South Fowl Lake was Cook County Road 16, which required snowmobiles to share a steep and potentially dangerous road with cars and trucks. Seeking to develop a safe alternative route that would provide public snowmobile access to South Fowl Lake, the Forest Service proposed construction of South Fowl Trail, connecting McFarland Lake to South Fowl Lake along the same general route as Tilbury Trail. In November 2005, the Forest Service released an EA for the proposed South Fowl Trail. Based on the analysis set forth in the EA, the Forest Service issued a Decision Notice (DN) and Finding of No Significant Impact (FONSI) on February 21, 2006, approving the selection of the second alternative trail for the South Fowl Trail. Regarding sound impact, the FONSI stated that the decibel level of a snowmobile in the adjoining wilderness, at a distance of 600 to 800 feet from the proposed route, would be approximately 49 decibels. The FONSI concluded that this decibel level was not significant. Wilderness Watch filed suit against the Forest Service, alleging, inter alia: (1) that the Forest Service had allowed snowmobiles on South Fowl Lake in violation of the BWCAW Act ("Count I"); (2) that the Forest Service has failed to implement motorboat quotas on North and South Fowl Lakes in violation of § 4(f) of the BWCAW Act ("Count II"); and (3) that the Forest Service violated NEPA by failing to prepare an EIS for the proposed trail ("Count V"). Wilderness Watch, the Forest Service, and the Intervenors filed cross-motions for summary judgment on each of Wilderness Watch's claims.

2007 District Court Holding

The district court found that the Fowl Lakes were not located within the wilderness area prescribed under the BWCAW. In a subsequent opinion, the district court, inter alia, granted the Forest Services's motion for summary judgment on Counts I and II of the complaint but denied the motion as to Count V. The district court held that the Forest Service's decisions to construct a snowmobile trail connecting lakes adjacent to the BWCAW and not to set motorboat quotas on the Fowl Lakes were not arbitrary and capricious under the Wilderness Act and the BWCAW Act. But the district court found that the EA prepared by the Forest Service for the plan to construct the snowmobile trail connecting the Fowl Lakes adjacent to the BWCAW failed to properly analyze the noise impact resulting from snowmobile use on the trail, as required under NEPA. According to the court, the EA provided no quantitative evidence or analysis of decibel

levels to be projected by the trail into the adjoining wilderness. Finding the decision to issue a FONSI arbitrary and capricious, the district court remanded the matter to the Forest Service, ordering it to "promptly prepare an EIS to evaluate more thoroughly the sound impact in the BWCAW, and to suspend further activity on the South Fowl Trail pending completion of the EIS."

2009 8th Circuit Background

Both Wilderness Watch and the Intervenors appeal from the district court's judgment. According to Wilderness Watch, the only plausible reading of § 4 of the BWCAW Act is that Congress specifically included these lakes in the BWCAW and intended the motor-use restrictions specified in § 4 to apply to those lakes. In response, the Forest Service and the Intervenors argue that Wilderness Watch's claims in Counts I and II of the complaint are barred by the sixyear statute of limitations in 28 U.S.C. § 2401(a) because all of the harms of which Wilderness Watch complains are the result of Congress's exclusion of the Fowl Lakes from the BWCAW on April 4, 1980, when the Forest Service published the maps and legal description showing the boundaries of the BWCAW in the Federal Register. Second, as to Wilderness Watch's claim that the Forest Service violated NEPA, the Intervenors argue that the district court erroneously found that the issuance of a FONSI and the failure to complete an EIS were arbitrary and capricious regarding the consideration of the potential sound impact from the Fowl Lake project.

8th Circuit Court Holding

- "Because the latest possible accrual date is April 4, 1980, and because Wilderness Watch did not file the instant action until August 17, 2006, its claims in Counts I and II are timebarred. Accordingly, we hold that Wilderness Watch's claims that the Forest Service (1) violated the BWCAW Act by permitting snowmobiles on South Fowl Lake and (2) failed to implement motorboat quotas on North and South Fowl Lakes in violation of § 4(f) of the BWCAW Act are time-barred by the six-year statute of limitations."
- "As to the district court's NEPA ruling, we lack jurisdiction to review the district court's order remanding the matter to the Forest Service for an EIS and decline to vacate the injunction."

Key language

- Preserving wilderness character - "The plain language of § 4(b) of the Wilderness Act makes no distinction based on the source of the allegedly degrading agency activity. Rather, § 4(b) mandates that any agency administering the wilderness area shall be responsible for preserving the wilderness character of the area."
- Buffer zones - "[A]n agency's duty to preserve the wilderness character under § 4(b) of the Act may apply to agency activity that occurs outside the boundary of the wilderness area....The key question in determining whether agency action violates § 4(b) of the Wilderness Act is whether the action degrades the wilderness character of a designated wilderness area."

- “Congress can insulate the wilderness by imposing restrictions...very close to the wilderness area ‘to insure (sic) that these lands be protected against interference with their intended purposes.’ Minnesota v. Block, 660 F.2d, 1249 (8th Cir. 1981) (holding Congress has the power under the Property Clause of Article IV of the Constitution to regulate ‘conduct on or off the public land that would threaten the designated purpose of federal and’).”

River Runners for Wilderness v. Martin, 593 F. 3d 1064 (9th Cir. 2010)

(Also applies to: Motor Vehicle)

Background

A coalition of four wilderness advocacy groups (River Runners for Wilderness; Rock the Earth; Wilderness Watch and Living Rivers) brought suit against the National Park Service in March 2006, under the Administrative Procedures Act, challenging the park's 2006 Colorado River Management Plan (CRMP), which among other things, permits the continued use of motorized rafts and support equipment on the Colorado River within Grand Canyon National Park.

A hearing was held in October 2007, in the United States District Court for the District of Arizona in which United States District Judge David G. Campbell heard oral arguments, and then rendered a decision in November 2007 in favor of the National Park Service. The Plaintiffs appealed that decision in 2008 to the United States Court of Appeals for the Ninth Circuit.

Holding

"Plaintiffs have failed to establish that the Park Service acted arbitrarily and capriciously when it adopted the 2006 Management Plan. The court accordingly AFFIRMS the granting of the summary judgment motions of Defendants and Intervenors and the denial of the summary judgment motion of Plaintiffs."

Key language

- "Congress has never acted on the Park Service's recommendation that portions of the Park be formally designated as wilderness. The Park Service, therefore, is not under the same "statutory responsibility" that applied to the Forest Service in Blackwell. The court must look to the Concessions Act, not the Wilderness Act, for the governing legal standard."
- "Defendants have identified a number of factors in the Administrative Record that support the Park Service's decision to allow motorized traffic to continue. First, because motorized trips take less time to complete (10 days as opposed to 16 days for nonmotorized trips), substantially more people can see the Park each year from the river if motorized trips continue. FEIS Vol. I at 33-34; Vol. III at 87-88, 328-29. Second, motorized trips are frequently chartered for special-needs groups, educational classes, family reunions, or to support kayak or other paddle trips. Third, because of their increased mobility, motorized trips help alleviate overcrowding at popular campsites and attractions in the Corridor. FEIS Vol. I at 33-34; Vol. III at 302. Fourth, some individuals

feel safer when traveling in motorized rafts. FEIS Vol. III at 312-313. In addition, studies performed as part of the DEIS found that visitors are able to experience the river as wilderness in the presence of motorized uses and that those who took motorized trips were significantly more likely to stress safety and trip length as the most important factors in the choosing the type of trip they took."

American Whitewater v. Tidwell, 959 F.Supp.2d 839 (D.S.C. 2013)

Background

Plaintiffs brought this action alleging that the USFS unlawfully infringed upon American Whitewater's federally-protected right to recreate on the Chattooga Wild and Scenic River upstream of South Carolina Highway 28 (the "Headwaters" or "Upper Chattooga") by way of hand-powered boating or floating. American Whitewater notes that the Headwaters flow through the Ellicott Rock Wilderness and therefore contends that portion of the headwaters is subject to the Wilderness Act. American Whitewater argues that the USFS has violated the Wilderness Act's requirement that wilderness be made available to the optimum extent where a "historical, low-impact form of primitive recreation is banned without any scientifically demonstrated impact on the wilderness area."

Holding

The USFS did not violate the Wilderness Act by proposing a plan that established limitations that do not allow whitewater rafting in the Headwaters. The USFS has not banned whitewater floating altogether, but rather established certain limitations that allow for whitewater floating in other areas of the river while addressing other environmental and recreational concerns and interests. The USFS presented evidence to demonstrate that it considered and balanced, among others, the recreational and solitary goals of the Act.

Key Language

The Wilderness Act focuses on the administration of wilderness areas for the use and enjoyment for the people and does not support the elevation of "recreational activity over the long-term preservation of the wilderness character of the land." *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d (9th Cir. 2004). The Wilderness Act does not create any specific mandates on whitewater floating, and only requires that the USFS provide opportunities for wilderness recreation more generally.

