

WILDERNESS EXCEPTIONS

BY

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The Wilderness Act provides for the management of “undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions.” Except when it doesn’t. This Article considers when activities that are inconsistent with wilderness are nonetheless allowed in it. That result happens in four different ways: (1) Congress decided not to designate an area as “wilderness” even though the area possesses wilderness characteristics; (2) Congress draws the boundaries of a wilderness area to exclude land that possesses wilderness characteristics because Congress wants to allow activities there that would be forbidden by the Act; (3) Congress specifically authorizes otherwise prohibited activities when it establishes a new wilderness area; or (4) Congress acts to approve contested activities in response to a controversy that arises after a wilderness area has already been established. The careful decisions regarding those areas that should be entitled to the law’s protections, and the circumstances in which those protections may give way to other values, demonstrate the ability to identify and prioritize wilderness values in a way that was never possible before.

I.	INTRODUCTION.....	374
II.	ESTABLISHING WILDERNESS AREAS	376
III.	WILDERNESS BOUNDARIES	388
IV.	WILDERNESS ACT EXCEPTIONS	392
	A. <i>Minimum Requirements Exception</i>	392
	B. <i>Existing Aircraft & Motorboats</i>	397
	C. <i>Control of Fire, Insects & Diseases</i>	397
	D. <i>Mining</i>	398
	E. <i>Water Projects</i>	398
	F. <i>Grazing</i>	399

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374	<i>ENVIRONMENTAL LAW</i>	[Vol. 44:373]
	<i>G. Commercial Recreation Services</i>	400
	<i>H. Access to Inholdings</i>	400
V.	SPECIFIC WILDERNESS EXCEPTIONS	400
	<i>A. Establishment Acts</i>	401
	<i>B. Subsequent Amendments</i>	403
VI.	CONCLUSION	412

I. INTRODUCTION

We still debate the paternity of the Wilderness Act fifty years after it was born. The prevailing view is that Howard Zahniser was the father of the Wilderness Act.¹ As a Wilderness Society official lobbying Congress to pass the law, Zahniser authored the law's memorable definition of wilderness as "where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain."² The Act further defines wilderness as:

An area of wilderness is . . . an underdeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which . . . generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable.³

That sweeping language has helped the Wilderness Act gain the reputation of being the most stringent law governing the use of the natural environment.⁴ Motorized vehicles, structures, and commercial enterprises

¹ Wilderness Act, 16 U.S.C. §§ 1131–1136 (2006). *See, e.g.*, The Wilderness Land Trust, The Golden Anniversary of Wilderness, <http://www.wildernesslandtrust.org/50th-anniversary> (describing Zahniser as "Father of the Wilderness Act"); Ed Zahniser, *Howard Zahniser: Father of the Wilderness Act*, National Parks, Jan.–Feb. 1984, at 12; *see also* 151 CONG. REC. S4102 (2005) (statement of Sen. Feingold) (referring to "Wilderness Act author Howard Zahniser").

² *Id.*

³ 16 U.S.C. § 1131(c).

⁴ 16 U.S.C. §§ 1131–1136. *See, e.g.*, *Organ Mountains-Desert Peaks Wilderness Act: Hearing on S. 1689 Before the S. Energy and Nat. Res. Comm.*, 111th Cong. 22 (2010) [hereinafter *Organ Mountains Wilderness Hearing*] (statement of Tom Cooper, Rancher & Former Chairman, People for Preserving Our Western Heritage) ("Environmentalists state that wilderness is the gold standard of preservation."); Kevin Hayes, *History and Future of the Conflict Over Wilderness Designations of BLM Land in Utah*, 16 J. ENVTL. L. & LITIG. 203, 207 (2001) ("Many view the Wilderness Act as the zenith of preservationism."); William H. Rodgers, Jr., *The Seven Statutory Wonders of U.S. Environmental Law: Origins and Morphology*, 27 LOY. L.A. L. REV. 1009, 1009–10 (1994) (naming section 2 of the Wilderness Act as one of the seven most effective and influential U.S. environmental laws).

are excluded from wilderness areas.⁵ The courts read the Wilderness Act especially strictly to prohibit questionable activities.⁶

But Wayne Aspinall has been identified as the father of the Wilderness Act, too.⁷ Aspinall represented western Colorado in the United States House of Representatives as Congress debated long and hard before it finally enacted the Wilderness Act.⁸ Eight years elapsed between the first wilderness bill introduced by Senator Hubert Humphrey and the passage of the Wilderness Act in 1964.⁹ “Congress lavished more time and effort on the wilderness bill than on any other measure in American conservation history,” with nine hearings “collecting over six thousand pages of testimony.”¹⁰ Aspinall served as the chair of the House Interior and Insular Affairs Committee during that time, and he insisted on balancing wilderness values with other claimants to the use of federal public lands. The compromises extracted by Aspinall that were necessary to finally secure passage of the law included the relaxation of some of the law’s land use restrictions, shifting the authority to designate wilderness areas from federal land agencies to Congress, and the elimination of the proposed National Wilderness Preservation Council.¹¹ The protections of the Wilderness Act only apply to federal lands that Congress has designated as wilderness areas.

Zahniser and Aspinall’s competing paternity claims are of much more than historic interest. They represent the fundamental divide in our understanding of the Wilderness Act. Wilderness areas are places that are untrammelled by human activity and where natural conditions prevail. Except when they are not. The law allows some trammeling and some manipulation of natural conditions within designated wilderness areas.¹²

⁵ 16 U.S.C. § 1133(c).

⁶ See Peter A. Appel, *Wilderness and the Courts*, 29 STAN. ENVTL. L.J. 62, 95–119 (2010) (concluding through case studies and numerical data that courts tend to read the Wilderness Act more strictly than other statutes).

⁷ See STEVEN C. SCHULTE, WAYNE ASPINALL AND THE SHAPING OF THE AMERICAN WEST 115–65 (2002) (describing Aspinall’s role in forcing the compromises contained in the Wilderness Act); STEPHEN C. STURGEON, THE POLITICS OF WESTERN WATER: THE CONGRESSIONAL CAREER OF WAYNE ASPINALL (2002); JAMES MORTON TURNER, PROMISE OF WILDERNESS: AMERICAN ENVIRONMENTAL POLITICS SINCE 1964, at 30 (2012) (“While Zahniser is celebrated as the visionary behind the Wilderness Act, no one did more to shape the final legislation than its staunchest congressional opponent, Representative Wayne Aspinall.”).

⁸ DOUG SCOTT, THE ENDURING WILDERNESS 50–56 (2004) (chronicling the “eight year legislative odyssey” leading up to the Wilderness Act).

⁹ CRAIG W. ALLIN, THE POLITICS OF WILDERNESS PRESERVATION 102–142 (1982); CHAD P. DAWSON & JOHN C. HENDEE, WILDERNESS MANAGEMENT: STEWARDSHIP AND PROTECTION OF RESOURCES AND VALUES 90–97 (4th ed. 2009) (discussing the events leading up to the passage of the Wilderness Act); RODERICK FRAZIER NASH, WILDERNESS IN THE AMERICAN MIND 105–21, 200–26 (4th ed. 2001); DOUG SCOTT, THE ENDURING WILDERNESS 27–56 (2004); Michael McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288, 295–301 (1966).

¹⁰ NASH, *supra* note 9, at 222.

¹¹ DAWSON & HENDEE, *supra* note 9, at 96 (“The Wilderness Act clearly contained compromises, yet without them, it is unlikely that the bill would have ever passed.”).

¹² See Gordon Steinhoff, *Naturalness and Biodiversity: Why Natural Conditions Should Be Maintained Within Protected Areas*, 37 WM. & MARY ENVTL. L. & POL’Y REV. 77, 88 (2012) (“The Wilderness Act allows substantial manipulations of wilderness in special circumstances . . .”).

Moreover, the understanding of wilderness areas is not reciprocal. While wilderness areas are supposed to be places that are untrammelled by human activity and where natural conditions prevail, it is not true that all such places are wilderness areas that receive the protection of the Wilderness Act. There are many areas that are wilderness in fact, but not wilderness at law.

This Article considers when activities that are inconsistent with wilderness are nonetheless allowed in it. That result happens in four different ways: (1) Congress decided not to designate an area as “wilderness” even though the area possesses wilderness characteristics; (2) Congress draws the boundaries of a wilderness area to exclude land that possesses wilderness characteristics because Congress wants to allow activities there that would be forbidden by the Act; (3) Congress specifically authorizes otherwise prohibited activities when it establishes a new wilderness area; or (4) Congress acts to approve contested activities in response to a controversy that arises after a wilderness area has already been established. In Part II, I describe how only Congress has the authority to designate wilderness areas, and how Congress has used that authority both to establish over 100 million acres of wilderness areas and to exclude certain wild places because Congress does not want them managed as wilderness.¹³ Part III explains the importance of wilderness boundaries—which separate land subject to the land use regulations of the Wilderness Act from land that is free from those regulations—and how Congress employs those boundaries to achieve even finer distinctions between land use that is regulated by the Wilderness Act and land use that is not.¹⁴ Part IV examines the exceptions contained in the Wilderness Act that allow activities that are otherwise prohibited by the Act.¹⁵ Part V shows how Congress sometimes creates additional exceptions to the Wilderness Act’s general rules both in the statutes establishing new wilderness areas and in statutes enacted in response to controversies about the use of a wilderness area.¹⁶ My conclusion is that the combination of stringent restrictions and appropriate exceptions is what has made the Wilderness Act so successful for fifty years.

II. ESTABLISHING WILDERNESS AREAS

The first impediment to securing the protections of the Wilderness Act is that Congress must act. No matter how wild or untrammelled, the establishment of a wilderness area depends on congressional legislation. In other words, there are places that are wilderness in fact, but not wilderness at law.¹⁷

¹³ See *infra* Part II and notes 51–53.

¹⁴ See *infra* Part III.

¹⁵ See *infra* Part IV.A–H.

¹⁶ See *infra* Part V.

¹⁷ The fact that Congress has not designated land as a wilderness area does not preclude federal agencies from managing land to preserve wilderness values. The Forest Service and the

The original bills proposed by wilderness supporters would have empowered federal agencies to designate wilderness areas in the land they managed.¹⁸ That approach would have worked as a hybrid of the Antiquities Act¹⁹ and the Endangered Species Act (ESA).²⁰ As is the case with the Antiquities Act, the President would have unilateral authority to make the necessary decision.²¹ The President's authority to establish a national monument under the Antiquities Act is nominally limited to "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" located on federal lands.²² The original intent of the enactors of the Antiquities Act was even narrower: To preserve the relics of the ancient tribes of the Southwest.²³ But the Supreme Court held that the Grand Canyon satisfied the statutory test,²⁴ and presidents have liberally employed the law ever since.²⁵ They often do so precisely because Congress has failed to act. Indeed, both President Obama and Secretary of the Interior

Bureau of Land Management each manage lands that are not designated as wilderness in a manner that preserves many of their wilderness characteristics, though the formal provisions of the Wilderness Act do not apply. *See Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209 (10th Cir. 2011) (reversing the district court and holding that the Forest Service's roadless rule did not create de facto wilderness in violation of the Wilderness Act's provision that allows only Congress to designate new wilderness areas); DAWSON & HENDEE, *supra* note 9, at 98 (describing the BLM's management of "primitive" and "natural" areas). There are also ongoing disputes about the status of "wilderness study areas" which may possess the characteristics of wilderness but which Congress has not designated as wilderness areas. *See Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1039 (9th Cir. 2011) (holding that the Montana Wilderness Study Act did not prohibit the Forest Service from enhancing the wilderness character of a wilderness study area); Michael C. Blumm, *The Bush Administration's Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands*, 34 ENVTL. L. REP. 10,397, 10,404–09 (2004) (describing the controversy surrounding wilderness study areas in Utah).

¹⁸ *See, e.g.*, S. 4028, 85th Cong. § 2(a)–(d) (1958) (authorizing the Secretary of Agriculture to designate national forest lands as wilderness, and authorizing the Secretary of the Interior to designate lands within national parks, national wildlife refuges, and tribal reservations as wilderness areas).

¹⁹ An Act for the Preservation of American Antiquities, ch. 3060, 34 Stat. 225 (1996) (codified as amended at 16 U.S.C. §§ 431–433 (2006)).

²⁰ Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006); *see* discussion *infra* text accompanying notes 21–31.

²¹ *Compare* Antiquities Act, 16 U.S.C. § 431 (authorizing President to declare national monuments), *with* H.R. 361, 85th Cong. § 2 (1957) (proposing to authorize President to unilaterally identify National Park units for inclusion within the new wilderness system).