Breaker v. U.S., 977 F.Supp.2d 921 (D. Minn. 2013)

(Also applies to: Motor Vehicle)

Background

Owners of real property located entirely within the Boundary Waters Canoe Area Wilderness (BWCAW) filed suit against the United States Forest Service challenging its denial of a special use permit for motorized access to the parcel. No road provides ingress or egress to the property, other than an old logging road that is a narrow, faint trail overgrown with trees and brush. When plaintiffs purchased the property, they believed that the old logging road continued all the way to the property rather than ending on the county road. Plaintiff subsequently requested a special use permit application for motorized access to the parcel by reopening the old road. The District Ranger denied the special use permit because: 1) road access had not been granted to other similarly situated landowners within Superior National Forest; 2) historical access to this particular property did not include a road; 3) constructing and maintaining a road would be inconsistent with wilderness value of opportunities for solitude; and 4) constructing and maintaining a road would be inconsistent with the need to allow wilderness to remain "untrammeled," or generally free from sights and sounds made by man. The District Ranger concluded that the plaintiffs had adequate access to their property via two possible ways without using a motor vehicle by way of the Portage River and the old road that runs toward the property: 1) traveling part of the way past the old road by foot through a section of uncharted forest; and 2) through the Portage River using a canoe.

Holding

The Court found that the Forest Service applied the incorrect standard in analyzing the plaintiff's request because "possible" means of access do not constitute "adequate" means of access. The Forest Service acted arbitrarily and capriciously by conflating the "any access" standard with that of "adequate access," and by failing to consider facts that may support a determination of inadequate access. In addition, the Forest Service did not distinguish between the rights of inholders and the general public such that inholders may be granted more access rights than the general public. Specifically, the Forest Service Manual itself distinguishes between inholders and the general public, noting that for those owning land completely surrounded by wilderness, the "Regional Forester may provide these landowners with written permission to use wilderness routes or motorized modes of travel not available to the general public."

Key Language

§ 1133(c) of the Wilderness Act grants a specific right of adequate access to privately owned land completely surrounded by areas designated as wilderness. Furthermore, the Wilderness Act expressly delegates regulatory authority to effectuate access to occupancies in wilderness areas.

While § 1133(c) provides an exception for activities necessary to meet the minimum requirements of an area, § 1134(b) empowers the Forest Service to regulate means of access to occupancies wholly within an area designated as wilderness as customarily enjoyed in similarly situated areas.

Commercial Services Cultural Resources Fish & Wildlife Access
Minerals Motor Vehicle Resource Protection Water Rights

Ark Initiative v. Tidwell, 816 F.3d 119 (D.C. Cir. 2016)

Background

Environmental groups and individuals filed suit against the United States Forest Service alleging violation of the APA, Wilderness Act, and NEPA based on the agency's action of removing "roadless" designation from national forest land in Colorado that fell within the boundaries of permitted ski areas and authorizing the removal of trees. Pursuant to the Wilderness Act in 1964, the Forest Service completed its Roadless Area Review and Evaluation project in the 1970's to fulfill the Wilderness Act's mandate to inventory extensive primitive areas of federal lands potentially suitable for congressional wilderness designation (potential wilderness areas). The land in question here is a "roadless" area that did not make the congressional wildernessdesignation cut and falls within the 2001 Roadless Rule, which prohibits road construction, reconstruction, and timber harvest in inventories roadless areas.

Holding

The USFS did not violate the Wilderness Act when it decided to exclude an area from the roadless inventory in order to build an egress to a ski area, because the area was outside the governance of the Wilderness Act and is governed by the rules of the 2001 Roadless Rule.

Key Language

The criteria for roadless inventory is different from the criteria for potential wilderness areas. "This inventory of potential wilderness is not a land designation, nor does it imply any particular level of management direction or protection in association with the evaluation of potential wilderness areas." The Roadless Area Conservation Rule definition is different from the criteria for potential wilderness areas.

Commercial Services | Cultural Resources | Fish & Wildlife | Access | Minerals | Motor Vehicle | Resource Protection | Water Rights

High Point, LLLP v. Nat'l Park Serv., 850 F.3d 1185 (11th Cir. 2017)

(Also applies to: Motor Vehicle)

Background

Owner of life estate in property located on barrier island within national seashore managed by National Park Service (NPS) sought review under the APA of denial by NPS of permission for owner to relocate dock used to access property, and declaration that deed by which owner conveyed property to government allowed it to relocate the dock. The owner appealed the United States District Court for the Southern District of Georgia's summary judgment in favor of NPS (*see High Point, LLLP v. U.S. Nat'l Park Serv.*, No. CV 212–095, 2015 WL 858150 (S.D. Ga. Feb. 27, 2015)), arguing that the deed unambiguously reserves to High Point a right to relocate the dock.

Holding

The Court affirmed the district court's determination that High Point has no reserved right to unilaterally relocate or extend the dock. The deed did not reserve a right to relocate the dock. The deed's reservation of use of the dock did not provide authorization for the owner to relocate or expand the dock; the clause in the deed providing that any building or structure deteriorated by the elements could be reconstructed did not provide authorization for the owner to relocate the dock; NPS's denial of permission under the Wilderness Act for the owner to relocate or expand the dock was not arbitrary and capricious; and NPS's denial of permission for the owner to extend the portion of the dock that was within the area owned by the state, rather than the federal government, was not arbitrary and capricious.

Key Language

A straightforward reading of the deed language demands the conclusion that High Point reserved only a right to use – not to move or to extend—the dock as it was "presently known" at the time of the conveyance. The Wilderness Act categorically prohibits structures in wilderness areas subject to two exceptions: a private rights exception and an administrative-needs exception. 16 U.S.C. § 1133(c). Because the deed did not grant any right to move or extend the dock, there was no "private rights exception" which would allow High Point to move or extend the dock.

High Point, LLLP v. U.S. Nat'l Park Serv., No. CV 212-095, 2015 WL 858150 (S.D. Ga. Feb. 27, 2015); affirmed by High Point, LLLP v. Nat'l Park Serv., 850 F.3d 1185 (11th Cir. 2017)

Background

Plaintiff, High Point, LLLP, motions for summary judgment on the Forest Service's denial of High Point's requests to either relocate an entire dock (Brick-Kiln Dock) or just the non-upland portion of a dock located on Cumberland Island National Seashore, which was designated as a wilderness area in 1982 pursuant to the Wilderness Act of 1964. Over time, due to natural causes, the flow of water in Hawkins Creek changed, causing a buildup of silt in certain areas and making the area of Hawkins creek where Brick-Kiln Dock is located too shallow for navigation by passenger vessels, except for during a period of approximately four hours at high tide. High Point maintains that Hawkins Creek will eventually be unusable as a point of deep water access to Cumberland Island at all times, as the "silting-in" continues to increase. In response to this problem, High Point requested permission from the Park Service to relocate the dock. The Park Service reasoned that High Point's reserved rights under the Warranty Deeds upon purchase of the land did not include its present requests, and that, absent a reserved right, the Wilderness Act prohibited High Point's proposed actions.

Holding

The Park Service was correct to conclude that High Point does not have an "existing private right" to relocate the dock. Thus, entirely new structures, such as the new docks proposed by High Point, are prohibited under the Wilderness Act unless they would be "necessary to meet minimum requirements for the administration of the area for the purpose of the Wilderness Act. Because the construction of a new dock for private use clearly has nothing to do with the administration of the wilderness area, the construction would not be "necessary" for the administration of the area. As a result, the Park Service's conclusion that the Wilderness Act prohibited the relocation of the dock in the absence of an existing private right was correct.

Key Language

Once federal land has been designated as wilderness, the Wilderness Act places severe restrictions on commercial activities, roads, motorized vehicles, motorized transport, and structures within the area, subject to very narrow exceptions and existing private rights. 16 U.S.C. § 1133(c) of the Wilderness Act states that "except as specifically provided for in this

chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter … there shall be no … structure or installation within any such area."

Dobbs v. U.S. Forest Service, Civ. 16-112-RAW (E.D. Okla. Dec. 26, 2017) aff'd, No. 18-7007 (10th Cir. Apr. 20, 2020)

Background

Plaintiff, Dobbs, owned a 160 acre inholding surrounded by the Upper Kiamichi River Wilderness. Dobbs applied for a special use permit from the FS to build a road to his property for motor vehicle use, in support of building a residence. Historical access was by foot or stock on the remnants of a trail or via cross country. The FS considered multiple factors in reaching its decision: 1) the presence of a road (no evidence of a road having ever existed was present); 2) the presence of roads to other wilderness inholdings (no new roads were constructed to other inholdings in wilderness on the Ouachita National Forest; the only inholding that has roaded access is a property that had roaded motorized access prior to wilderness designation); 3) the impacts of new road construction on wilderness character (lasting adverse effects would occur as quantified in acres of soil disturbed and sediment delivery due to erosion); and, 4) the reasonable use and enjoyment of the private parcel (non-motorized use would allow for reasonable use and enjoyment). Subsequently, the FS denied the application to build the road.

Holding

The FS must comply with the Wilderness Act and the Alaska National Interest Lands Conservation Act in providing access to inholdings. Dobbs argued that the FS had not made a determination of "reasonable use" as required. The District Court found that the FS had appropriately compared Dobbs' property with those "similarly situated" in the wilderness, as well as all other wilderness areas on the National Forest, and such analysis constituted a determination of reasonable use. The FS did not act arbitrarily or capriciously in making its determination. The District Court Decision was affirmed on appeal to the 10th Circuit Court.

Key Language

The District court noted "that no road may be constructed because no road has been constructed" has elements of circular reasoning. However the court will not substitute its judgement for that of the FS. "The Forest Service's determination is supported by more than a scintilla of evidence and is not arbitrary or capricious." The appellate court, responded "neither do we think that the agency's definitions of 'similarly situated properties' involves circular reasoning" because the FS also considered the impact that road construction would have on wilderness character.