²² 16 U.S.C. § 431.

²³ *See* KRISTINA L. WOODALL, U.S. BUREAU OF LAND MGMT., HISTORY AND INTENT OF THE PROCLAMATION FOR CANYONS OF THE ANCIENTS NATIONAL MONUMENT 2012, at 1–6, *available at* http://www.blm.gov/pgdata/etc/medialib/blm/co/nm/cannm/CANM_Documents.Par.77038.File.dat/History_and_Intent.pdf (discussing political and cultural context of the Antiquities Act).

²⁴ *See* Cameron v. United States, 252 U.S. 450, 455–56 (1920) (holding the Grand Canyon is an "object of unusual scientific interest").

²⁵ *See, e.g.*, Press Release, White House, President Obama Designates Five New National Monuments (Mar. 25, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/03/25/president-obama-designates-five-new-national-monuments> ("[T]he Antiquities Act has been used by 16 presidents since 1906 to protect unique natural and historic features in America, such as the Grand Canyon, the Statue of Liberty, and Colorado's Canyons of the Ancients.").

Sally Jewell have threatened to designate national monuments pursuant to the Antiquities Act if Congress fails to take their desired conservation actions.²⁶ Not surprisingly, the unilateral authority that the Antiquities Act gives the President to establish national monuments continues to face significant—and sometimes fierce—resistance more than 100 years after Congress passed it.²⁷

The ESA takes a different approach to designating the species that are protected by the law. The United States Fish & Wildlife Service (FWS) must determine whether a species is “endangered” or “threatened” according to the statutory definitions of those terms.²⁸ A species must be listed if it satisfies that criteria; it may not be listed if it does not.²⁹ Judicial review is available to ensure that the agency has properly applied the statutory test to any proposed listing.³⁰ But this process, too, faces frequent dissatisfaction both from those who object to the mandatory nature of the listing process for species whose value is less evident, and from those who complain that the agency stalls its decisions because of concerns about the regulatory provisions that automatically attach once a species is listed.³¹

The original version of the proposed wilderness law would have empowered an executive branch official (like the Antiquities Act) to

²⁶ See Sally Jewell, Sec. of Interior, Remarks at the National Press Club Speech (Oct. 31, 2013) [hereinafter Secretary Jewell’s National Press Club Speech], *available at* <http://www.doi.gov/news/pressreleases/secretary-jewell-offers-vision-for-conservation-balanced-development-youth-engagement-in-national-press-club-speech.cfm> (describing President Obama’s national monument designations and asserting that “[a]s he has already demonstrated, President Obama is ready and willing to step up where Congress falls short”).

²⁷ See, e.g., National Monument Designation Transparency and Accountability Act, H.R. 2192, 113th Cong. § 3 (2013) (establishing public participation requirements for national monument designations and providing that such designations be “narrowly tailored and essential to the proper care and management of the objects to be protected”); Idaho Land Sovereignty Act, H.R. 1439, 113th Cong. § 3 (2013) (requiring congressional approval for the establishment of national monuments “on any lands in Idaho”).

²⁸ See Endangered Species Act of 1973, 16 U.S.C. § 1532(6) (2006) (defining “endangered species” as “any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man”); *id.* § 1532(20) (defining “threatened species” as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range”); *id.* § 1533(a)(1) (providing that the Secretary shall “determine whether any species is an endangered species or a threatened species because of any of the following factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence”).

²⁹ 73 Fed. Reg. 28,212, 28,242 (May 15, 2008) (codified at 50 C.F.R. § 17.11).

³⁰ See, e.g., *In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig.*, 709 F.3d 1 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 310 (2013) (upholding the FWS’s listing of the polar bear as “threatened,” and rejecting the claims of environmental groups that the polar bear should have been listed as “endangered” and the claims of the State of Alaska that the polar bear should not have been listed at all).

³¹ See generally JOHN COPELAND NAGLE ET AL., *THE LAW OF BIODIVERSITY AND ECOSYSTEM MANAGEMENT* CH. 4 & 5 (3d ed. 2013).

designate wilderness areas pursuant to statutory criteria (like the ESA). That was a stumbling block for western members of Congress who supported continued development of western lands.³² Many western officials and economic interests opposed wilderness legislation when it was first considered during the 1950s.³³ Their principal fear was that the prohibition upon economic activities in lands designated by federal agency officials as wilderness would deprive local interests of the ability to provide for their economic wellbeing.³⁴ They complained about “giving a power to unknown officials in the departments to denominate as wilderness, lands that might be necessary for the economic fate or the defense fate of the United States.”³⁵ They further observed that “[t]he method of establishment of wilderness areas by executive department recommendation, subject to objection by Congress, is contrary to the precedent established in providing for the creation of national parks.”³⁶ Only Congress can create national parks.³⁷ And so the erstwhile opponents of the original wilderness proposal amended it “to provide for establishment of wilderness areas only by affirmative act of Congress with respect to each proposed wilderness area.”³⁸ That was one of the essential compromises necessary for the Wilderness Act to become law in 1964. The Wilderness Act thus provides that “no Federal lands shall be designated as ‘wilderness areas’ except as provided for in this Act or by a subsequent Act.”³⁹

The shift of wilderness designation authority from federal agencies to Congress divided some wilderness supporters.⁴⁰ Some worried “that requiring congressional approval of each individual area could prove to be a cumbersome barrier to rapid and equitable wilderness designation.”⁴¹ Other supporters liked the idea of relying on popular support for new wilderness designations.⁴²

The significance of congressional designation of wilderness areas is seen in the record that Congress has achieved. The Wilderness Act itself

³² See Michael McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288, 299 (1966).

³³ See Michael McCloskey, *Wilderness Movement at the Cross, 1945–1970*, 41 PAC. HIST. REV. 346, 349 (1972).

³⁴ See Dennis Roth, *The National Forests and the Campaign for Wilderness Legislation*, 28 J. FOREST HIST. 112, 117–18 (1984).

³⁵ 106 CONG. REC. 2896 (daily ed. Feb. 18, 1960) (remarks of Sen. O’Mahoney).

³⁶ *Id.* at 2897.

³⁷ Nat’l Park Serv., *U.S. National Park Service History*, <http://www.nps.gov/aboutus/history.htm> (last visited Apr. 12, 2014).

³⁸ 106 CONG. REC. 2897 (1960) (quoting the Explanation of Amendments to S. 1123 Proposed by Senator Allot Based on the Assumption that Amendments Contained in Committee Print No. 2 Will Be Adopted).

³⁹ Wilderness Act, 16 U.S.C. § 1131(a) (2006).

⁴⁰ See DAWSON & HENDEE, *supra* note 9, at 95–96; see also *infra* notes 41–42.

⁴¹ DAWSON & HENDEE, *supra* note 9, at 95.

⁴² KEVIN M. MARSH, DRAWING LINES IN THE WILDERNESS: CREATING WILDERNESS AREAS IN THE PACIFIC NORTHWEST 87 (2007) (“[M]any wilderness advocates felt that Aspinall’s amendment was actually a very positive step toward increased wilderness protection because it would fuel a grassroots citizen campaign to protect more public lands under the Wilderness Act.”).

designated nine million acres of Forest Service land as wilderness areas.⁴³ The Act also directed the Secretaries of Agriculture and the Interior to review whether additional federal lands should be added to the wilderness system.⁴⁴ The Act instructed federal land management agencies to study their lands and determine which ones could qualify as wilderness, a process that proved controversial in its own right, but which simply provided a recommendation that Congress was free to accept or ignore.⁴⁵

Congress has enacted more than 170 statutes adding land to the wilderness system.⁴⁶ More than half of those lands were designated as wilderness by a single act—the Alaska National Interest Lands Conservation Act (ANILCA)—which established fifty-six million acres of wilderness areas in 1980.⁴⁷ Other notable additions include the over two hundred thousand acres of federal lands in the eastern United States designated by the Eastern Wilderness Act of 1975,⁴⁸ and the 7.5 million acres of wilderness lands designated by the California Desert Protection Act of 1994.⁴⁹ Congress added another half million acres to the wilderness system in 2002, most of which is in Nevada but also includes lands in California, Colorado, and South Dakota.⁵⁰ The Omnibus Public Lands Management Act of 2009 designated more than two million acres of wilderness areas in nine states.⁵¹ There are now more than one hundred million acres of federal land designated as wilderness pursuant to the Act.⁵²

⁴³ 16 U.S.C. § 1132(a) (2006) (providing that lands already managed “as ‘wilderness,’ ‘wild,’ or ‘canoe’ are hereby designated as wilderness areas”); ROSS W. GORTE, CONG. RESEARCH SERV., RL31447, WILDERNESS: OVERVIEW AND STATISTICS 1 (2008) (“The National Wilderness Preservation System was created with 9 million acres of Forest Service land.”).

⁴⁴ 16 U.S.C. § 1132(b)–(e).

⁴⁵ *Id.* See also DAWSON & HENDEE, *supra* note 9, at 113–39 (describing those reviews); Sandra Zellmer, *A Preservation Paradox: Political Prestidigitation and an Enduring Resource of Wilderness*, 34 ENVTL. L. 1015, 1021–25 (2004) (describing the biodiversity values of wilderness lands); *id.* at 1044 (discussing Congress’s reactions to RARE I and II, which was affected by the perceived procedural inadequacy of RARE II).

⁴⁶ See DAWSON & HENDEE, *supra* note 9, at 501–06 (listing the public laws in chronological order).

⁴⁷ Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3101–3233 (2006).

⁴⁸ Eastern Wilderness Act of 1975, Pub. L. No. 93-622, 88 Stat. 2096 (1975) (codified as amended at 16 U.S.C. § 1132 (2006)). See also DOUG SCOTT, THE ENDURING WILDERNESS 71 (2004) (“[T]he correct name is the Eastern Wilderness *Areas* Act. This title was mistakenly left out of the bill itself in a clerical error at the eleventh hour as it passed Congress in the hectic final two days of the session.”).

⁴⁹ California Desert Protection Act, Pub. L. No. 103-433, 108 Stat. 4471 (1994) (codified as amended at 16 U.S.C. § 1132 (2006)).

⁵⁰ See AMERICAN WILDERNESS COALITION, WILD CARD: WILDERNESS REPORT CARD 2004, at 37 (2004), available at <http://www.americanwilderness.org/wildcard/2004/index.html> (describing the four statutes enacted by the 107th Congress that established new wilderness areas).

⁵¹ See Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 9401, 123 Stat. 991 (2009).

⁵² The 758 wilderness areas comprise 109,504,348 acres of land in 44 states, which is about 4.7% of the total land in the United States. See Wilderness.net, *Fast Facts About America’s Wilderness*, <http://www.wilderness.net/NWPS/fastfacts> (last visited Apr. 12, 2014). The six states

But other wilderness proposals await congressional approval,⁵³ and many observers object to the slow pace of wilderness designations.⁵⁴ The 112th Congress, which served from 2010 to 2012, was the first Congress not to designate any new wilderness areas since the Wilderness Act was approved in 1964.⁵⁵ Congress finally ended that dry spell in March 2014, when it established over 32,000 acres of wilderness in the Sleeping Bear Dunes National Lakeshore.⁵⁶ Even so, numerous wilderness bills remain pending in Congress, and there are some conspicuous exceptions where the protections of the Wilderness Act do not apply to some of the wildest places in the United States. Two such places are especially contested: The Arctic National Wildlife Refuge and southern Utah.

The northeast corner of Alaska is the wildest place in the United States.⁵⁷ Roads, settlements, and other evidence of human civilization are almost entirely absent.⁵⁸ The area rapidly gained attention during the 1950s, when a number of prominent conservationists, including Justice William O. Douglas, wrote about their travels there.⁵⁹ Alaska became a state in January 1959,⁶⁰ and its congressional delegation immediately blocked legislation to establish a federal wildlife refuge in northeastern Alaska despite extensive congressional hearings.⁶¹ Then, during President Eisenhower's lame duck

with no designated wilderness areas are Connecticut, Delaware, Iowa, Kansas, Maryland, and Rhode Island. *Id.*

⁵³ See, e.g., S. REP. NO. 113-28, at 1 (2013) (supporting the establishment of the Devil's Staircase Wilderness in Oregon); S. REP. NO. 113-99, at 1 (2013) (supporting the establishment of the San Juan Mountains Wilderness in Colorado).

⁵⁴ See, e.g., John D. Leshy, *Contemporary Politics of Wilderness Preservation*, 25 J. LAND RESOURCES & ENVTL. L. 1, 7-8 (2005) (outlining the factors influencing additional wilderness designations); Zellmer, *supra* note 45, at 1018 ("[T]he cumbersome and compromise-ridden legislative process has not fulfilled the Wilderness Act's goal of 'securing an enduring resource of wilderness.'").

⁵⁵ See Kate Sheppard, *Will Congress Go Another Year Without Designating New Wilderness?*, HUFF POST GREEN, Jan. 3, 2014, http://www.huffingtonpost.com/2014/01/03/wilderness-congress-public-lands_n_4509730.html (last visited Apr. 12, 2014); see also Secretary Jewell's National Press Club Speech, *supra* note 26 (observing that Congress "hasn't acted to protect a single new acre of public land as a national park or a wilderness area" since 2010).

⁵⁶ See Sleeping Bear Dunes National Lakeshore Conservation and Recreation Act, Pub. L. No. 113-87, 128 Stat. 1017, 1017-18. According to one poll, the Sleeping Bear Dunes are the most scenic place in the United States. See Alberto Orso & Sabrina Parise, *Sleeping Bear Dunes Voted "Most Beautiful Place in America"*, ABC News, Aug. 17, 2011 (citing the results of a "Good Morning America" poll).

⁵⁷ See ROGER KAYE, *LAST GREAT WILDERNESS: THE CAMPAIGN TO ESTABLISH THE ARCTIC NATIONAL WILDLIFE REFUGE* 2, 3-4, 90 (2006).

⁵⁸ *Id.* at 3.

⁵⁹ See WILLIAM O. DOUGLAS, *MY WILDERNESS: THE PACIFIC WEST* 9-31 (1960). For more information about northeastern Alaska, see WALTER R. BORNEMAN, *ALASKA: SAGA OF A BOLD LAND* 413-17 (2003); DOUGLAS BRINKLEY, *THE QUIET WORLD: SAVING ALASKA'S WILDERNESS KINGDOM, 1879-1960*, at 465-67 (2011); KAYE, *supra* note 57 at 23; DANIEL NELSON, *NORTHERN LANDSCAPES: THE STRUGGLE FOR WILDERNESS ALASKA* 43 (2004).

⁶⁰ Alaska Historical Soc'y, *When and How Did Alaska Become a State?*, <http://www.alaskahistoricalociety.org/index.cfm/discover-alaska/FAQs/11> (last visited Apr. 12, 2014).

⁶¹ See KAYE, *supra* note 57, at 171-72, 202 (explaining that while most of the people who attended the hearings were in favor of establishing the refuge, Congress failed to do so).

period following the election of President Kennedy, Secretary of the Interior Fred Seaton created the Arctic National Wildlife Refuge (ANWR) in northeastern Alaska in December 1960.⁶² The next battle over the area culminated in December 1980, when Congress—again acting in a lame duck session, this time after President Carter lost his bid for reelection—enacted ANILCA.⁶³ ANILCA designated eight million acres of ANWR as wilderness, as well as expanded the refuge and authorized studies of the energy potential of 1.5 million acres of the coastal plain.⁶⁴ The 9.1 million acres that ANILCA added to ANWR are subject to “minimal management,” which is a category intended to maintain existing natural conditions and resource values.⁶⁵ The remaining 10.1 million acres of the refuge are designated for ‘minimal management,’ a category intended to maintain existing natural conditions and resource values.⁶⁶

Since ANILCA, Congress has been engaged in a tug-of-war between those who want to designate the remaining 10.1 million acres of ANWR as a wilderness area and those who want to open it up for mineral production. Much of the actual debate over ANWR presents wholly contradictory portrayals of the refuge, the possible effects on it of oil drilling, and the extent of its potential contribution to decreasing national dependence on foreign sources of oil. Opponents of drilling tend to see ANWR as a pristine wilderness with abundant wildlife that is vulnerable in the face of oil drilling and extraction.⁶⁷ They see a vast, pristine landscape that is home to extraordinary wildlife and only a handful of native Alaskans.⁶⁸ ANWR is home to a herd of approximately 160,000 free-range caribou; forty-five other species of land and marine mammals; including grizzly, polar and black bears, wolves, muskox and moose; up to 180 species of birds, many of them

⁶² See *id.* at 204–09 (describing Seaton’s order and the various reactions to the order).

⁶³ See NELSON, *supra* note 59, at 246.

⁶⁴ See Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, § 702(3), 94 Stat. 2371, 2418 (1980); *id.* § 1002, 94 Stat. 2371, 2449; U.S. Fish & Wildlife Serv., *Management of the 1002 Area Within the Arctic Refuge Coastal Plain*, <http://www.fws.gov/alaska/nwr/arctic/1002man.htm> (last visited Apr. 12, 2014).

⁶⁵ U.S. Fish & Wildlife Serv., ANWR, Management of Lands Added to the Refuge in the 1980s, <http://www.fws.gov/alaska/nwr/arctic/minman.htm> (last visited Apr. 12, 2014).

⁶⁶ *Id.*

⁶⁷ See, e.g., *ANWR: Jobs, Energy and Deficit Reduction Parts 1 and 2: Oversight Hearings Before the H. Comm. on Natural Res.*, 112th Cong. 50–51 (2011) [hereinafter *2011 House ANWR Hearing*] (statement of John Garamendi, Rep. from California) (“[ANWR is a] place for wildlife and mosquitoes, but not a place where we should extract resources.”); *id.* at 74 (statement of Douglas Brinkley, Professor of History, Rice University) (describing ANWR as a place of solace that should not be opened up for oil drilling).

⁶⁸ See, e.g., *2011 House ANWR Hearing*, *supra* note 67, at 50 (statement of John Garamendi, Rep. from California) (contending that “[t]here is no other place on this planet like ANWR”); *id.* at 81 (statement of Erich G. Pica, President, Friends of the Earth) (describing ANWR as “one of the last vast pristine, undisturbed wildernesses left in America”); 148 CONG. REC. 4,822 (daily ed. Apr. 17, 2002) (statement of Sen. John Kerry) (“[ANWR] is one of the great untouched lands remaining in America and on the northern continent. Its ecological value is unlike any other in the Nation and in the world.”).

migratory waterfowl; and a variety of other animals and plants.⁶⁹ Further, wilderness supporters cite figures suggesting that oil from ANWR would do little to solve the nation's energy woes.⁷⁰ In contrast, proponents of drilling see ANWR as a bleak and uninhabited place whose wildlife could easily adapt to the presence of environmentally friendly drilling operations.⁷¹ They see tapping its oil as one small but significant part of a larger national energy policy. ANWR is the site of the largest petroleum reserves in the United States that could help us achieve energy independence.⁷² President George W. Bush made opening ANWR to oil drilling a major part of his administration's national energy policy.⁷³ Dismissing worries that drilling would destroy the region's wilderness character, he insisted that "[a]dvanced new technologies allow entrepreneurs to find oil and to extract it in ways that leave nature undisturbed. . . . In Arctic sites, like ANWR, we can build roads on ice that literally melt away when summer comes, and the drilling stops to protect wildlife."⁷⁴ An Alaskan union representative offered a third perspective when he explained that "[w]hether you choose to believe it to be the 'Serengeti plain of America' or a cold, desolate, God forsaken, mosquito infested wasteland, there is no all-encompassing absolute that can describe ANWR. The truth is it is neither of the two. It falls somewhere in the middle."⁷⁵ Most people, though, eschew the middle and prefer either of the two extremes.⁷⁶ The status quo favors the opponents of drilling because existing law prohibits oil development in ANWR.⁷⁷ Despite President Bush's appeals, Congress was unwilling to change the law.⁷⁸

⁶⁹ Porcupine Caribou Mgmt. Bd., *Oil Development and Caribou Science*, <http://arctic.circle.uconn.edu/ANWR/anwrcaribouscience.html> (last visited Apr. 12, 2014); U.S. Fish & Wildlife Serv., *Arctic*, <http://www.fws.gov/refuges/profiles/index.cfm?id=75600> (last visited Apr. 12, 2014).

⁷⁰ NBC News, *Study: ANWR Oil Would Have Little Impact*, http://www.nbcnews.com/id/4542853/ns/us_news-environment/t/study-anwr-oil-would-have-little-impact/#.UvKrz_1N1uY (last visited Apr. 12, 2014).

⁷¹ World Issues 360, *Government Drill Oil Arctic National Wildlife Refuge Steps Reduce Dependence—Yes*, FOSSIL FUELS, Dec. 28, 2008, <http://www.worldissues360.com/index.php/government-drill-oil-arctic-national-wildlife-refuge-steps-reduce-dependence-yes-23444/> (last visited Apr. 12, 2014).

⁷² See, e.g., *2011 House ANWR Hearing*, *supra* note 67, at 1 (statement of Rep. Doc Hastings, Chairman) ("ANWR is the single greatest opportunity for new energy production on federal land. No single energy project in America can produce more jobs and do more to reduce the debt.").

⁷³ Press Release, White House Office of the Press Secretary, *President Applauds House Vote Approving Energy Exploration in Arctic National Wildlife Refuge (May 25, 2006)*, *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2006/05/>.

⁷⁴ Press Release, White House Office of the Press Secretary, *Radio Address by the President of the Nation (May 19, 2001)*, <http://georgewbush-whitehouse.archives.gov/news/releases/2001/05/20010519.html> (last visited Apr. 12, 2014).

⁷⁵ *2011 House ANWR Hearing*, *supra* note 67, at 20 (statement of Tim Sharp, Business Manager/Secretary Treasurer, Alaska District Council of Laborers).

⁷⁶ See, e.g., Rose Ragsdale, *Tis the Season for ANWR*, http://www.anwr.org/archives/tis_the_season_for_anwr.php (last visited Apr. 12, 2014).

⁷⁷ Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3143 (2006). See also M. LYNNE CORN ET AL., CONG. RESEARCH SERV., 7-5700, ARCTIC NATIONAL WILDLIFE REFUGE (ANWR): A PRIMER FOR THE 112TH CONGRESS 21 (2012), *available at* <https://www.fas.org/spp/crs/>

But the status quo does not include additional wilderness designations, either. Representative—now Senator—Edward Markey has repeatedly introduced the Udall-Eisenhower Arctic Wilderness Act to designate ANWR as a wilderness area, to no avail.⁷⁹ The bill's findings assert that:

It is widely believed by ecologists, wildlife scientists, public land specialists, and other experts that the wilderness ecosystem centered around and dependent upon the Arctic coastal plain of the Arctic National Wildlife Refuge, Alaska, represents the very epitome of a primeval wilderness ecosystem and constitutes the greatest wilderness area and diversity of wildlife habitats of its kind in the United States.⁸⁰

The Obama Administration supports that proposal.⁸¹ In 2011, the FWS—which manages ANWR—prepared a draft revised comprehensive conservation plan (CCP) for the refuge which contained a formal wilderness review that recommended the establishment additional wilderness in ANWR.⁸²

Congress has never come close to designating all of ANWR as wilderness. Indeed, Alaska's congressional delegation insisted that it was illegal for the FWS to even engage in the wilderness review.⁸³ They relied on ANILCA's "no more" clause, which states:

This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for

[misc/RL33872.pdf](#) (discussing the option of "continu[ing] to take no action" with regard to developing the ANWR, and the arguments in favor of this approach).

⁷⁸ Sheryl Gay Stolberg, *Bush Calls for End to Ban on Offshore Oil Drilling*, N.Y. TIMES, June 19, 2008, <http://www.nytimes.com/2008/06/19/washington/19drill.html?pagewanted=1&r=0&partner=rssnyt> (last visited Apr. 12, 2014).

⁷⁹ H.R. 139, 113th Cong. (2013). The title of the bill celebrates President Eisenhower's establishment of ANWR and Representative Morris Udall's role in enacting ANILCA. *See id.* § 2(a)(3)–(4). *See also 2011 House ANWR Hearing, supra* note 67, at 76 (testimony of Douglas Brinkley, Professor of History, Rice University) (arguing that designating ANWR as wilderness "is the proper way to nationally honor Eisenhower with something more meaningful than Interstate Highway signs and a parkway in New Jersey"). Senator Maria Cantwell introduced companion legislation to H.R. 139 in the Senate. S. 1695, 113th Cong. (2013).

⁸⁰ H.R. 139, § 2(2).

⁸¹ *See, e.g.,* Juliet Eilperen, *Administration Won't Trade ANWR Drilling for Clean Energy Fund*, WASHINGTON POST, Mar. 19, 2013, <http://www.washingtonpost.com/blogs/post-politics/wp/2013/03/19/administration-wont-trade-anwr-drilling-for-clean-energy-fund/> (last visited Apr. 12, 2014) (describing the Obama Administration's prioritization of conserving the wilderness over intense pressure to drill).