Minerals

Brown v. U.S. Dept. of Interior, 679 F.2d 747 (8th Cir. 1982)

(Also applies to: Access)

Background

Plaintiff Brown held roughly 100 mining claims that had been filed on the Buffalo National River, managed by the National Park Service. The claims had been filed subsequent to the National River's designation, and at the time it was being reviewed for suitability as wilderness. Brown appealed decisions of the lower court, IBLA, and the district court holding that his mining claims on NPS federal land within the Buffalo National River area were void.

Holding

The Eighth Circuit held that the appellant's claims were void because the act establishing Buffalo River as part of the NPS implicitly withdrew the lands in question from mineral entry and location. With respect to the Wilderness Act, the appellant argued that the Buffalo River was subject to mining claims because the act establishing the project required that the river be reviewed for suitability as a national wilderness area under the Wilderness Act. Appellant reasoned that because the Wilderness Act withdraws certain "wilderness areas" from mineral exploitation as of December 31, 1983, claims may have been asserted in wilderness areas before that date. The Court rejected this argument and instead held that the Wilderness Act was merely preserving the right to mineral entry on those federal lands where the right previously existed, such as national forest lands administered by the Secretary of Agriculture. The court held that the provision does not apply to the river lands in question.

Key Language

"A careful reading of 16 U.S.C. § 1131(d)(3) reveals, however, that it applies only to mining activities within national forest lands designated as wilderness. As the district court correctly noted, "the Wilderness Act did not open areas for mineral entry; it merely preserved the right to mineral entry in those national forest lands administered by the Secretary of Agriculture, the right to mineral entry in national forests having been created by act of Congress, 16 U.S.C. § 478." Brown v. Department of Interior, supra, slip op. at 5. This provision of the Wilderness Act is not applicable to lands such as the River which are not national forest lands and the Act, therefore, can provide no support for Brown's claim."

Key lesson

The Wilderness Act preserves an existing right to mineral entry, but it does not create the right to mineral entry on lands where the right did not previously exist.

Eugene Water & Electric Bd., 98 IBLA 272 (1987)

Background

On November 30, 1978, EWEB filed two noncompetitive geothermal lease offers with BLM (OR 20049 and OR 20050). The lease offers covered the lands included within secs. 5, 6, 7, 18, and 19 of unsurveyed T. 9 S., R. 8 E., Willamette Meridian, Oregon. The master title plat in the case files discloses that portions of the lands were withdrawn for the Willamette National Forest and the Mt. Hood National Forest. Subsequently, on June 26, 1984, Congress enacted the Oregon Wilderness Act of 1984, P.L. 98-328, 98 Stat. 272. The purpose of that Act was, in part, to "designate certain National Forest System lands and certain public lands in the State of Oregon as components of the National Wilderness Preservation System, in order to promote, perpetuate, and preserve the wilderness character of the lands." Section 2(b)(1), 98 Stat. 272. Among those lands were certain lands in the Willamette and Mt. Hood National Forests which were designated as a part of the Mount Jefferson Wilderness. Section 3(23), 98 Stat. 274-75. This addition is shown on copies of the master title plat appearing in the case files as embracing portions of sections 7, 18, and 19, which were included in appellant's lease offers. Hence, on August 6, 1985, BLM issued a decision rejecting appellant's lease offers for those lands that had been designated wilderness by the Oregon Wilderness Act. The lands rejected amounted to approximately 616.38 acres. The BLM decision further advised appellant: "The acreages used above are subject to change when the final wilderness boundaries are approved for the Oregon Wilderness Act of 1984. You will be notified at that time of any discrepancies which may occur." Appellant's major contention on appeal is that the partial rejection of its lease offers was premature. Appellant's contention is apparently premised on a perception the lands involved have merely been proposed and not designated as wilderness. Appellant argues that much of the land rejected lacks wilderness characteristics, is not isolated and "is unlikely to be included in the final wilderness area designation." In conclusion, appellant states: "[I]t is premature to reject EWEB's application based on present assumptions about future designations of the involved lands. We are convinced that the area in question is not a true wilderness area."

Holding

"Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed." (See key language below.)

Key language

Appellant's arguments reflect an apparent misunderstanding of the effect of the wilderness designation made by section 3 of the Oregon Wilderness Act. For example, appellant states: "Because the area [of the lease offer rejected by BLM] includes roads touching it on three sides, … [it] is unlikely to be included in the final wilderness area designation." Contrary to

appellant's perception, the Oregon Wilderness Act in fact made the "final wilderness designation" for the land in the lease offers that BLM rejected. Only Congress can designate an area as wilderness, and, once it has done so, as it has in this case, the land must be administered in a manner consistent with the legislative mandate. [1] An area designated by Congress as wilderness becomes a component of the National Wilderness Preservation System, and as such is managed in accordance with the provisions of the Wilderness Act of 1964, 16 U.S.C. § 1131-1136 (1982). The Wilderness Act provides, in pertinent part, that: "Subject to valid rights then existing, effective January 1, 1984, the minerals in lands designated by this chapter as wilderness areas are withdrawn from all forms of appropriation under the mining law and from disposition under all laws pertaining to mineral leasing and all amendments thereto." 16 U.S.C. § 1133(c)(3) (1982). Appellant has made no showing of valid existing rights that would exempt the land from the withdrawal from leasing. Accordingly, BLM was required to reject appellant's lease offers to the extent they embraced land within the designated wilderness."

U.S. v. Arthur Mavros, 122 IBLA 297 (1992)

Background

Arthur Mavros and others 1/ (hereinafter claimants) have appealed from an October 30, 1989, decision by Administrative Law Judge John R. Rampton, Jr., declaring the MAVROS'S Nos. 1 through 9, Mavros Nos. 1X and 1 through 5, ART MAVROS Nos. 7 through 11, and MAVROS Nos. 1A through 10A lode mining claims (M MC 42937 through M MC 42956 and M MC 78950 through M MC 78959) invalid for lack of discovery of a valuable mineral deposit. Prior to approving a mining plan of operations for operations in wilderness areas, the claims must be shown to be supported by a discovery. To have a reasonable prospect of success in developing a valuable mine, the mine owner must be able to demonstrate, as a present fact, that there is a reasonable probability that the mineral can be extracted and marketed at a profit. After making the discovery, the discovery must be maintained (i.e. perfected patent application, vested equitable title). During the hearing and at its conclusion, claimants sought an order directing the Government and claimants to conduct joint sampling of the claims. See Tr. 5, 269, 435. Judge Rampton took the motion under advisement and denied the motion in his October 1989 decision.

Holding

“There is nothing in the record that would give the slightest hint that during the period between November 1984 and June 1989 claimants were precluded from taking surface samples to support their case. They took none, and we can find no justification for imposing an obligation to take further samples on the Forest Service. There being no evidence to support claimants' bare assertions that joint sampling would disclose the existence of prior existing discoveries, as that phrase is used in the mining laws, an order directing joint sampling is entirely unwarranted. Judge Rampton properly denied claimants' motion.”

Wilderness Soc'y v. Robertson, 824 F.Supp. 947 (D. Mont. 1993)

Background

Environmental group sued to challenge determination that mining rights owned by Noranda Minerals Corporation (Noranda) existed on government land in the Cabinet Mountains Wilderness in Montana. Prior to December 31, 1983, Noranda's predecessor, Borax, located the mining claims at issue. The Forest Service completed an annual mineral claims report (Rock Lake Report) stating that Borax had discovered a valuable mineral deposit on the subject claim prior to December 31, 1983, therefore constituting valid existing rights under the 1872 Mining Law and the 1964 Wilderness Act. As a result, the Regional Forester recommended that the Kootenai National Forest proceed with the processing of Borax's proposed plan of mining operations. Noranda purchased the mining claims from Borax in 1988, and applied to the BLM for a mineral patent on the subject claims. Plaintiffs filed a protest with the BLM against Noranda's application.

Holding

The USFS has made a sufficient final determination of the validity of rights, the group had standing, and the environmental assessment or environmental impact statement was not required to be Motions to dismiss denied.

Key Language

At the same time that Congress designated a portion of the Cabinet Mountains as a wilderness area in 1964 pursuant to the Wilderness Act, Congress enacted a mining law provision. The mining provision stated that, until January 1, 1984, mining laws under the 1872 Mining Law would apply to wilderness areas designated by the Wilderness Act, such that minerals from valid claims existing on or before December 31, 1983, could be appropriated and such claims patented even after the withdrawal date.

Clouser v Espy, 42 F.3d 1522 (9th Cir. 1994)

(Also applies to: Access)

Background

Plaintiffs sought motorized access to conduct mining operations, including the use of a suction dredge to perform tests on their unpatented claim. The plaintiffs proposed motorized access over four miles of Forest Service wilderness trails. The Forest Service restricted plaintiffs to using

pack animals or other non-motorized means of access on the grounds that motorized access was not essential due to the limited nature of the proposed operation. The Forest Service prohibited motorized transportation as access to the claim during the period the claim's validity was being determined. Plaintiffs argued that the level of access affects the commercial value of the claims and constituted a takings under the 5th and 14th Amendments. Plaintiffs further argued the Forest Service does not have the authority to restrict access, and the restrictions materially interfered with the mining operation, in violation of the mining law.

Holding

Section 5(b) of the Wilderness Act provides "unambiguous instruction to the Secretary of Agriculture to permit ingress and egress to mining claims " by means which have been or are being customarily enjoyed with respect to other such areas similarly situated." The Forest Service finding that the trails proposed for motorized use had not been used by motor vehicles since designation as wilderness, and that the small scope of the proposed sampling was not great, was a reasonable basis for determining that motor vehicle use was not essential. The court found that the Forest Service mineral examiner had used the same equipment to examine the claim, and had accessed the claim by pack horse. The claimant provided no evidence that motorized transport was essential. The Forest Service could not be found to have materially interfered with the claim, in that the standard for such interference "does not apply to actions taken by the government to regulate mining-related activities that occur on national forest lands outside of the boundary of the mining claim." The court reaffirmed that "The property right in an invalidated claim [is] one that may permissibly be restricted pending determination of validity, in order to guard against damage to the claim and surrounding land." Finally, the court concluded that a claim holder is not vested with a "property right to any particular type of access to their claims across national forest wilderness lands surrounding their claims."