⁸² U.S. FISH & WILDLIFE SERV., ARCTIC REFUGE DRAFT REVISED COMPREHENSIVE CONSERVATION PLAN, at H-7 to H-12 (2011) [hereinafter DRAFT PLAN].

⁸³ *See* 157 Cong. Rec. S6693, S6696 (daily ed. Oct. 18, 2011) (statement of Sen. Murkowski) (claiming that the state of current law allows for drilling in ANWR).

more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.⁸⁴

The “no more” clause represents the congressional finding that ANILCA had established all of the needed conservation areas in Alaska and that additional areas were unnecessary.⁸⁵ Thus, in response to the FWS’s wilderness review, Senator Lisa Murkowski warned that the “no more” clause “is an express prohibition on any more wilderness withdrawals in Alaska.”⁸⁶ Of course, Congress is free to ignore that earlier statutory limitation, but it does add rhetorical weight to the case against designating ANWR as a wilderness area.

Southern Utah provides a second example of a wild area that has thus far escaped wilderness designation. The area is home to five national parks, five national monuments, and a collection of superlatives for its scenic landscapes.⁸⁷ But wilderness designations have largely eluded it. Congress enacted a Utah Wilderness Act in 1984, but that law focused on the northern

⁸⁴ ANILCA, 16 U.S.C. § 3101(d) (2006); 157 CONG. REC. S6693, S6696 (daily ed. Oct. 18, 2011). *See also* 16 U.S.C. § 3205(a)–(b) (2006) (requiring that the Secretary of Interior “review, as to their suitability or unsuitability for preservation as wilderness, all lands within units of the National Park System and units of the National Wildlife Refuge System in Alaska not designated as wilderness . . . and report his findings to the President” who “shall advise the Congress of his recommendations with respect to such areas”).

⁸⁵ 16 U.S.C. § 1326(b) (2006) (“No further studies of Federal lands in the State of Alaska for the single purpose of considering the establishment of a conservation system unit, national recreation area, national conservation area, or for related or similar purposes shall be conducted unless authorized by this Act or further Act of Congress.”).

⁸⁶ 157 CONG. REC. S6693 (daily ed. Oct. 18, 2011) (statement of Sen. Murkowski). *See also* FISH & WILDLIFE SERV., ARCTIC NATIONAL WILDLIFE REFUGE REVISED COMPREHENSIVE CONSERVATION PLAN PUBLIC COMMENTS 79 (2012) (comment of Sen. Murkowski) (asserting that the “no more” clause means that “[s]hould FWS take steps to encroach upon or compromise Congressional authority over any federally-held lands, or should any federal agency take unilateral steps to sterilize a commonly-owned and valuable resource, this fundamental principle of public land management would be corrupted, and public reaction, likely manifested in Congress, may be both swift and far reaching”); *id.* at app. B-113 (comment of Rep. Young) (“The FWS has no authority to declare additional wilderness designations within the existing refuge. Therefore, the actions of the FWS are nothing more than a gross waste of taxpayer money and an overstep in authority.”); *id.* at 68 (comment of Red Rock & Edward Itta, President & CEO, Major ASRC/North Slope Borough) (arguing that the FWS wilderness review violates the “no more” clause); *id.* at 62–63 (comment of Kate Williams, Regulatory Affairs Rep., Alaska Oil & Gas Ass’n) (arguing the same). The FWS believes that its wilderness review does not violate the “no more” clause “because the reviews do not constitute a withdrawal nor are they being conducted for the sole purpose of establishing a conservation system unit.” FISH & WILDLIFE SERV., ARCTIC NATIONAL WILDLIFE REFUGE SUMMARY OF DRAFT CCP 7 (2011). *See also* Martin Nie, *Governing the Tongass: National Forest Conflict and Political Decision Making*, 36 ENVTL. L. 385, 403 (2006) (noting that the Wilderness Society contends that “the prohibition on further wilderness reviews ‘applies only to “single purpose” studies, not to wilderness reviews undertaken as part of comprehensive land-use planning such as national forest plan revisions”).

⁸⁷ Utah Office of Tourism, *National Parks*, http://travel.utah.gov/publications/onesheets/NationalParks_web.pdf (last visited Apr. 12, 2014).

part of the state.⁸⁸ Like the Arctic, efforts to establish wilderness areas in southern Utah have been stalemated by opposing efforts to permit more energy development on the same land.

The southern Utah wilderness controversy began when the Bureau of Land Management (BLM) inventoried its lands there pursuant to FLPMA's direction.⁸⁹ Conservationists successfully challenged the initial determination of 2.5 million acres of wilderness study areas, and BLM raised that number to 3.2 million acres.⁹⁰ The Utah Wilderness Coalition proposed the designation of 5.7 million acres.⁹¹ Utah's Representative Wayne Owens relied on that number in the America's Red Rock Wilderness Act⁹² that he introduced in the House in 1989.⁹³ The latest version of the bill would designate more than nine million acres.⁹⁴ Congress held its only hearing on the bill in 2009,⁹⁵ but Congress has never come close to passing it.

The core of the southern Utah wilderness controversy is a disagreement about how to use the land. Wallace Stegner offered one perspective when he wrote:

The dispute over how much land shall be set aside as wilderness in the state of Utah is one more round in the long disagreement between those who view the earth as made for man's domination, and wild lands as a resource warehouse to be freely looted, and those who see wild nature as precious in itself - beautiful, quiet, spiritually refreshing, priceless as a genetic bank and laboratory, priceless either as relief or even as pure idea to those who suffer from the ugliness, noise, crowding, stress, and self-destructive greed of industrial life.⁹⁶

⁸⁸ See Utah Wilderness Act of 1984, Pub. L. No. 98-428, 98 Stat. 1657, 1657-59 (1984).

⁸⁹ Southern Utah Wilderness Alliance, *The Story of America's Red Rock Wilderness Act*, <http://www.suwa.org/issues/arrwa/the-story-of-americas-red-rock-wilderness-act/> (last visited Apr. 12, 2014).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² America's Red Rock Wilderness Act of 2013, S. 769, 113th Cong. §§ 101-09 (2013).

⁹³ *Id.*; H.R. Res. 4559, 101st Cong. (1990).

⁹⁴ 151 CONG. REC. S4129 (daily ed. Apr. 21, 2005) (statement of Sen. Durbin) ("America's Red Rock Wilderness Act will designate 9.5 million acres of land managed by the Bureau of Land Management, BLM, in Utah as wilderness under the Wilderness Act. . . . For more than 20 years Utah conservationists have been working to add the last great blocks of undeveloped BLM-administered land in Utah to the National Wilderness Preservation System."). See America's Red Rock Wilderness Act of 2013, S. 769, 113th Cong. §§ 101-09 (2013); America's Red Rock Wilderness Act, H.R. 1630, 113th Cong. §§ 101-09 (2013). The history of the southern Utah wilderness saga is told in Stephen H.M. Bloch & Heidi J. McIntosh, *A View From the Front Lines: The Fate of Utah's Redrock Wilderness Under the George W. Bush Administration*, 33 GOLDEN GATE U. L. REV. 473 (2003); Kevin Hayes, *History and Future of the Conflict Over Wilderness Designations of BLM Land in Utah*, 16 J. ENVTL. L. & LITIG. 203 (2001); Southern Utah Wilderness Alliance, *supra* note 89.

⁹⁵ See *Hearing on H.R. 86, H.R. 1925, H.R. 2689, H.R. 2781, & H.R. 2888 Before the H. Comm. on Natural Res.*, 111th Cong. 35-38 (2009) [hereinafter *Utah Wilderness Hearing*] (statement of Robert V. Abbey, Dir., BLM).

⁹⁶ WALLACE STEGNER, *UTAH WILDERNESS COALITION, WILDERNESS AT THE EDGE* 3 (1990), available at http://action.suwa.org/site/PageServer?pagename=WATE_introduction.

Wilderness advocates view southern Utah as one of the last untrammelled places in the United States.⁹⁷ They accused the Bush Administration of disregarding the wilderness values of southern Utah.⁹⁸ Their opponents look at the same landscape and see thousands of roads. What constitutes a “road” is deeply contested, in part because the existence of a road can provide access rights and block wilderness protections.⁹⁹ The other way of putting it is as a conflict between those who want to develop the area’s abundant natural resources and those who want to “lock them up” to the detriment of the local economy.¹⁰⁰ That the congressional supporters of the America’s Red Rock Wilderness Act are outsiders—and worse yet, from New York and New Jersey—adds to the dispute.¹⁰¹ It was the self-described Democratic commissioner of “the most Democratic county in Utah” who taunted that “[t]he idea that SUWA [Southern Utah Wilderness Alliance], and its lackey Mr. Hinchey, represents the voice of rural Utah is like saying King George III represented the American colonies on issues of taxation.”¹⁰²

Both ANWR and southern Utah are areas that are wilderness in fact but not wilderness at law. That is because the definition of wilderness in the Wilderness Act is not reciprocal. The Act states that wilderness areas are those places that are untrammelled. But the corollary is not true: All untrammelled places are not necessarily wilderness areas. Congress retains the power to decide which places should be wilderness areas and those which should not, and the exercise of that power demonstrates that

⁹⁷ See, e.g., Robert Redford, *The Red Rock Wilderness Act: Our Chance to Be Present at the Creation*, HUFF. POST GREEN, Sept. 30, 2009, http://www.huffingtonpost.com/robert-redford/the-red-rock-wilderness-a_b_304281.html (last visited Apr. 12, 2014) (describing the proposed southern Utah wilderness areas as “some of the last great places on earth”).

⁹⁸ See, e.g., 151 CONG. REC. S4130 (daily ed. Apr. 21, 2005) (statement of Sen. Durbin) (asserting that the Bush Administration “proposed little or no serious protections for Utah’s most majestic places”); Michael C. Blumm, *supra* note 17, at 10,398, 10,406. See generally Bloch & McIntosh, *supra* note 94 (critique of the Bush Administration’s Utah wilderness policies authored by two Southern Utah Wilderness Alliance attorneys).

⁹⁹ See generally *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 740–42 (10th Cir. 2011) (describing the application of R.S. 2477, an 1866 statute that authorized rights-of-way across public lands).

¹⁰⁰ See *Utah Wilderness Hearing*, *supra* note 95, at 39 (statement of Rep. Young) (asking David E. Jenkins, Vice President for Government and Political Affairs, whether he thinks the government takes better care of the land by “locking it up”); *id.* at 28 (statement of Rep. Chaffetz) (“The small Utah towns that depend on ranching, outdoor motorized recreation and energy production would see their economies decimated because of the restrictive burdens created by the . . . America’s Red Rock Wilderness Act.”).

¹⁰¹ *Id.* at 8 (statement of Rep. Hastings of Wash.) (“I am deeply troubled by legislation whose sponsors live far from the communities and districts whose legislation they are targeting.”); *id.* at 13 (statement of Sen. Hatch) (“The authors of the legislation were careful to name it America’s Red Rock Wilderness Act, not Utah’s Red Rock Wilderness Act, even though the bill’s only purpose is to designate more than one-sixth of my state, of our state, as former wilderness. According to the authors of this legislation, Utahans have no special claim to those nine million acres within our state’s boundaries.”).

¹⁰² *Id.* at 66 (statement of John Jones, Carbon County Comm’r). See also *id.* at 68 (statement of Rep. Heinrich) (noting that “we have a certain decorum here” and asking Commissioner Price to “not refer to any Member of this Committee in the future as a lackey”).

wilderness designations also depend on whether Congress judges it desirable to impose the Wilderness Act's legal restrictions on certain lands.