Other points of interest

An unpatented claim is a possessory interest solely for the purpose of mining, and it may be contested by the government or a third party. A patented claim is a fee simple interest from the United States and no contest can be brought against the claim.

U.S. v. Clouser, 144 IBLA 110 (1998)

Background

Clouser appealed the BLM finding that his mining claims in the Kalmiopsis Wilderness were null and void because "a valuable mineral deposit had not been discovered…as of December 31, 1983, the date of withdrawal of the claims, and did not exist at the present time." The claims had

been originally located in 1960 and 1973 "in an area where significant gold deposits had been discovered in the early 1900's." Clouser's arguments failed. In *Clouser v. Espy*, he seemed to be indicating he would file a "takings" suit, which the Court had held would have to be in the U.S. Court of Federal Claims. He did not.

Holdings

- "In the case of land withdrawn from mineral entry, a valuable mineral deposit must be shown to have existed on the claim as of the date of the withdrawal, as well as of the date of the hearing. . . . The reason is that, in the absence of a discovery, the land was withdrawn from appropriation under the mining laws, and the unpatented claim deemed void."
- "Where the Government contests a mining claim because it is not supported by the discovery of a valuable mineral deposit, it bears the initial burden of making [the] case that no discovery exists…the burden [then] shifts to the claimant to establish by a preponderance of the evidence" that the Government erred in the specific points it made in denying validity.
- "In determining whether ore can be extracted, removed, and marketed at a profit…at the time of the hearing, concern must not be focused exclusively on the price extant at that time, but rather on the price that is likely in the future given past experience with prices. Gold prices more than 5 years prior to the time of the hearing cannot be considered to reflect the likely price in the future where they include abnormally high prices and there is no evidence that there is a reasonable expectation that the high prices will return."
- "The labor costs to be used [in a profitability analysis] are those that reflect the 'value that an ordinary person would expect to receive for his labor.' This is true whether the work is to be performed by the claimants or hired help…" The minimum wage will not be used "when there is better evidence that a prudent mine operator would expect to pay a higher wage."

Other points of interest

Clouser's arguments were centered on disputing the adequacy of the samples in determining the quantity and quality of mineralization, and disagreeing over labor costs. The issue of lack of motorized access (see *Clouser v. Espy*, above) was not raised in this appeal, despite Clouser's

contention in Appellate Court that the restriction would detrimentally affect the validity determination by raising his costs.

McMaster v. U.S., 731 F.3d 881 (9th Cir. 2013)

Topic: Mineral patents

Background

Plaintiff McMaster owned the Oro Grande mining claim in the Trinity Alps Wilderness managed by the Forest Service. After satisfying all of the requirements for receiving a patent under the General Mining Law of 1872, McMaster filed for a patent. The Bureau of Land Management (responsible for administering patents) issued a patent for the mineral estate, reserving the surface estate to the United States. McMaster brought suit in District Court seeking fee-simple title including the minerals, surface, and improvements to the surface. The District Court rejected McMaster's claim of ownership to the surface and improvements, and McMaster appealed to the Ninth Circuit Court of Appeals.

Holding

The Ninth Circuit upheld the District Court ruling, stating that prior to 1983, McMaster's only "valid existing right" was to a claim, not a patent. A right to a patent does not occur until there has been full compliance with the procedures for obtaining a patent. In this case McMaster did not comply with all the requirements for a patent until after 1983. After 1983, as directed by Section 4(d)(3) of the Wilderness Act, the extent to which the holder of a mining claim is eligible for a patent was reduced, by Congress, to only the mineral estate. Therefore, the BLM was correct in only issuing a patent for the minerals.

The Circuit Court also upheld the District Court in dismissing the claim to ownership of a cabin, workshop, and outhouse located on the mining claim. The cabin dated to the 1890s, but the other buildings were newer. The 1934 bill of sale of the Oro Grande mining claim conveyed all structural improvements, as did the 1991 bill of sale to McMaster. There was no documentation to indicate that the owner of the claim in 1934 actually held title to the structures and was therefore able to pass title to his predecessors. When a claim is abandoned or deemed invalid, the title to surface structures passes to the United States. Through a series of claim re-locations prior to 1934, it appears that title to the claim was broken such that the surface structures would have been passed in this manner to the United States at some time. McMaster failed to provide "particularly sufficient" facts showing title to the structures. Furthermore, the lack of ownership of the surface means that McMaster must now acquire authorization to utilize the surface to access the minerals. Consequently, even if McMaster does own the structures, he could be required to remove them if they are not necessary to develop the mineral estate.

Key Language

"A vested right does not arise until there has been full compliance with the extensive procedures set forth in the federal mining laws for the obtaining of a patent." "Individuals with valid claims who have not even filed a patent application do not have a 'legitimate expectation' of receiving fee-simple title." "McMaster's only 'valid existing right' was to a claim, not a patent."

"Although owners of unpatented mining claims hold fully recognized possessory interests in their claims, ... these interests are a 'unique form of property.' The United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired."

"McMaster no longer holds a valid claim to the Oro Grande lands, by virtue of the fact that he received only a mineral patent, he is required to obtain a special use permit prior to using the surface of the land."

Key Lesson

Mineral patents issued within the wilderness areas convey only the mineral estate within the claim, unless the mining claim was a valid discovery and the claimant complied with all the requirements for obtaining a patent prior to 1983 or, if later, the date on which the wilderness was designated.

Owners of the mineral estate are required to obtain a use permit prior to using the surface of the land. The agency may require the mineral estate owner to remove structures not necessary to develop the mineral estate.

Other points of Interest: A fee simple patent is not necessary for mining to continue. A mining claim itself allows for active mining.

Idaho Conservation League v. Lannon, No. 1:15-cv246-BLW, 2016 WL 4099060 (D. Idaho Aug. 2, 2016)

(Also applies to: Motor Vehicle and Access)

Background

This case examines how much mining should be allowed in a wilderness area. Specifically, the Court is reviewing the Forest Service's decision to allowing drilling, road construction and the use of motorized vehicles and heavy equipment at the Golden Hand Mine in the Frank Church River of No Return Wilderness Area. The Golden Hand Mine was discovered and owned by AIMMCO in 1889 and the Wilderness area was created pursuant to the Wilderness Act of 1964.

Commercial Services | Cultural Resources | Fish & Wildlife | Access | Minerals | Motor Vehicle | Resource Protection | Water Rights

Pursuant to the 1872 Mining Law and the Wilderness Act of 1964, as of January 1, 1984, mining would be prohibited subject to valid rights then existing. This meant that as of January 1, 1984, AIMMCO's right to mine the Golden Hand claims would be restricted to any valid rights it had prior to that date. Under the Mining Law of 1872, AIMCO is entitled to gather sufficient evidence to make its case that 1) there was a discovery of a pre-existing exposure of minerals before the creation of the wilderness area; and 2) that the two claims contain a "valuable mineral deposit" under the "prudent-man test." AIMMCO's mining must be conducted "in a manner compatible with the preservation of a wilderness environment" to comply with the wilderness Act of 1964 16 U.S.C. § 1133(d)(2). The Forest Service thus used a Final Environmental Impact Statement (FEIS) in December of 2014 and a Record of Decision (ROD) in July of 2015. The ROD authorizes AIMMCO to conduct mineral confirmation activities inside the Frank Church Wilderness to prepare for validity hearings on the mining claims. The ROD authorizes AIMMCO to use a bulldozer and other motorized earth-moving equipment, drill rigs, and other machinery within the Wilderness and use large pickup trucks and other motor vehicles to drive 3 miles into and out of the wilderness 571 times each field season to transport work crews and equipment to the mine site. To mitigate impacts, no new roads will be constructed – all roads will be reconstructed on existing roadbeds. To balance mineral extraction with wilderness protection, the Forest Service must assess the minimum activity necessary for AIMMCO to prepare for its validity hearing.

Holding

The Court granted in part the plaintiff's motion for summary judgment. As it pertains to the Wilderness Act of 1964, the Court found that the EIS and ROD violate the Wilderness Act and NFMA because the Forest Service did not take into account the potential reduction of 400 motorized trips by having workers walk to the mining site instead of using motorized vehicles through the wilderness area, rendering arbitrary and capricious the finding that 571 trips was an essential amount necessary for AIMMCO's assessment work.

Key Language

The proponents of the Wilderness Act could not convince Congress to completely ban all mining in wilderness areas. Instead, a compromise was reached that allowed valid mining claims made prior to wilderness designation to continue. 16 U.S.C. § 1133(d)(3) of the Wilderness Act provides that as of January 1, 1984, mining would be prohibited "subject to valid rights then existing" pursuant to the Mining Law of 1872.

Motor Vehicle

U.S. v. Gregg, 290 F.Supp. 706 (W.D. Wash. 1968)

Background

This case was an appeal by the defendant from a conviction for the unauthorized landing of an airplane in National Forest Wilderness. The leading issues in this case are the defendants claim that the FS cannot prohibit landing where it has become established, but can only regulate the use. Defendant asserts this based on Section 4(d)(1) of the Wilderness Act which says "the use of aircraft… where… established, may be permitted to continue subject to… restrictions."

Holding

The District Court ruled that the defendant was properly convicted of the unauthorized landing of his airplane, and subject to criminal penalties. The court found that the Wilderness Act specifically prohibits the landing of aircraft in wilderness areas except where required for administration for the purpose of the Wilderness Act, including emergency response. The Act gives the Secretary discretion to permit landings to continue where the practice was established prior to wilderness designation. Congress did not intend the reading of the statute the defendant proposes. Congress indicated that aircraft "may" be permitted, and if it had intended that the blanket prohibition of aircraft use in Section 4(c) did not apply to areas where it had been established, it would have used the word "shall" as it had in the grazing provision in Section 4(d)(4)(2). Until the Secretary creates an exception, aircraft landings are prohibited even when they occurred prior to wilderness designation. The default rule in absence of an exception made by the Secretary is that all non-administrative aircraft landings are prohibited.

Key Language

Sections 4(c) and 4(d)(1) of the Wilderness Act "say quite specifically that all landing of aircraft is prohibited, but that the Secretary may, by positive regulation, create an exception to this blanket prohibition at places where the use of aircraft was established before the passage of the Act."

Pete v. U.S., 209 Ct.Cl. 270 (Ct. Cl. 1976)

(Also applies to: Commercial Services)

Background

Owners of three cabin barges filed suit seeking just compensation under the Fifth Amendment and federal statute claiming that the enactment of a provision within the BWCAW Act effectively destroyed the usefulness of their barges. The BWCAW Act was carved out of the Wilderness Act of 1964 to specifically govern the Boundary Waters Canoe Area. In 1965, the Secretary of Agriculture promulgated regulations governing the use and enjoyment of the area – the regulations banned all commercial enterprises, privately owned property, private buildings, floating living quarters, aircraft, permanent roads, and the storage or mooring of boats throughout the BWCA. Plaintiffs have three barges that were built on site at Basswood Lake, prior to 1966, which is virtually landlocked and transportation of objects of that size and weight to plaintiff's base of business activity was almost impossible. In the summer, the barges were used to transport, house, and feed hunting and fishing parties; in winter, they housed hardy hunters. The U.S., under the Declaration of Taking Act, obtained an order for immediate possession of plaintiff's land on account of them violating the BWCAW Act commercial enterprise and boat prohibition provision. In response, plaintiffs filed an application for a special use permit to continue to operate their business, even on a limited basis, to conduct daily sight seeing trips around Basswood Lake by cabin barge for senior citizens and persons unable to canoe or backpack, but the application was denied by the Forest Service. Plaintiffs were ordered to cease their business operations and remove all personal or movable equipment.

Holding

The government's action of banning the use of the barges within the BWCA for commercial purposes constituted an inverse condemnation compensable under the Fifth Amendment, and plaintiffs would have no way of continuing their business. Specifically, it was impossible to remove the three barges intact over land from their floating location in land-locked Baswood Lake; it was technically and physically impractical to disassemble the barges, transport them out of the BWCA, and reassemble them elsewhere for further use; and the fair market value of the three barges as of January 19, 1966, the date condemnation proceedings were commences against plaintiff's realty, was $46,800, $54,000, and $52,200.

Key Language

Property is legally taken when the taking directly interferes with or substantially disturbs the owner's use and enjoyment of the property. A compensable taking under the Fifth Amendment is "just compensation," which is reimbursement to the owner of the property interest taken. The essential question is always that the owner has lost, with the owner's indemnity being measured in different ways depending on the circumstances in each case. Federal law recognizes that the interference with use or possession may be so substantial and of such a character that it cannot be

done without compensation under the Federal Government's regulatory and executive powers. Where these factors exist and a constitutional taking is implied, it is assumed that the U.S. has acquired a definite interest in the property.

Friends of the Boundary Waters Wilderness v. Dombeck, 164 F.3d 1115 (8th Cir. 1999)

Background

The plaintiffs in each of the two cases that are consolidated into this case challenge the USFS's statutory interpretations of the Boundary Waters Canoe Area Wilderness Act (BWCAW Act) Wilderness Management plan (Wilderness or Management Plan) and the Wilderness Act that deal with visitor and motorboat use restrictions in the BWCAW. The BWCAW Act of 1978 eliminated the provision within the Wilderness Act of 1964 (*see* 16 U.S.C. § 1133 (d)(5) (1976) that permitted the continuance within the BWCA of any already established use of motorboats. Specifically, the BWCAW Act legislated a ban on the use of motorboats in the BWCAW except on particular named lakes, portions of lakes, and rivers. *See* 92 Stat. at 1650, § 4(c). The Management Plan responded to a Record of Decision indicating that use levels within the BWCA were beginning to strain the wilderness environment. The Management Plan restricts visitor and motorboat use within the BWCA through a quota system, entry point restrictions, special permits for commercial towboats, and a special exemption from the motorboat quota system for homeowners, resort owners, and their guests. Plaintiffs assert that 1) the Plan's motorboat quotas, visitor use restrictions, and definition of "guest" unduly limit access to the BWCAW in violation of the BWCAW Act, and 2) the special use permits for towboats and the grouping smaller lake chains as one lake on which homeowners, resort owners, and guests are exempt from the quota system allow for excessive motorized use in the area in violation of the BWCAW Act.

Holding

A) Towboat Special Use Permits

The USFS was not in violation of the BWCAW Act in not counting towboats in the entry point quota by requiring them to obtain a special use permit. Although plaintiffs are correct in saying that the plain language of the BWCAW Act requires towboat use to be included in the annual motorboat use, the USFS was not creating an exemption that was contrary to the Act. Rather, the USFS was choosing an independent means for monitoring commercial towboats so that they did not eventually grow and take up an increasingly greater percentage of the available motorboat use to leave less quota permits available to visitors. Furthermore, the overall quota of towboats and motorboats does not exceed the level mandated by the BWCAW Act.

B) "Guest" Definition

The agency's Wilderness Plan definition of "guest" (a person receiving overnight lodging at a home or resort, and who lodges with the consent of a keeper or owner, not customers who purchase a meal, rent a boat, or pay for parking) is not overly restrictive and in violation of the BWCAW Act. It is a reasonable attempt to comply with the congressional intent of protecting the BWCAW through limited motorboat use.

C) "That Particular Lake"

The USFS violated the BWCAW Act by defining "that particular lake" as including certain chains of lake within one lake for the purposes of administering the guest provision. By using this definition, the Wilderness Plan impermissibly allows for homeowners, resort owners, and their guests to use a group of lakes or lake chains without a permit, thereby greatly increasing motorboat use in the BWCAW. Congress did not intend for such a broad construction of one lake. This is supported in the same section of the Act, where Congress listed each of these smaller lakes that the USFS groups together as a "particular lake" and listed the different motor sizes allowed on each named lake.

Friends of Boundary Waters Wilderness v. Bosworth, 437 F.3d 815 (8th Cir. 2006)

Background

Environmental groups brought this action against the United States Forest Service (USFS), alleging that the USPS violated the Wilderness Act (subsequently the Boundary Waters Canoe Area Wilderness Act) in constructing a management plan that allowed visitor and motorboat use in the Boundary Waters Canoe Area Wilderness (BWCAW) (one of the first wilderness areas recognized under the Wilderness Act). The Wilderness Act generally prohibits all motorboat use within wilderness areas protected by the Act. However, the BWCAW was exempt from this general prohibition insofar as already established motorboat use within the BWCAW and other motorboat use not undermining the ability to maintain the primitive character of the area were permitted. 16 U.S.C. § 1133(d)(5) (1976). In 1978, Congress reconsidered the BWCAW exception to the Wilderness Act and enacted the BWCAW Act to protect against the increased and threatened deterioration of the wilderness that resulted from excessive use. The BWCAW Act restricted the motorboat use within the BWCAW area by permitting it only on specifically enumerated lakes comprising approximately ¼ of its waters: the Moose Lake Chain, the Saganaga Lake Chain, and the Farm Lake Chain. Specifically, the Act restricted the use to be "less than or equal to the average actual annual motorboat use of the calendar years of 1976-78." In 1981, the Secretary of Agriculture (in USFS) established motorboat quota levels that were based on the size and configuration of each lake and the amount of use on that lake, excluding motorboat use from home and resort owners plus their guests on that particular lake. In 1999, this court concluded that the USFS's interpretation that homeowner, resort, and guest lake chain use did not require a permit was contrary to the plain language of the BWCAW Act because it was too permissive with motorboat use. *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1124-25 (8th Cir. 1999). In 2002, the USFS recalculated the quotas (also referred to as base period use figures) in response to the increased demand for permits from the homeowners, resorts, and guests who were not required to obtain a permit prior to the *Dombeck* ruling. Because more people had to obtain a motorboat permit, the higher numbers increased the quota for the entire BWCAW area and allowed more motorboat use.

Holding

The USFS does have the authority under the BWCAW Act to recalculate the base period use; if done correctly pursuant to *Dombeck*, it would produce the actual use figure contemplated by the legislature in passing the BWCAW Act. However, the USFS was arbitrary and capricious because the USFS used unreliable data and inadequate calculations to recalculate the base period use by estimating total homeowner and resort chain use and the percentage that was non-exempt lake chain use. Basically, the USFS relied upon different and inconsistent data and methodologies for each lake chain recalculation.