III. WILDERNESS BOUNDARIES

Boundaries are everything for wilderness management.¹⁰³ Land that is within the wilderness boundaries receives the protections of the Wilderness Act; land that is outside those boundaries does not. Congress draws boundaries with two distinct criteria in mind. First, it seeks to identify those areas that, in the words of the Wilderness Act, are untrammeled. Congress, however, may designate *any* lands as wilderness areas. Many of the wilderness areas in the eastern United States were once the site of logging or other activities that changed the face of the landscape, or they are so near current human development that it is impossible to experience the solitude pursued by the Wilderness Act.¹⁰⁴

The second criteria that Congress employs when drawing wilderness boundaries is the desirability of the Wilderness Act's land use restrictions. No matter how wild or untrammeled, Congress may decide not to include land within a wilderness area's boundaries if it prefers to allow activities that would be prohibited by the Wilderness Act. Conversely, wilderness advocates often support including lands within a wilderness area's boundaries precisely because they want to exclude certain activities there. Boundaries thus matter because "they separate two distinct and incompatible realms of human land use."¹⁰⁵ That is why wilderness boundaries are a human artifact, not a natural one. "Nature does not recognize these boundaries," writes environmental historian Kevin Marsh, "thus when left substantially undeveloped, a wilderness boundary is nothing more than a wooden sign on a tree, slowly decomposing in the dampness of the forest."¹⁰⁶

There is another way of characterizing the boundaries of wilderness areas. On the one hand, they are prospective: They distinguish between places in which roads, structures, and commercial activities are prohibited by the Wilderness Act, and places where such activities are allowed because they lie outside the wilderness area. On the other hand, wilderness boundaries are responsive: They are drawn in part because of the activities that have occurred there before, so that places that experienced significant

¹⁰³ DOUG SCOTT, PROTECTING OUR NATURAL HERITAGE THROUGH THE WILDERNESS ACT 15 (2004) ("The effectiveness of wilderness protections rules relies upon establishing firm boundaries.").

¹⁰⁴ See DOUG SCOTT, THE ENDURING WILDERNESS 68, 71 (2004) (referring to the designation of "formerly abused lands"); KELLY A. PIPPINS, U.S. FISH & WILDLIFE SERV., CEDAR KEYS NATIONAL WILDLIFE REFUGE WILDERNESS: A REPORT ON WILDERNESS CHARACTER MONITORING 31 (2012) (noting that "[w]ilderness visitors are hard-pressed to find seclusion from the developed world" in a wilderness area that is "[l]ocated less than 5 miles from the town of Cedar Keys on Florida's Gulf Coast").

¹⁰⁵ MARSH, *supra* note 42, at 14.

¹⁰⁶ *Id.*

trammeling are placed outside the wilderness area while less trammled places are included within the wilderness area.

In practice, Congress draws wilderness boundaries with both the prospective and responsive consequences in mind. Trammled or not, Congress excludes some land from wilderness designation because it does not want to subject that land to the strictures of the Wilderness Act. The following three examples demonstrate this phenomenon.

According to Kevin Marsh, “[t]he central lesson of wilderness debates in the Oregon and Washington Cascades—one that applies nationwide—is that boundaries matter.”¹⁰⁷ Congress designated multiple wilderness areas on Forest Service land in the Cascades during the 1970s and 1980s.¹⁰⁸ Several environmental organizations championed the creation of those new wilderness areas.¹⁰⁹ But the timber industry was especially interested in the boundaries of those areas.¹¹⁰ The timber industry “employed wilderness designation as a tool to define specific boundaries, outside of which they hoped to count on a more reliable supply of timber from public land.”¹¹¹ From the industry’s perspective, “[d]rawing boundaries that left valuable forests outside protected areas was as important as putting trees in the wilderness.”¹¹² Marsh thus concludes, “designating wilderness in the Northwest benefited both preservation and logging interests.”¹¹³

The importance of wilderness boundaries is further evidenced in the Apostle Islands National Lakeshore, located in northern Wisconsin along Lake Superior. Bob Krumenaker, the national lakeshore’s superintendent, engaged in a painstaking effort to persuade local constituencies that wilderness designation was the best way to ensure that the management of the lakeshore would remain the same.¹¹⁴ He explained, “people liked the park the way it was, and did not want to see it change.”¹¹⁵ With that consensus, the actual creation of the wilderness area “was mostly an exercise in drawing boundaries.”¹¹⁶ The islands had been mined and logged around the turn of the twentieth century, but they returned to natural conditions once those activities ceased.¹¹⁷ The national lakeshore, established by Congress in 1970, encompasses all but one of the twenty-two Apostle Islands; the one

¹⁰⁷ MARSH, *supra* note 42, at 143.

¹⁰⁸ *See id.* at 140 (discussing new wilderness areas created during this period).

¹⁰⁹ *See id.* at 135 (discussing efforts of local environmental organizations to push for wilderness designations in the Cascades).

¹¹⁰ *See id.* at 11–12 (discussing efforts of the timber industry to create boundaries allowing access to timber resources).

¹¹¹ *Id.* at 11.

¹¹² *Id.* at 12.

¹¹³ *Id.*

¹¹⁴ *See* Nat’l Parks Serv., *New Apostle Islands Wilderness Honors Gaylor Nelson*, AROUND THE ARCHIPELAGO, 2005, at 1, available at <http://www.wilderness.net/toolboxes/documents/education/APIS%20Wilderness%20Newspaper%20Article.pdf> (discussing the process of designating lands under auspices of Bob Krumenaker).

¹¹⁵ Bob Krumenaker, *New Wildernesses Can Be Created: A Personal History of the Gaylor Nelson Wilderness at Apostle Islands National Lakeshore*, 22 GEORGE WRIGHT F., 2005, at 35, 37.

¹¹⁶ *Id.* at 39.

¹¹⁷ *Id.* at 35–36.

exception, Madeline Island, was excluded precisely because it has become the site of vacation home development.¹¹⁸

The twenty-one islands within the national lakeshore thus possessed wilderness characteristics, but the National Park Service (NPS) encouraged Congress to draw the wilderness boundaries to exclude three problematic areas. First, the wilderness area included the twenty-one islands and a unit along the mainland, but not the waters of Lake Superior.¹¹⁹ According to Krumenaker, the NPS “quickly realized that restricting motorized boat use” on Lake Superior “would be impractical, if not impossible to enforce. It would also subject future managers and park visitors to endless frustrations and conflict.”¹²⁰ Second, two islands were left outside the wilderness area “because of the density of cultural sites and our commitment to actively managing and interpreting them.”¹²¹ Krumenaker recognized that:

‘[M]aximum wilderness’ has an unintended consequence for cultural resources, even if the NPS makes a strong commitment to fulfilling all of its historic preservation mandates within designated wilderness (as we are required to do). By limiting future development to non-wilderness areas, many of which were excluded from wilderness due to their cultural significance, we may be inadvertently directing development toward sensitive sites.¹²²

Third, Long Island was excluded from the wilderness designation:

[I]n deference to the wishes of the Bad River Band of Lake Superior Chippewa Indians, who expressed concern that any additional federal recognition would make it more difficult for them to assert sovereignty over that island, which they believe is part of their reservation even while it is part of the national lakeshore.¹²³

This careful delineation of boundaries garnered the support of most local constituencies and of NPS officials, and Congress approved the wilderness areas during its lame duck session in November 2004.¹²⁴

The proposed Organ Mountain wilderness area in New Mexico is the latest demonstration of the importance of wilderness boundaries. The Organ

¹¹⁸ See *id.* at 36–37, 38 fig. 1.

¹¹⁹ *Id.* at 37.

¹²⁰ *Id.* at 38. See also *id.* (“NPS jurisdiction extends out one quarter-mile into the lake but the state maintains ownership over the lake bottom. The only way to get from one unit to another, whether one is a visitor or an NPS employee, is by boat. But distances in the lake are such that non-NPS waters lie in the interstices between islands, and in fact, the NPS has authority over a scant 15% of the waters of the entire archipelago. Thirteen of the islands have public docks on them, and six have historic lighthouses on the National Register of Historic Places. The park’s islands are generally convex in shape, lacking narrow bays or other areas that could plausibly be set aside as non-motorized zones.”).

¹²¹ *Id.* at 41.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See Consolidated Appropriations Act of 2005, Pub. L. 108-447, 118 Stat. 2809 (2004); see also Krumenaker, *supra* note 115, at 46–47 (describing the congressional action).

Mountains, “named for their needle-like extrusions of granite resembling organ pipes,” are a popular tourist destination near Las Cruces.¹²⁵ The push for wilderness designation has involved a local stakeholder committee, the State’s congressional delegation, and multiple meetings and hearings.¹²⁶ The effort has sought “to develop a proposal that tries to find an appropriate balance between allowing for development opportunities while providing for the protection of environmentally important public lands.”¹²⁷ The concerns include the impact of the Wilderness Act on grazing, flood control, local economic development, military training, and border security.¹²⁸ The resulting proposed wilderness boundaries have been carefully drawn to exclude areas where the restrictions of the Wilderness Act would be controversial.¹²⁹ Even so, the bill continues to face opposition from a number of interested constituencies, and its ultimate fate in Congress remains uncertain.¹³⁰

¹²⁵ The Wilderness Society, *Why the Organ Mountains*, <http://wilderness.org/article/why-organ-mountains> (last visited Apr. 12, 2014).

¹²⁶ See, e.g., *Organ Mountains-Desert Peaks Wilderness Act: Hearing on S. 1689 Before the Sen. Energy & Natural Res. Comm.*, 111th Cong. (Feb. 15, 2010) (field hearing held in Las Cruces, N.M.).

¹²⁷ *Id.* at 2 (statement of Sen. Bingaman).

¹²⁸ See, e.g., *id.* (statement of Sen. Bingaman) (“We modified many proposed wilderness boundaries to address the issues that had been raised, including the issues of border security, flood control, development plans, military needs, access for ranchers, sportsmen and the public . . .”); *id.* at 5 (testimony of Doña Ana County Commissioner Leticia Duarte-Benavidez) (“I know the legislation was altered to make room for larger trans-mission corridors and petroleum pipelines in the southern part of Doña Ana County was built in through boundary modifications. Several flood control structures were excluded to provide for unimpeded maintenance, and even larger designation changes were made when proposed wilderness areas were switched to national conservation areas. Many changes were made for cattle ranching; huge swaths of land were excluded from wilderness protection near the border for border security.”).

¹²⁹ See *id.* at 2 (statement of Sen. Bingaman).

¹³⁰ See *id.* at 23 (testimony of Tom Cooper, Rancher & Former Chairman, People for Preserving Our Western Heritage) (“[The proposed wilderness] would be a threat to the very existence of our ranches, and an administrative nightmare for BLM and the ranchers, requiring an inordinate amount of time creating and implementing management plans dealing with ranchers’ permit applications to make repairs or improvements with public comment periods responding to comments and legal challenges, et cetera.”); *id.* at 20 (testimony of Gary Esslinger, Treasurer-Manager, Elephant Butte Irrigation District) (“We recognize the threats posed by a changing climate, and we know that we must adapt to it together. . . . Let us keep our options open.”); *id.* at 26 (statement of John L. Hummer, Chair of the Board of Directors, Greater Las Cruces Chamber of Commerce) (“The presence of any wilderness on or near the Mexican border is a danger to the security of the United States.”). The unwillingness of Congress to establish a wilderness area has prompted efforts to designate the Organ Mountains as a national monument pursuant to the Antiquities Act instead, even though a national monument would not provide the same land use restrictions as the Wilderness Act. See *Organ Mountains—Desert Peaks Conservation Act*, S. 1805, 113th Cong. (2013) (as referred to Committee); *Organ Mountains National Monument Establishment Act*, H.R. 995, 113th Cong. (2013) (as referred to Committee); Phil Taylor, *N.M. Businesses Ask Obama to Protect Organ Mountains*, GREENWIRE, Jan. 9, 2014, <http://www.eenews.net/greenwire/2014/01/09/stories/1059992648> (last visited Apr. 12, 2014).

Moreover, wilderness boundaries can be changed.¹³¹ There are numerous instances of Congress adding or subtracting land to wilderness areas, as discussed below in Part IV. Most of these changes are motivated by the same desires that influence the original determination of wilderness boundaries: to add the protections of the Wilderness Act in order to prevent activities that are inconsistent with wilderness, or to remove the protections of the Wilderness Act in order to accommodate such activities.¹³²

IV. WILDERNESS ACT EXCEPTIONS

The Wilderness Act commands that wilderness areas are to be managed to preserve their wilderness character.¹³³ Toward that end, the Act prohibits nine specific activities: 1) temporary roads, 2) motor vehicles, 3) motorized equipment, 4) motorboats, 5) aircraft landings, 6) mechanical transport, 7) structures or installations, 8) permanent roads, and 9) commercial enterprises.¹³⁴ But the Act also contains exceptions for the first seven of those activities.¹³⁵ Together, these exceptions demonstrate that the Wilderness Act engages in more balancing of land uses than is typically recognized.

A. *Minimum Requirements Exception*

The most frequently employed exception allows numerous otherwise prohibited activities when they are “necessary to meet minimum requirements for the administration of the area for the purpose of this Act.”¹³⁶ That exception applies to temporary roads, motor vehicles, motorized equipment, motorboats, aircraft landings, mechanical transport, structures and installations.¹³⁷ It has been cited to invoke a host of decidedly

¹³¹ Wilderness Act, 16 U.S.C. § 1132(e) (2006).

¹³² See ALLIN, *supra* note 9, at 151–52.

¹³³ See Wilderness Act of 1964, Pub. L. No. 88-577, § 4(b), 78 Stat. 890 (1964) (codified at 16 U.S.C. §§ 1131–1136 (2006)) (“[E]ach agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character.”).

¹³⁴ *Id.* § 4(c). See also Frank Buono, *The Wilderness Act: The Minimum Requirement Exception*, 28 GEORGE WRIGHT F., 2011, at 307, 308 (listing the prohibitions and exceptions).

¹³⁵ Wilderness Act § 4(d). See also Buono, *supra* note 134, at 308.

¹³⁶ 16 U.S.C. § 1133(c) (2006); Buono, *supra* note 134, at 308.

¹³⁷ 16 U.S.C. § 1133(c) (2006). The threshold question is whether an activity falls within one of the Wilderness Act’s prohibitions, for an exception is unnecessary if the activity is not prohibited. For example, conservation drones are being employed for a variety of environmentally beneficial purposes. See Denis Gray, *Conservation Drones Protect Wildlife, Spot Poachers and Track Forest Loss*, WORLD POST, Aug. 19, 2012, http://www.huffingtonpost.com/2012/08/19/conservation-drones_n_1806592.html (last visited Apr. 12, 2014). But conservation drones would appear to “motorized equipment” within the meaning of the Wilderness Act. If so, then they would be prohibited unless one of the Act’s exceptions applies. Conservationdrones.org, *What are Conservation Drones*, <http://conservationdrones.org/what-are-conservation-drones/> (last visited Apr. 12, 2014).

nonwilderness activities, including operation of helicopters and cars.¹³⁸ But the courts have taken a much narrower view of the exception on the occasions when they have had to construe it.¹³⁹

Federal agencies struggle to apply the minimum requirements exception. Frank Buono, a former NPS employee who has been involved in countless wilderness management decisions, “attests to the difficulty of applying the minimum requirement exception.”¹⁴⁰ Buono adds that “[s]ubjective judgment inevitably enters into determinations of what is ‘necessary to meet minimum requirements for the administration of the (wilderness) area for the purpose of the (Wilderness) Act.’”¹⁴¹ For example, Buono explains how he “judged that removal of tamarisk, an invasive and water-loving non-native plant, from springs and watercourses in Joshua Tree National Park was ‘necessary’ for the administration of the park wilderness.”¹⁴² He further recalls that another NPS official “promoted the opinion that once NPS determined that an activity is ‘necessary’ to administer a wilderness area, then any and all seven otherwise prohibited acts automatically pass the minimum requirement test.”¹⁴³ Buono did not endorse that view, but he did advise that “[a] reasonable determination will likely survive court challenge, if challenged at all.”¹⁴⁴

Recent decisions confirm that agencies apply the minimum requirements exception liberally. For example, the NPS concluded that the use of helicopters to install structures to upgrade the telecommunications network in Denali National Park satisfied the minimum requirements requirement.¹⁴⁵ The NPS explained that an improved telecommunications network “would provide better protection of Park resources for current and future visitors, enhance the Park’s ability to respond to visitor needs (including in emergency situations), more efficiently and effectively interpret Park resources to a wider public audience, and allow for more efficient and effective administration of the Park.”¹⁴⁶ The NPS acknowledged

¹³⁸ See Sandra Zellmer, *Wilderness, Water, and Climate Change*, 42 ENVTL. L. 313, 350–51 (2012) (discussing several cases in which the Forest Service invoked the exception to defend actions within wilderness).

¹³⁹ *Id.* at 350.

¹⁴⁰ See Buono, *supra* note 134, at 308. Buono is more famous in legal circles as the plaintiff in an unsuccessful establishment clause challenge to a cross standing in the Mojave National Preserve. See *generally* Buono v. Salazar, 559 U.S. 700 (2010).

¹⁴¹ Buono, *supra* note 134, at 309. Buono cited additional examples of “construction of trails or hardened campsites (to confine impacts of human use to small locations); installation of repeater sites (to provide rangers with means of communication while on wilderness patrol); and installation of monitoring equipment for natural resource parameters (for research on the physical attributes of wilderness—water, air, biologic processes, etc.).” See *id.* at 312 n.13. Buono concluded that “[n]ot all would agree with my judgment, and there is room for vigorous debate.” *Id.*

¹⁴² *Id.* at 309.

¹⁴³ *Id.* at 308.

¹⁴⁴ *Id.* at 309.

¹⁴⁵ U.S. DEP’T OF THE INTERIOR, NAT’L PARK SERV., DENALI NATIONAL PARK & PRESERVE, ENVIRONMENTAL ASSESSMENT FOR TELECOMMUNICATIONS AND CLIMATE MONITORING IMPROVEMENTS IN DENALI NATIONAL PARK AND PRESERVE 62–64 (2013).

¹⁴⁶ *Id.* at 62.

that “[t]hese actions are not legally necessary and do not insure the preservation of wilderness character,” but emphasized that “they do support the public purposes of recreation, science, education, . . . conservation, and public safety.”¹⁴⁷ The NPS emphasized that the structures would remain largely invisible to most park visitors—indeed, “[t]he only visitors who might encounter” one of the weather stations “would be those dog mushing or snowmachining in the area in the winter.”¹⁴⁸

Another minimum requirements analysis would authorize the aerial application of a rodenticide to eliminate invasive house mice from the Farallon National Wildlife Refuge.¹⁴⁹ The refuge consists of a collection of small islands located about thirty miles west of San Francisco. President Theodore Roosevelt created the refuge in 1909 “as a preserve and breeding ground for native birds.”¹⁵⁰ The FWS believes that “[e]limination of house mice would cement more than a century’s worth of restoration efforts allowing the South Farallon Islands to flourish as a biodiversity and a globally significant breeding colony for marine birds and mammals.”¹⁵¹ The FWS also explained their proposed action was necessary because “[f]or islands of the size and rugged topography of the Farallones, aerial broadcast of rodent bait is currently regarded as the only primary method available to successfully and safely eradicate rodent populations.”¹⁵² The FWS admitted, albeit in an understated fashion, that “[l]ow-flying helicopters over the wilderness . . . could negatively effect [sic] solitude,” but insisted that those “[i]mpacts are expected to be minimal because the wilderness is closed to the public, only personnel affiliated with the project will be present on the Farallon Islands, and limited boat activity occurs off the islands during the period of proposed operations.”¹⁵³

Such agency minimum requirements decisions have a mixed track record when challenged in court.¹⁵⁴ The leading case is *Wilderness Watch, Inc. v. FWS*,¹⁵⁵ which involved the FWS’s efforts to increase and stabilize populations of desert bighorn sheep in the Kofa National Wildlife Refuge in the Sonoran Desert in southwestern Arizona.¹⁵⁶ Desert bighorn are well-adapted to the harsh environment on the Kofa, where temperatures rise to 120 degrees and whose seven inches of rain annually often falls in one storm. The Kofa was the site of the King of Arizona gold mine during the

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 44.

¹⁴⁹ U.S. FISH & WILDLIFE SERV., FARALLON NATIONAL WILDLIFE REFUGE SOUTH FARALLON ISLANDS INVASIVE HOUSE MOUSE ERADICATION PROJECT: REVISED DRAFT ENVIRONMENTAL IMPACT STATEMENT app. G, Alternative 2 (2013).

¹⁵⁰ *Id.* at 26 (quoting Exec. Order No. 1043).

¹⁵¹ *Id.* at 22.

¹⁵² *Id.* at app. G (Minimum Requirements Decision Guide Workbook Alternative 2 at 6).

¹⁵³ *Id.* at app. G.

¹⁵⁴ *See, e.g., Zellmer, supra* note 138, at 350–51 (noting the courts restrictive view of the exception).

¹⁵⁵ 629 F.3d 1024 (9th Cir. 2010).

¹⁵⁶ *Id.* at 1026.

1920s, which gave rise to the area's current name.¹⁵⁷ President Franklin D. Roosevelt established the Kofa Game Reserve in 1939 with a primary purpose of preserving bighorn sheep.¹⁵⁸ In 1976, the site was renamed the Kofa National Wildlife Refuge, placing it under the jurisdiction of the FWS, which has a duty to conserve the refuge's wildlife. The Arizona Desert Wilderness Act of 1990 designated 82% of the refuge as wilderness, making that part of the refuge subject to the requirements of the Wilderness Act.¹⁵⁹ Because most of the Kofa is aggressively managed to promote wildlife populations, desert bighorn populations generally remained stable, until mountain lions began to frequent the area, and bighorn numbers dropped from 700 to 390 sheep.¹⁶⁰ A state report found that the sheep were affected by a lack of water, predation by mountain lions, translocation to other areas, hunting, and hikers.¹⁶¹ Despite the availability of alternate management options that did not offend the Wilderness Act, the FWS focused on the lack of water, and built two water structures inside the wilderness area in 2007, citing the minimum requirements exception.¹⁶²

However, the Ninth Circuit held that the water structures failed the Wilderness Act's minimum requirements test.¹⁶³ The court first deferred to the FWS's determination that conservation of bighorn sheep is a valid purpose under the Wilderness Act.¹⁶⁴ Then, the court held that FWS did not determine that the structures were necessary to meet the minimum requirements for conserving bighorn sheep because the FWS failed to show the water structures were necessary. The court found FWS failed to consider the other factors for the decline in the sheep.¹⁶⁵ The court explained that:

[U]nless 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.¹⁶⁶

¹⁵⁷ Arizona Game & Fish Dep't, *Overview of the Kofa National Wildlife Refuge*, http://www.azgfd.gov/w_c/bhsheep/overview.shtml (last visited Apr. 12, 2014).

¹⁵⁸ *Wilderness Watch*, 629 F.3d at 1026; Exec. Order No. 8,039, 4 Fed. Reg. 438 (Jan. 27, 1939).

¹⁵⁹ *Wilderness Watch*, 629 F.3d at 1027 (citing Arizona Desert Wilderness Act of 1990, Pub. L. No. 101-628, § 301(a)(3), 104 Stat. 4469 (1990)).

¹⁶⁰ *Id.* at 1028–29.

¹⁶¹ *Id.* at 1029.

¹⁶² *Id.* at 1031–32.

¹⁶³ *Id.* at 1024.

¹⁶⁴ *Id.* at 1036.

¹⁶⁵ *See id.* at 1037. Judge Bybee dissented, a potentially significant fact overlooked by much of the scholarly commentary on the case. Rightly or wrongly, divided Ninth Circuit pro-environmental decisions are obvious targets for future Supreme Court review. According to Judge Bybee, the multiple documents prepared by the FWS “demonstrate that the Service considered all the important aspects of the problem and offered a reasonable explanation for the necessity of building additional water sources for the sheep.” *Id.* at 1042.

¹⁶⁶ *Id.* at 1039.

Numerous cases concur with the strict approach to the minimum requirements exception articulated by the majority in *Wilderness Watch*. Like *Wilderness Watch*, several cases overturned agency efforts to engage in wildlife preservation in a wilderness area.¹⁶⁷ By contrast, some courts have upheld the use of the minimum requirements exception. One district court allowed the Las Vegas police department to use helicopters in a wilderness area to practice search and rescue operations.¹⁶⁸ The court agreed with BLM that training within the actual wilderness area was necessary because “[t]he unique formations that are present in the subject areas, and which likely played a significant role in wilderness designation,” could not be simulated elsewhere.¹⁶⁹ Another district court allowed the Forest Service to authorize a state wildlife agency to use helicopters to monitor the population of wolves that were reintroduced in an Idaho wilderness area.¹⁷⁰ The court found that it was the “rare case where machinery as intrusive as a helicopter could pass the [minimum requirements] test.”¹⁷¹

Much of the confusion regarding the minimum requirements exception focuses on whether a proposed activity is necessary and whether it causes the minimum impact to wilderness values.¹⁷² Both of these issues sometimes require difficult judgments regarding the facts of a particular proposal.¹⁷³ The other source of confusion regarding the minimum requirements exception results from a contested interpretation of the law. The exception applies to actions that are “necessary to meet minimum requirements for the administration of the area *for the purpose of this [Act]* (including measures required in emergencies involving the health and safety of persons within the area).”¹⁷⁴ But the Act states multiple purposes. One purpose of the Act is “to secure for the American people of present and future generations the benefits of an enduring resource of wilderness.”¹⁷⁵ The same section of the Act then adds that 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.”¹⁷⁶ And when defining “wilderness,” the Act notes that such lands “may also contain ecological, geological, or other features of scientific, educational, scenic, or

¹⁶⁷ See *Californians for Alternatives to Toxics v. U.S. Fish & Wildlife Serv.*, 814 F. Supp. 2d 992, 992–93 (E.D. Cal. 2011) (rejecting the Forest Service’s proposed use of motorized equipment and a rodenticide to help restore the threatened Paiute cutthroat trout to a creek in California).