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

Background

Wilderness Watch, Inc., a non-profit organization dedicated to preservation and stewardship of lands in National Wilderness Preservation System and National Wild and Scenic Rivers System, brought suit against the federal Bureau of Land Management (BLM), alleging that BLM violated the Wilderness Act and NEPA by allowing the city police department to conduct helicopter search and rescue training at designated sites within wilderness areas inside a National Conservation Area. Plaintiffs argue that the helicopter activities fall within the Wilderness Act restriction that indicates that there shall be "no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, [and] no other form of mechanical transport within wilderness areas." BLM argues that the helicopter search and rescue training falls under the emergency exception found in the same subsection of the Act, which excludes measures "required in emergencies involving the health and safety of persons within the area." 16 U.S.C. § 1133(c).

Holding

The helicopter use in this case does fall within the exception of 16 U.S.C. § 1133(c) of the Wilderness Act that allows motor vehicles/equipment for emergency situations. Therefore, helicopter search and rescue training within the wilderness area is not prohibited. First, search and rescue training had been carried out in wilderness areas for over four decades as part of the provision of safety through emergency rescue services for people using wilderness areas. Additionally, while some training can occur outside of wilderness areas, most training needs to occur on the landing sites on the actual cliffs and canyons within the wilderness area where the rescue operations will take place so that search and rescue team members will not be on unfamiliar terrain, as would be the case if they had never practiced there.

Key Language

The Act includes language that allows for the "recreational, scenic, scientific, educational, conservation, and historical" uses by humans, and Congress did not intend that the wilderness be preserved in a "museum diorama" condition. As such, while the Act contains direction for agencies to preserve the wilderness as it was naturally before human interaction, it also provides instruction to maintain the wilderness in such a way that allows humans to enjoy it safely for a variety of purposes. The exception that allows for the minimum necessary to meet minimum requirements for the administration of the area relevant here is the "measures required in emergencies involving the health and safety of persons within the area."

Minn. Center for Environmental Advocacy v. U.S. Forest Serv., 914 F.Supp.2d 957 (D. Minn. 2012)

Background

Environmental organizations brought this action challenging a travel management plan (roads) in a national forest that bordered the Boundary Waters Canoe Area Wilderness. Plaintiffs assert that the road project violates the Wilderness Act because it will permit OHV use outside of the BWCAW that will allegedly degrade the wilderness character of the BWCAW by increasing noise impacts, degrading water and air quality, and increasing non-native species. Plaintiff's Wilderness Act claim relies on their contention that OHV use outside of the BWCAW will nevertheless have negative impacts within the BWCAW.

Holding

As it pertains to the Wilderness Act, the Court concluded that the allowance of off-highway vehicle use (OHV) outside of the wilderness area in the national forest's travel management plan was not arbitrary and capricious in violation of the Wilderness Act. The plan was confined to a portion of the forest that was outside of the wilderness area, did not authorize any OHV use in the wilderness area, and the Forest Service concluded that the low standard roads being closed within one mile of the wilderness area would decrease air quality pollutants entering the wilderness, decrease sounds entering the wilderness, decrease potential water quality impacts to the wilderness, decrease potential impacts to wildlife, and decrease the potential for non-native invasive species to spread into the wilderness.

Key Language

The plain language of 4(b) makes no distinction based on the source of the allegedly degrading agency activity, and the agency's duty to preserve the wilderness is wholly independent of the source or location of that activity. However, the Court relied on *Izaak Walton League of America, Inc. v. Kimbell*, 516 F.Supp.2d 982 (D.Minn.2007), where that court distinguished this duty and was not persuaded that § 4(b) of the Wilderness Act supports a *per se* ban on agency activity that has any impact on the adjoining wilderness. Although the agency's duty to preserve the wilderness character under § 4(b) may apply to agency activity that occurs outside of the boundaries of the wilderness area, a *per se* ban on all agency activity having some impact on the adjoining wilderness area would substantially impede its administration of wilderness areas, and could serve to expand the wilderness boundaries beyond the areas established by Congress. At some point, the wilderness stops and civilization begins.

Izaak Walton League of America, Inc. v. Tidwell, No.

06-3357 (JRT/LIB), 2015 WL 632140 (D. Minn. Feb. 13, 2015)

Background

This case is the next stage in long-standing litigation between four environmental advocacy organizations and the United States Forest Service over the proposed South Fowl Snowmobile Trail, which runs through the Superior National Forest in northeastern Minnesota, adjacent to the Boundary Waters Canoe Area Wilderness (BWCAW). The Court previously ordered the Forest Service to produce a full Environmental Impact Statement (EIS) analyzing the proposed trail's effects on sound quality in the BWCAW. Since then, the Forest Service has completed its environmental analysis and selected a preferred route. The plaintiffs challenge the Forest Service's decision as violating both Section 4(b) of the Wilderness Act and NEPA.

Holding

The Court granted the Forest Service's and interveners' motion for summary judgment on the Wilderness Act Claim and denied the plaintiff's motion. The Forest Service's conclusion that "opportunities for solitude are substantially unchanged by the alternative" was not arbitrary and capricious. Alternative 2 will not introduce a new type of sound to the wilderness. While it will increase the volume and duration of sound heard at Royal Lake and Royal River, these increases are not significant enough to constitute a Wilderness Act violation. Ultimately, the most any wilderness visitor will hear due to the Alternative is sound equivalent to moderate rainfall. The impact will only occur in a small portion of the affected wilderness. Alternative 2 does not amount to an impermissible degradation of wilderness character because the area has been surrounded by snowmobile and other motorized traffic since the time it was designated as wilderness, and there are few winter visitors and the expectation of solitude is slim. The plaintiffs have failed to demonstrate that the increase in snowmobile sounds under Alternative 2 is significant enough to constitute a violation of the Wilderness Act.

Key Language

The responsibility under 4(b) of the Wilderness Act extends to agency activities that occur outside wilderness boundaries but nonetheless impact the character of the designated wilderness. While the Wilderness Act's protections plainly encompass activity that occurs outside a wilderness area – if that activity impacts the wilderness's character – the Act does not bar agency activity simply because that activity has some effect on adjoining wilderness. To determine whether an action impermissibly degrades the wilderness character of a designated wilderness area, the Court will consider 1) the nature of the agency activity; 2) the existing character of the wilderness area; and 3) the extent to which the essential, natural characteristics of the wilderness

area are changed by the agency activity in question. As to the third factor, if the agency activity in question would increase the audible sound in a wilderness area, the agency looks to several facts about that change in sound to determine if the areas natural characteristics are changed and if the area's wilderness character is impermissibly degraded. Agency activity that affects a wilderness area with sound that is similar in volume, duration, frequency, and quality to the sound that already exists is unlikely to result in a violation of Section 4(b). On the other hand, agency activity that results in noise that is louder, more constant, more frequent, or of a different quality, is more likely to degrade the wilderness character from its present condition and thus violate § 4(b).

Wilderness Watch v. Vilsack, No. 4:16-cv-12-BLW, 2017 WL 241320 (D. Idaho Jan. 18, 2017)

(Also applies to: Fish and Wildlife)

Background

The Idaho Department of Fish and Game (IDFG) received approval from the Forest Service to use helicopters in the Frank Church Wilderness to tranquilize and collar elk with monitors to trace their movements. The project was designed to obtain data to explain the decline in the elk population, which was suspected to be a result wolf predation from the increase in wolves in the area. Ignoring a prior directive of the Court, the Forest Service allowed the project to begin immediately, preventing plaintiff environmental groups from being able to timely seek injunctive relief. The Forest Service allowed the project to begin immediately, ignoring a prior directive of the Court. After three days, 57 elk and 4 wolves were collared. The IDFG intended to seek over 10 years of helicopter landings to collar elk in the Wilderness Area by masking it in the 5 year plan, even though the original plan was stated to be at most 5 years.

Holding

The court held that the Forest Service's approval of the project violated NEPA and the Wilderness Act of 1964, and the court enjoined the Forest Service from considering the data collected, and will enjoin the IDFG from using the data in any way when it seeks future Forest Service approvals. Although the harm of having helicopter landings in the Wilderness Area has passed, there is an ongoing harm because the IDFG continues to hold data that was obtained in violation of federal law. IDFG was required to destroy the data and discontinue any further helicopter use and elk and wolf collaring. Although the court permitted helicopter use in the wilderness in a different study to monitor the wolf population, it made clear that this decision was not a free pass for helicopter use in the future, as it will add to the disruption and intrusion of the wilderness even more. The Forest incorrectly determined in the EA that the 5 year plan for helicopter use would not have a significant affect on the environment, and in essence ignoring the fact that this 5 year plan was actually a 10 year plan proposed by the IDFG. When making this finding, the Forest Service only looked at a one-year portion of the much larger long-term plan. Three important factors – cumulative impacts on the environment, precedent (allowing this would allow for much more of the same thing in the future), and an ecologically critical area (wilderness area) – were present, any one of which should have triggered the preparation of an EIS rather than an EA. The Forest Service therefore violated NEPA by failing to prepare an EIS. Additionally, the Forest Service failed to make the "necessity" finding required by the Wilderness Act when authorizing activities such as helicopter use that are otherwise prohibited by the Act.

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Key Language

The Wilderness Act of 1964 was passed to protect “areas untrammeled by man, where man himself is a visitor who does not remain.” 16 U.S.C. § 1131(c). The landing of aircraft, among other activities, is banned except as necessary to meet minimum requirements for the administration of the area. This provision requires that the Forest Service make a finding of “necessity” before authorizing otherwise prohibited activities in wilderness areas. This prohibition is one of the strictest prohibitions in the Act. The conundrum in this case is that the intrusive helicopter flights were inconsistent with wilderness values, but their purpose of better understanding the wolf and protecting the elk, furthered wilderness values. Here, the Forest Service failed to make this finding of necessity, and therefore the plan to allow helicopters in the wilderness area could not be approved by the court.