¹⁶⁸ *Wilderness Watch, Inc. v. U.S. Bureau of Land Mgmt.*, 799 F. Supp. 2d 1172, 1178 (D. Nev. 2011).

¹⁶⁹ *Id.* at 1181.

¹⁷⁰ See *Wolf Recovery Found. v. U.S. Forest Serv.*, 692 F. Supp. 2d 1264 (D. Idaho 2010).

¹⁷¹ *Id.* at 1268.

¹⁷² See Gordon Steinhoff, *The Wilderness Act, Prohibited Uses, and Exceptions: How Much Manipulation of Wilderness is Too Much?*, 51 NAT. RESOURCES J. 287, 290–91 (2011).

¹⁷³ See *Wolf Recovery Found.*, 692 F. Supp. 2d at 1267–68.

¹⁷⁴ Wilderness Act, 16 U.S.C. § 1133(c) (2006) (emphasis added).

¹⁷⁵ *Id.* § 1131(a).

¹⁷⁶ *Id.*

historical value.”¹⁷⁷ The meaning of the “purpose” referenced in the minimum requirements exception is the “major ambiguity” in the provision.¹⁷⁸

B. Existing Aircraft & Motorboats

The Wilderness Act’s second exception provides that “[w]ithin wilderness areas designated by this [Act] the use of aircraft or motorboats, where these uses have already become established, may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable.”¹⁷⁹ The one case to construe this provision involved the Las Vegas search and rescue team, which BLM permitted to conduct helicopter training on wilderness lands in Nevada. Besides satisfying the minimum requirements exception, as described above, the court also held that the training qualified for this exception. The training began as early as 1970, thirty-two years before Congress established the wilderness area, thus satisfying the statutory requirement that the use was already established.¹⁸⁰ The exception also grandfathered scenic overflights at the Grand Canyon National Park, so Congress eventually addressed the growing number of flights there through separate legislation.¹⁸¹

C. Control of Fire, Insects & Diseases

A third exception authorizes such measures “as may be necessary in the control of fire, insects, and diseases, subject to such conditions as the Secretary deems desirable.”¹⁸² Sandra Zellmer suggested that such circumstances could become more common thanks to climate change, and that “at least some courts may be willing to give agencies wide latitude to define terms like ‘necessary’ when it comes to technical management decisions related to climate change mitigation and adaptation.”¹⁸³ Similarly, the leading wilderness management treatise asserts that “[f]ive broad policy alternatives are available as wilderness fire alternatives: 1) attempt to suppress all fires; 2) allow all fires to burn; 3) manage lightning-caused fires; 4) ignite prescribed fires; and 5) manipulate vegetation and fuels without fire.”¹⁸⁴ This description of alternatives implies that the Wilderness Act and this exception neither require nor forbid fire management in wilderness areas, so the decision is a policy judgment for the agency officials.

¹⁷⁷ *Id.* § 1131(c).

¹⁷⁸ McCloskey, *supra* note 9, at 309.

¹⁷⁹ 16 U.S.C. § 1133(d)(1) (2006).

¹⁸⁰ *Wilderness Watch, Inc. v. U.S. Bureau of Land Mgmt.*, 799 F. Supp. 2d 1172, 1181 (D. Nev. 2011).

¹⁸¹ *See* DAWSON & HENDEE, *supra* note 9, at 102 (suggesting that the exception might make administrative action “necessary to limit aircraft within the backcountry of Grand Canyon National Park”).

¹⁸² 16 U.S.C. § 1133(d)(1) (2006).

¹⁸³ Zellmer, *supra* note 138, at 354.

¹⁸⁴ DAWSON & HENDEE, *supra* note 9, at 289.

The two cases reviewing agency decisions invoking this exception reached opposite conclusions. Both cases involved Forest Service efforts to control the southern pine beetle within wilderness areas. The first decision rejected extensive chemical spraying and using chainsaws to harvest thousands of acres of trees. "Only a clear necessity for upsetting the equilibrium of the ecology could justify this highly injurious, semi-experimental venture of limited effectiveness."¹⁸⁵ The Forest Service responded with a revised plan that the second decision upheld. This time the court held that the Wilderness Act's exception permitted measures that "fall short of full effectiveness" so long as those measures are "reasonably designed" to limit the feared pine beetle infestation.¹⁸⁶

D. Mining

A fourth exception provides that "[n]othing 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."¹⁸⁷ To be sure, "[m]ining in wilderness is a paradox" that "makes sense only when viewed as a necessary political compromise."¹⁸⁸ Indeed, fear that wilderness management would block mining on federal lands was one of the major impediments to the approval of the Wilderness Act. In practice, though, few disputes have arisen with respect to mining within wilderness areas, and this exception has not been the subject of any litigation.

E. Water Projects

Access to water was another key part of the congressional compromise that resulted in the Wilderness Act.¹⁸⁹ The law thus authorizes the President to:

¹⁸⁵ *Sierra Club v. Lyng (Lyng I)*, 662 F. Supp. 40, 43 (D.D.C. 1987).

¹⁸⁶ *Sierra Club v. Lyng (Lyng II)*, 663 F. Supp. 556, 560 (D.D.C. 1987). *See also* DAWSON & HENDEE, *supra* note 9, at 102-03 (describing other efforts to control southern pine beetles in wilderness areas).

¹⁸⁷ 16 U.S.C. § 1133(4)(d)(2) (2006). "Furthermore," that provision states, "in accordance with such program as the Secretary of the Interior shall develop and conduct in consultation with the Secretary of Agriculture, such areas shall be surveyed on a planned, recurring basis consistent with the concept of wilderness preservation by the United States Geological Survey and the United States Bureau of Mines to determine the mineral values, if any, that may be present; and the results of such surveys shall be made available to the public and submitted to the President and Congress." *Id.* A related provision authorizing the continued application of federal mining laws expired by its own terms at the end of 1983. *See id.* § 1133(4)(d)(3).

¹⁸⁸ George C. Hendee et al., *Wilderness Management*, 72 (U.S. Department of Agriculture Miscellaneous Publication No. 1365, 1978).

¹⁸⁹ *See* Comment, *The Wilderness Act of 1964: Where Do We Go From Here?*, 1975 BYU L. REV. 727, 728-33 (1975) (describing the participation of preservationists in the formation of the Wilderness Act and their particular concentration on water access issues).

Within a specific area and in accordance with such regulations as he may deem desirable, authorize prospecting for water resources, the establishment and maintenance of reservoirs, water-conservation works, power projects, transmission lines, and other facilities needed in the public interest, including the road construction and maintenance essential to development and use thereof, upon his determination that such use or uses in the specific area will better serve the interests of the United States and the people thereof than will its denial.”¹⁹⁰

More recent statutes establishing specific wilderness areas often include provisions allowing new or existing water projects.¹⁹¹ One possible source of controversy involves old reservoirs within wilderness areas that are in need of repair.¹⁹²

F. Grazing

The continuance of grazing was another important issue during the Wilderness Act debates.¹⁹³ The law thus 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 the Secretary of Agriculture.”¹⁹⁴ Congress has revisited this exception on several occasions. In 1980, a House committee report on the proposed Colorado Wilderness Act articulated specific legislative policy statements and guidelines. Those guidelines include a warning against phasing out grazing, permission for fences and stock tanks and other auxiliary uses, and the use of motorized equipment for emergencies such as rescuing sick animals. Congress codified those guidelines when it established wilderness areas in Arizona, Utah, and Wyoming.¹⁹⁵ The leading wilderness treatise thus concludes that “Congress sees grazing as a continuing, legitimate use in wilderness.”¹⁹⁶

¹⁹⁰ 16 U.S.C. § 1133(4)(d)(4) (2006).

¹⁹¹ See Zellmer, *supra* note 138, at 347 n.252 (citing examples).

¹⁹² See *id.* at 347 (noting that “there are already some 200 preexisting dams situated in wilderness areas”); DAWSON & HENDEE, *supra* note 9, at 104 (flagging the issue).

¹⁹³ See Comment, *supra* note 189, at 729–30.

¹⁹⁴ 16 U.S.C. § 1133(4)(d)(4) (2006).

¹⁹⁵ See Arizona Wilderness Act of 1984, Pub. L. No. 98-406, § 101(f)(1), 98 Stat. 1485, 1489 (1984); Utah Wilderness Act of 1984, Pub. L. No. 98-428, § 301(a), 98 Stat. 1657, 1660 (1984); Wyoming Wilderness Act of 1984, Pub. L. No. 98-550, § 501, 98 Stat. 2807, 2813 (1984).

¹⁹⁶ DAWSON & HENDEE, *supra* note 9, at 105. The status of grazing on wilderness lands sometimes yields conflicting claims during debates over the establishment of new wilderness areas. One rancher testifying about a proposed wilderness designation in New Mexico reported that “[i]t has been represented that we will have access to wells, troughs and corrals.” Organ Mountains-Desert Peaks Wilderness Act hearing, *supra* note 4, at 23 (testimony of Tom Cooper, Rancher & Former Chairman, People for Preserving Our Western Heritage).

G. Commercial Recreation Services

Another exception provides that “[c]ommercial services may be performed within the wilderness areas designated by this chapter to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.”¹⁹⁷ That provision has been litigated in two cases brought by the High Sierra Hikers Association. The first case challenged the Forest Service’s decision to allow commercial packstock operators to lead trips into the John Muir and Ansel Adams Wilderness Areas. The court noted “that Congress intended to enshrine the long-term preservation of wilderness areas as the ultimate goal of the Act,” but it also recognized “the diverse, and sometimes conflicting list of responsibilities imposed on administering agencies.”¹⁹⁸ The court thus seemed to acknowledge that commercial packstock operations were allowed in a wilderness area in principle, but it remanded the case because the Forest Service issued the permits without considering the “documented damage resulting from overuse.”¹⁹⁹ A district court reached a similar result in the second case, which involved the NPS’s approval of commercial packstock operations in the Sequoia and Kings Canyon National Parks. This time the court held that the NPS failed to engage in the necessary balancing of all of the relevant interests to determine whether such operations were necessary.²⁰⁰

H. Access to Inholdings

A final exception provides for access to private or state-owned land that “is completely surrounded by” a designated wilderness area.²⁰¹ The owners of such inholdings “shall be given such rights as may be necessary to assure adequate access” to their property.²⁰² This exception has not produced any commentary or litigation.

V. SPECIFIC WILDERNESS EXCEPTIONS

Generally, the land use restrictions imposed by the Wilderness Act apply automatically once Congress designates an area as wilderness.²⁰³ Again, there are exceptions. Often those exceptions are contained in the law that establishes the wilderness area. In other instances, Congress responds to concerns about the management of a wilderness area by allowing an

¹⁹⁷ 16 U.S.C. § 1133(d)(5) (2006).

¹⁹⁸ High Sierra Hikers Ass’n v. Blackwell, 390 F.3d 630, 647–48 (9th Cir. 2004).

¹⁹⁹ *Id.* at 648; Mark Squillace, *Grazing in Wilderness Areas*, 44 ENVTL. L. 415 (2014).

²⁰⁰ High Sierra Hikers Ass’n v. U.S. Dept. of Interior, 848 F. Supp. 2d 1036 (N.D. Cal. 2012).

²⁰¹ 16 U.S.C. § 1134(a) (2006).