Resource Protection

Nat'l Audubon Soc'y v. Hodel, 606 F.Supp. 825 (D. Alaska 1984)

Background

The Secretary of the Interior exchanged St. Matthew Island, a wilderness area within the Alaska Maritime National Wildlife Refuge, for lands held by several native corporations in the Kenai and Yukon Delta National Wildlife Refuges, on August 10, 1983. The native Alaskan corporations, Cook Inlet Region, Inc., Calista Corp., and Sea Lion Corp., were known collectively as CIRI. After the suits were filed, the Secretary defended his actions under Alaska National Interest Lands Conservation Act (ANILCA). 16 U.S.C. § 3192(h). The lawsuits were brought by plaintiffs concerned about the probable loss of a treasured wilderness area that provided crucial habitat for wildlife and birds. CIRI planned to excavate oil and gas from the area, an action that could damage the ecosystem of St. Matthew Island. A draft environmental statement outlined possible plans, including a potential pipeline to St. Matthew Island or offshore loading with facilities to be built on St. Matthew Island. The plaintiffs sought declaratory and injunctive relief. First, the plaintiffs sought judicial declaration that the Secretary's land exchange was unlawful and invalid, and second, the plaintiffs sought a permanent injunction preventing the defendants from completing the proposed plan of activity on St. Matthew Island.

Holding

In consideration of the evidence before the Secretary, the court held that the Secretary's decision was an abuse of discretion. While the Secretary had determined that the lands received in exchange for St. Matthew Island enhanced the national wildlife and conservation worth, the court decided that the Secretary erred in his judgment. The court found that the Secretary's determination that the land exchange would not have a permanent impact on St. Matthew was incorrect. (For summary of potential damage, see 606 F. Supp. at 843-44).

Key Language

"My review of the underlying record has convinced me that the Secretary, by failing to consider the protections otherwise provided by law and by failing to consider relevant facts appearing of record, seriously misconstrued the benefits to CSU and general wildlife conservation and management objectives advanced by this exchange. Additionally, by characterizing the effects on St. Matthew Island as temporary and by erroneously assuming that the land use stipulations would provide sufficient protection to wildlife and wilderness habitats, the Secretary failed to properly consider the likely negative effects caused by environmental impacts on St. Matthew Island. Finally, the Secretary's determination under ANCSA § 22(g) that a support base located within the Alaska Maritime NWR would be compatible with the environmental protection

purposes of this refuge is contrary to the underlying record. The Secretary's Public Interest Determination thus constitutes a clear error of judgment."

Park County (Wyo.) Resource Council v. U.S. Bureau of Land Mgmt., 638 F.Supp. 842 (D. Wyo. 1986)

(Also applies to: Minerals)

Background

A nonprofit organization corporation and property owner sought a preliminary injunction restraining oil drilling in an exploratory well on federal land that was close to a wilderness area. The plaintiffs allege that the environmental assessment should have more fully discussed the potential effects of operations on the wilderness area that was located over one-half mile from the proposed operations.

Holding

The undisputed evidence demonstrates that effects on wilderness users will not be significant given the location of the wilderness on high ground shielded from the proposed operations. Additionally, the Wyoming Wilderness Act of 1984 specifically provides that multiple use lands are not to be managed to provide buffer zones around wilderness areas.

Key Language

An environmental assessment does not need to fully discuss potential effects of oil drilling operations on nearby wilderness areas if effects on the wilderness are not significant.

Sierra Club v. Lyng, 662 F.Supp. 40 (D.D.C. Jan. 1987), amended by 663 F.Supp. 556 (D.D.C. June 1987)

Background

In a series of three cases, Plaintiff groups challenged FS program to control southern pine beetle population expansions in federally designated wilderness areas located in Arkansas, Louisiana, and Mississippi. The southern pine beetle program was not limited to wilderness areas and the purpose and effect of the program was to aid interests of adjacent private property owners, not to enhance wilderness values or further national wilderness policy. Plaintiffs argued that extensive tree-cutting and chemical-spraying violated the Wilderness Act Section 4(c) (16 U.S.C. § 1131(c)) and that the wilderness areas were being destroyed by extensive spot cutting (within wilderness). Plaintiffs argued further that the FS program had not achieved appreciable success in curbing the beetle population expansions. Plaintiffs also brought claims under ESA and NEPA. Defendant argued in response that the Wilderness Act establishes no standards for control of fire, insects, or disease.

January 1987 Holding

The court held that in the immediate situation, the Secretary (FS) was not managing the wilderness but acting in contravention of the Wilderness Act for the benefit of outsiders. The FS' southern pine beetle program as carried out in the wilderness areas at issue was "wholly antithetical to the wilderness policy established by Congress." *Sierra Club*, 662 F.Supp. at 40. The court noted, "the destruction of many acres of pine trees by chain sawing, and chemical spraying accompanied by noise and personnel in a continuing process unlimited in scope, is hardly consonant with preservation and protection of these areas in their natural state. While many facts remain unclear, the record before the Court suggests that within Wilderness Areas, as mature pines are destroyed by the beetle there will be less and less possibility of outbreaks infecting neighboring areas. Only a clear necessity for upsetting the equilibrium of the ecology could justify this highly injurious, semi-experimental venture of limited effectiveness. The Secretary has failed to demonstrate that the Southern Pine Beetle program as carried out in the three Wilderness Areas is necessary to control the presence of that pest in neighboring pine forests or that it has in any way been more than marginally effective in doing so. Because this Court's analysis raises issues not fully addressed in the papers and because it suggests a need to particularize any approach to the Southern Pine Beetle program in terms of each Wilderness Area, area by area, the Court has concluded that final resolution of the motion can most appropriately await the EIS. The Court directs the parties to file further papers in support of or opposition to the motion within 30 days of the publication of the final EIS with emphasis upon the Secretary's burdens as set out herein in the light of whatever Southern Pine Beetle program emerges in the EIS. In the meantime, the preliminary injunction remains in effect and final action on the motion will be held in abeyance."

June 1987 Holding

“Whether the Secretary has met his burden, on this record, of justifying intrusion on wilderness values for the benefit of adjacent landowners depends initially upon how Section 4(d)(1)'s allowance of "necessary" measures is interpreted. If plaintiffs are correct that only measures which are proven to be fully successful in effectively preventing the spread of beetles in an entire area are to be allowed, then the Secretary has failed to meet his burden; he admits that effective area-wide control measures have not yet been identified. If the statute incorporates a less stringent necessity standard, however, the record will support the Secretary's judgment. Plaintiffs read the Act too broadly. First, there is no ground for concluding that Congress used the term "necessary" in the absolute sense urged by plaintiffs. Under the statute, various measures are authorized to the extent that they "may be necessary in the control . . . of insects. . . ." The most natural reading of the Section focuses on the phrase "necessary in the control." In this context "necessary" simply embraces measures "needed to achieve a certain result or effect," American Heritage Dictionary of the English Language 877 (1981) -- that is, measures that are needed as part of a program designed to control, in the sense of restrain or curb, beetle infestations. Cf. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421, 4 L. Ed. 579 (1819) (construing the necessary and proper clause of art. I, ? 8, cl. 18, as sanctioning "all means which are appropriate, which are plainly adapted to [the desired] end"). The pertinent section of the statute is therefore most reasonably construed as allowing the Secretary to use measures that fall short of full effectiveness so long as they are reasonably designed to restrain or limit the threatened spread of beetle infestations from wilderness land onto the neighboring property, to its detriment. The Secretary's burden under Section 4(d)(1) affirmatively to justify control actions taken for the benefit of adjacent landowners is grounded on the need to ensure that wilderness values are not unnecessarily sacrificed to promote the interests of adjacent landowners which Congress authorized the Secretary to protect. The Secretary has now made clear that unless adjacent landowners and federal authorities responsible for neighboring lands are following all reasonable means for combating beetles, the well-settled policies governing preservation of Wilderness Areas will not be compromised.”

Key lesson

The Secretary of Agriculture must justify actions regarding insect control in wilderness areas that contravene wilderness values when such actions are challenged. The Secretary must show that such actions are necessary to effectively control the threatened outside harm. The primeval character of wilderness areas must not be sacrificed for private interests. Private owners of land contiguous to wilderness are obligated to act in a way that minimizes effects on wilderness in all issues of trans-boundary management. Such issues could include insect proliferation, wildfire, and recreational uses.

McDaniel v. U.S., 899 F.Supp. 305 (E.D. Tex 1995)

Background

The plaintiffs brought suit under the Federal Torts Claim Act alleging damages to their property as a result of a southern pine beetle infestation that spread to their property from an adjacent wilderness area. They claimed that the United States, through the Department of Agriculture, knew or should have known the threat that the beetle infestation would have for their property and that it negligently failed to eliminate the hazard or issue a warning to the plaintiffs. The defendants argued that the case should be dismissed because the agency actions fell within the discretionary function exception of the Federal Torts Claim Act and that the United States had no duty owed to the plaintiffs to warn or protect.

Holding

The court dismissed the case finding that the Forest Service's decision-making process regarding insect control is protected as a discretionary function. It held that "internal processes for making insect control decisions are a matter of discretion because there are policy considerations which should be protected from judicial second-guessing. In this case, the Forest Service employees were permitted but not required to control infestations of southern pine beetles in the wilderness. Because the policy did not require the Forest Service to take particular action, the action was left to employee discretion and could not be challenged in court."

Key lesson

The Forest Service's decision-making process regarding insect control is protected as a Discretionary Function Exception, and suits brought under the Federal Tort Claims Act challenging such decisions will be dismissed.

Newton Cnty Wildlife Ass'n v. Rogers, 141 F.3d 803 (8th Cir. 1998)

(Also applies to: Commercial Services)

Background

Environmental group sued the USFS seeking to enjoin or set aside four national forest timer sales, alleging that the sales violate the Wilderness Act (made applicable by the Arkansas Wilderness Act) because the logging activities are upstream and will degrade the quality of Buffalo River and Richland Creek waters flowing through designated wilderness areas.

Holding

The national forest timber sales do not violate the Wilderness Act. Section 7 of the Arkansas Wilderness Act disclaims any congressional intent to create "protective perimeters or buffer zones around each wilderness area." Furthermore, the USFS was not arbitrary and capricious in concluding that the proposed mitigation measures and good management practices would make the impact on water quality insignificant. The USFS thoroughly considered the effect of logging and road construction on the water quality of the Buffalo River and its tributaries.

Key Language

The USFS cannot prohibit an activity outside a wilderness area solely because of its *potential* effect on the Wilderness Area. The Arkansas Wilderness Act of 1984 designated parts of the Ozark National Forest as wilderness areas.

Woodward Stuckart, LLC v. U.S., 973 F.Supp.2d 1210 (D. Or. 2013)

Background

Property owners brought action against United States under Federal Tort Claims Act (FTCA) alleging that their properties were damaged as a result of mismanagement of a fire in wilderness area. The case involves a lightning-caused fire in the Bridge Creek Wilderness that was allowed to burn naturally as a wilderness fire for approximately nine days until it suddenly escalated. Suppression efforts were unable to contain it within the wilderness area, and it burned Plaintiff's properties. Plaintiffs argue that defendant was negligent in many of the decisions made in handling this fire, including designating the fire as a wilderness fire, maintaining that designation

for approximately nine days, and making certain chain-of-command delegations and decisions, including determining the personnel managing the fire.

Holding

The Court finds that defendant's decisions regarding whether to manage the Bridge Creek Fire for WFU purposes, and how the management of the fire would proceed, were susceptible to a policy analysis. These discretionary decisions were grounded in policy regarding management of naturally ignited fires in the wilderness. The Court's task is not to determine whether the Forest Service made the correct decision in its allocation of resources. Where the government is forces, as it was here, to balance competing concerns, immunity shields the decision. The government is immune from liability (not negligent) because the defendant demonstrated that its conduct was the result of a discretionary function susceptible to a policy analysis.

Key Language

For areas protected under the Wilderness Act, the relevant Forest Service Manual specifies that the number one objective of fire management is to permit lightning-caused fires to play, as nearly as possible, their natural ecological role. This objective is pursuant to 16 U.S.C. § 1131(b), (c) of the Wilderness Act, which states that an "agency administering any area designated as wilderness . . . Shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character." Because the definition of "wilderness" is "[…] an area of undeveloped Federal land retaining its primeval character and influence[,] which is protected and managed so as to preserve its natural conditions," it follows that the Forest Service Manual permitting lightning-caused fires to play their natural role is a valid exercise of agency administration of a wilderness area.

Water Rights

Sierra Club v. Yeutter, 911 F.2d 1405 (10th Cir. 1990)

Background

Sierra Club brought suit against the United States Forest Service in 1984 seeking a declaratory judgment that the Wilderness Act of 1964 creates federal reserved water rights. Sierra Club alleged that the Forest Service's failure to claim these water rights in water rights adjudications in Colorado violated their duties under the Wilderness Act. The district court ruled in favor of the plaintiff Sierra Club, and the Forest Service appealed to the Tenth Circuit.

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Holding

- The Tenth Circuit reversed the district court, holding that the Forest Service's actions were not subject to judicial review for two reasons. First, the Court held that, because the Wilderness Act doesn't provide "meaningful standards" for review, the Forest Service's actions with regard to federal reserved water rights are discretionary unless the Sierra Club can show that its actions constitute an "irreconcilable threat to the Wilderness Act's preservation mandate." *Sierra Club*, 911 F.2d at 1414. Second, the Court held that the action was not ripe for review because it was unclear that the Forest Service had reached a final decision on the issue and because a delay in consideration of the issue would not impose a substantial hardship on the Sierra Club.
- The Court held that the Forest Service's actions were not irreconcilable with the Wilderness Act's statutory mandate to preserve the wilderness character of the Colorado wilderness areas for four reasons. First, the federal reserved water rights are already protected from extinguishment under state law by the Supremacy Clause. Second, the location and impact of a possible water diversion is unclear. Third, the Forest Service presented evidence that diversions within or above the wilderness area were unlikely because of administrative controls currently in place. Fourth, a diversion within or above the wilderness area may have no noticeable impact on wilderness water values.

High Country Citizens' Alliance v. Norton, 448 F. Supp. 2d 1235 (D. Colo. 2006)

(Also applies to: Resource Protection)

Background

The National Park Service administers a wilderness area within Black Canyon of the Gunnison National Park. In 1978, the Colorado water court issued a decree awarding the federal government an absolute and conditional water right for the Black Canyon. This decree granted the right to the amount of water necessary to, among other things, preserve the wilderness area in the park. In 2003, the Department of the Interior and the Colorado Water Conservation Board entered into two agreements setting the amount of water the Park Service would be entitled to receive for the park. Under the agreements, the Park Service relinquished its reserved right to peak and shoulder flow and claimed a year-round base flow of 300 cubic feet per second or natural flow, whichever was lower, while the Board claimed an instream flow water right which would be for water beyond that which satisfied present and future obligations of the authorized purposes of Aspinall unit, a series of three dams located upstream from the park. High Country Citizens' Alliance and other environmental groups sued, claiming the agreements violated the Park Service's nondiscretionary duty to protect the park's – and the wilderness area's –

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resources. Plaintiffs complain that although the July agreement recognizes that the "National Park Service is the federal agency responsible for protecting the natural resources, including the water resources, of the Black Canyon of the Gunnison National Park," the April agreement delegates a significant portion of this responsibility to the state of Colorado. The responsibility is delegated through reliance on the Colorado Water Conservation Board to produce instream flows above 300 cfs when the Park Service concedes that flows above 300 cfs are necessary to preserve the canyon.

Holding

“Plaintiffs contend that the delegation of authority and responsibility to the Colorado Water Conservation Board is prohibited. This Court agrees. While federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so. *United States Telecom Association v. Federal Communications Commission*,359 F.3d 554, 566 (D.C.Cir.2004), cert. denied, 543 U.S. 925, 125 S.Ct. 313, 160 L.Ed.2d 223 (2004). The fact that the subdelegation is to state commissions rather than private organizations does not alter the analysis. Delegation to outside entities increases the risk that these parties will not share the agency's "national vision and perspective," and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme. *Id*. at 565-66.”

“NOW, THEREFORE, IT IS HEREBY ORDERED that the federal Defendants' entry into the April and July agreements is SET ASIDE. This matter is remanded to the National Park Service for further proceedings consistent with this decision.”

Key language

- “Under the Wilderness Act of 1964, this wilderness area must be administered in such a manner as will leave it unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of the area, and the preservation of its wilderness character. 16 U.S.C. §§ 1131(a), 1133(b). It is without a doubt that the Black Canyon of the Gunnison is a pre-eminent treasure of the people of Colorado, as well as the people of the United States. The water of the Gunnison is vital to the beauty and enjoyment of this spectacular wilderness area. Relinquishment of any rights, authority or responsibility has to be done cautiously and in compliance with all of the public's laws.”
- “This Court finds that the effect of the April and July agreements was actually to remove the administration of the Black Canyon resources from the National Park Service in direct contravention of the National Park Service Organic Act, the Black Canyon Act and the Wilderness Act.”

Key lesson

A federal agency cannot relinquish a water right that is necessary to maintain the wilderness character of an area.

Sierra Club v. Block, 622 F. Supp. 842 (D. Colo. 1985)

Background

National conservation organization brought action against federal officials, contending that federal reserved water rights existed in wilderness areas designated pursuant to the Wilderness Act, that federal officials had failed to claim those reserved water rights in violation of their duties under the Act and the "public trust doctrine," and that officials' failure to carry out their statutory and trust obligations was arbitrary and capricious and unlawfully withheld agency action.

Holding

Although the federal water rights were impliedly reserved in previously unappropriated water in wilderness areas designated as such pursuant to the Wilderness Act, the federal officials did not unlawfully withhold agency action by failing to assert reserved water rights in the wilderness areas.

Key lesson

Congress intended for federal water rights in wilderness areas in previously unappropriated water to be reserved water rights in the wilderness area; however, if an agency fails to retain those rights and appropriates the water, it does not violate the Wilderness Act.

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Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515 (10th Cir. 1992)

(Also applies to: Commercial Services)

Background

Nonprofit organization brought suit to set aside land use easement issued by Forest Service and construction permit issued by United States Army Corps of Engineers for water diversion project (Homestake II) in wilderness area.

Holding

The Homestake II project is exempt from the Wilderness Act's ban on water projects in wilderness areas. The project nonetheless required authorization from the Forest Service under Title V of the Federal Land Policy and Management Act (FLPMA).

Key Language

Although the Wilderness Act generally forbids water/commercial projects in wilderness areas, certain areas can be exempt from this rule. Projects must still be authorized by the Forest Service pursuant to other environmental policies.