²⁰² *Id.*

²⁰³ *Voyageurs Region Nat’l Park Ass’n v. Lujan*, 966 F.2d 424, 425 (8th Cir. 1992) (“Once Congress has designated land as a wilderness area, its use is restricted,” citing 16 U.S.C. § 1133(c) (2006)).

activity that would otherwise be prohibited. In both instances, the regular land use rules imposed by the Wilderness Act do not apply.²⁰⁴

A. *Establishment Acts*

The Wilderness Act itself contained one provision creating an exception for a specific wilderness area:

Other provisions of this Act to the contrary notwithstanding, the management of the Boundary Waters Canoe Area, formerly designated as the Superior, Little Indian Sioux, and Caribou Roadless Areas, in the Superior National Forest, Minnesota, shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, the primitive character of the area, particularly in the vicinity of lakes, streams, and portages: *Provided*, That nothing in this Act shall preclude the continuance within the area of any already established use of motorboats.²⁰⁵

In 1978, however, Congress repealed that provision when it established the Boundary Waters Canoe Area Wilderness.²⁰⁶ In doing so, Congress preserved exceptions that allow motorboats on specified lakes, snowmobiles on specified portages, and certain overflights notwithstanding the general prohibitions of the Wilderness Act.²⁰⁷

ANILCA provides numerous special rules for Alaskan wilderness areas that operate as exceptions to the Wilderness Act's general rules. ANILCA authorizes mineral assessments using "techniques such as side-looking radar imagery and, on public lands other than such lands within the national park system, core and test drilling for geologic information."²⁰⁸ It empowers the President to approve certain transportation or utility systems.²⁰⁹ It approves "[r]easonable access to and operation and maintenance of facilities for national defense purposes and related air and water navigation aids."²¹⁰ More generally, ANILCA section 3203 contains a list of exceptions to the Wilderness Act that Congress "enacted in recognition of the unique conditions in Alaska."²¹¹ Those exceptions apply to aquaculture, new and

²⁰⁴ Wilderness Act of 1964, Pub. L. No. 88-577 § 4(c), 78 Stat. 895 (1964). *See also* Steinhoff, *supra* note 172, at 289 (discussing and interpreting the Wilderness Act's exception clause).

²⁰⁵ Wilderness Act of 1964, Pub. L. No. 88-577 § 4(d)(5), 78 Stat. 895 (1964).

²⁰⁶ *See* Boundary Waters Canoe Area Wilderness Act of 1978, Pub. L. No. 95-495, 92 Stat. 1649 (1978); *see also* *Minnesota v. Block*, 660 F.2d 1240, 1241 (8th Cir. 1981) (rejecting a constitutional challenge to the act); DAWSON & HENDEE, *supra* note 9, at 105-07 (describing the history of the Act).

²⁰⁷ Boundary Waters Canoe Area Wilderness Act §§ 4(c), 4(e), 8 (addressing motorboats, snowmobiles, and airspace, respectively). The Act also allowed the use of motor vehicles to transport boats within the wilderness area, but that provision expired in 1984. *See id.* § 4(g).

²⁰⁸ Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3150(a) (2006).

²⁰⁹ *Id.* § 3166(b).

²¹⁰ *Id.* § 3199(a).

²¹¹ *Id.* § 3203(a).

existing cabins, timber contracts, and beach log salvage.²¹² Finally, and perhaps most importantly, ANILCA authorizes “appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents, subject to reasonable regulation.”²¹³

Congress has continued to add exceptions in many of its wilderness acts. The Arizona Desert Wilderness Act of 1990 authorizes border enforcement activities within the wilderness lands of the Cabeza Prieta National Wildlife Refuge.²¹⁴ The New England Wilderness Act instructs the Forest Service to allow marking and maintenance for three designated trails.²¹⁵ Congress included special provisions for water projects in the Lincoln County, Nevada, wilderness because Congress recognized that “the unique nature and hydrology of the desert land designated as wilderness” make it “possible to provide for proper management and protection of the wilderness and other values of lands in ways different from those used in other legislation.”²¹⁶ Most recently, the Omnibus Public Land Management Act of 2009 established a lot of new wilderness areas, and it contained specific management directions for several of them.²¹⁷ A competitive running event may be allowed in the Dolly Sods Wilderness and the Roaring Plains West Wilderness Area in West Virginia.²¹⁸ Electric motor boats are allowed on Little Beaver and Big Beaver Lakes in the Beaver Basin Wilderness.²¹⁹ Motorized equipment and mechanized transport may be used for ecological restoration projects in Virginia’s Kimberling Creek Wilderness.²²⁰ The federal government is obligated “to manage maintenance and access to hydrologic, meteorologic, and climatological devices, facilities and associated equipment” in some of the new wilderness areas.²²¹ Military overflights are allowed in several of the new wilderness areas.²²²

²¹² *Id.* § 3203(b)–(f).

²¹³ *Id.* § 3121(b).

²¹⁴ Arizona Desert Wilderness Act of 1990, Pub. L. No. 101-628, § 301(g)(1), 104 Stat. 4469, 4479 (1990). *See also* U.S. DEPT OF THE INTERIOR, VEHICLE TRAILS ASSOCIATED WITH ILLEGAL BORDER ACTIVITIES ON CABEZA PRIETA NATIONAL WILDLIFE REFUGE 2 (2011), *available at* http://www.rewilding.org/rewildit/images/Cabeza-Prieta-Vehicle-Trails_2011July.pdf (“Smuggling and interdiction activities have resulted in significant impacts to wilderness character.”).

²¹⁵ New England Wilderness Act of 2006, Pub. L. No. 109-382, § 213(c), 120 Stat. 2673, 2676 (2006). The extent to which trail maintenance constitutes an exception to the Wilderness Act is unclear. *See* NPS, MANAGEMENT POLICIES 2006 § 6.3.10.2 (2006) (stating that “[t]rails will be permitted within wilderness when they are determined to be necessary for resource protection and/or for providing for visitor use for the purposes of wilderness”).

²¹⁶ Lincoln County Conservation, Recreation, and Development Act of 2004, Pub. L. No. 108-424, § 204(d)(1)(E), 118 Stat. 2403, 2409–10 (2004).

²¹⁷ Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991 (2009).

²¹⁸ *Id.* § 1001(c), 123 Stat. at 1000–01.

²¹⁹ *Id.* § 1653(b), 123 Stat. at 1043.

²²⁰ *Id.* § 1103(c)(1), 123 Stat. at 1004.

²²¹ *Id.* § 1903(c), 123 Stat. at 1070 (Sequoia and Kings Canyon National Parks Wilderness). *See also id.* § 1972(b)(8), 123 Stat. at 1079 (Washington County, Utah).

²²² *See id.* § 1503(b)(11)(A), 123 Stat. at 1036 (Owyhee Public Land Management). *See also id.* § 1803(g)(1), 123 Stat. at 1056 (Eastern Sierra and Northern San Gabriel Wilderness, California); *id.* § 1972(b)(5)(A), 123 Stat. at 1078 (Washington County, Utah).

Many of these provisions mimic exceptions that are already contained in the Wilderness Act itself. Many others go further. Collectively, they demonstrate a congressional willingness to allow a significant number of activities that are contrary to the general provisions of the Wilderness Act, though only when Congress identifies a particularized reason for allowing that activity in a specific wilderness area.

B. Subsequent Amendments

Congress may also respond to a dispute regarding the permissible use of a specific wilderness area. Three techniques have been employed. First, Congress may simply dictate whether a contested activity is permissible or impermissible in a wilderness area. Second, Congress may modify the boundaries of a wilderness area so that the activity now takes place *outside* the wilderness. Third, Congress may direct the federal land management agency to decide the dispute based on general public policy considerations, rather than binding the agency to the requirements of the Wilderness Act.

Congress took the first approach in response to a district court decision ordering the Forest Service to remove a reconstructed lookout tower from the Glacier Peak Wilderness Area in Washington. The Civilian Conservation Corps built the tower in 1933, and it was used during World War II to spot fires and enemy aircraft. The tower was then added to the National Register of Historic Places in 1987, but by then the tower was beginning to deteriorate. The Forest Service responded by salvaging the materials from the original tower, using them to construct a new tower off-site, and then using a helicopter to install the restored structure in its original location. But Wilderness Watch challenged the project, and the district court held that the Forest Service had violated the Wilderness Act because the restored structure did not satisfy the Act's minimum requirements exception.²²³ The court found that "there are less extreme measures that could have been adopted" and that the "presence of the lookout detrimentally impacts on the wilderness character of the Glacier Peak Wilderness."²²⁴

The district court's decision sparked a bipartisan outrage in the state's congressional delegation. In April 2014, Congress approved the Green Mountain Lookout Heritage Protection Act, which mandated that the designation of the wilderness area "shall not preclude the operation and maintenance of the Green Mountain Lookout."²²⁵ No one spoke against the

²²³ *Wilderness Watch v. Iwamoto*, 853 F. Supp. 2d, 1063 (W.D. Wash. 2012).

²²⁴ *Id.* at 1076. *See also* *Wilderness Watch v. Iwamoto*, No. C10-1797-JCC, 2012 WL 6766551, at *2 (W.D. Wash. Sept. 20, 2012) (finding that "[n]o reasonable decision-maker could conclude that what the Forest Service did was the 'minimum necessary' for preserving historical use of the Green Mountain lookout while also respecting the wilderness character of the area," but agreeing that the case should be remanded to the Forest Service rather than simply ordering the removal of the tower).

²²⁵ S. 404, 113th Cong., § 2(a) (2d Sess. 2014). President Obama has yet to sign the bill, but he has already indicated that he approves it. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATIVE POLICY: H.R. 2954 – PUBLIC ACCESS AND LANDS IMPROVEMENT ACT (REP. MILLER, R-FLORIDA), Feb. 5, 2014, *available at* <http://www.whitehouse>

bill in Congress. Senator Patty Murray took the lead in promoting the legislation to overturn the court's decision. She described the lookout tower as "a cherished historical landmark" and "a place where parents have brought their kids for generations to appreciate the splendor of the great outdoors in the Northwest."²²⁶ Senator Murray also linked the bill to the landslide that had killed 36 people in the area of the lookout tower less than two weeks earlier.²²⁷ Representative Suzan DelBene remarked that the purpose of the legislation was "allowing critical maintenance while keeping this iconic structure in its original home."²²⁸ Representative Doc Hastings lamented that the court's decision would have eliminated "a popular hiking destination," and added that "[t]his bill puts a stop to that nonsense and protects the lookout."²²⁹ Even Arizona's Representative Raul Grijalva, the head of the House's progressive caucus, agreed that it was "important and appropriate" to "ensure the tower remains where it is."²³⁰ The only opposition came from a group of "long-time wilderness professionals" who worried that the "legislation would degrade the Glacier Peak Wilderness, and, most important, set a terrible precedent for the wilderness system by inviting other proposals for wilderness-degrading exceptions to the Wilderness Act," which they found especially unseemly "[o]n the eve of the Wilderness Act's 50th anniversary."²³¹ In fact, there are already numerous other legislative exceptions to the Wilderness Act, though the Green Mountain lookout is unusual insofar as Congress acted to simply allow the otherwise prohibited activity.

Congress used the second approach—the adjustment of wilderness boundaries—in response to the Eleventh Circuit's decision prohibiting van tours through the wilderness area to visit the historic sites in the nonwilderness part of the Cumberland Island National Seashore.²³² A bipartisan group from Georgia's congressional delegation worked to remove the road from the wilderness area, rather than authorize the road within it.

.gov/sites/default/files/omb/legislative/sap/113/saphr2954h_20140205.pdf ("The administration supports provisions that would allow for the operation of the Green Mountain Lookout in Washington State.").

²²⁶ 160 CONG. REC. 2151 (daily ed. Apr. 3, 2014) (statement of Sen. Patty Murray).

²²⁷ *See id.* (statement of Sen. Patty Murray) (explaining that the lookout was "a place that has been a vital source of tourism-related income for the people who have been impacted by this deadly landslide that struck this region" and recalling that the local mayor had advised Senators Murray and Cantwell that "the one glimmer of hope he thought he could provide for his community was passage of this Green Mountain Lookout bill"). *See also* 160 CONG. REC. H2979 (daily ed. Apr. 7, 2014) (statement of Rep. DelBene) (confirming Senator Murray's account of the meeting with local officials); 160 CONG. REC. H2979 (daily ed. Apr. 7, 2014) (statement of Rep. Larsen) (acknowledging the effect of the landslide on the nearby community of Darrington and stating that "[k]eeping the lookout in place means Darrington has one more reason to tell eople from across this country that Darrington is open for business").

²²⁸ 159 CONG. REC. E222 (daily ed. Feb. 28, 2013) (statement of Rep. DelBene).

²²⁹ 160 CONG. REC. H2978 (daily ed. Apr. 7, 2014) (statement of Rep. Hastings).

²³⁰ *Id.* (statement of Rep. Grijalva).

²³¹ Letter from Bernie Smith et al. to Sen. Ron Wyden (Dec. 17, 2013), *available at* http://wildernesswatch.org/pdf/Letter_Green_Mountain.pdf.

²³² *See* Wilderness Watch v. Mainella, 375 F.3d 1085, 1089–90, 1094 (11th Cir. 2004).

The goal of the proposal was to provide access to the historic sites on the island.²³³ That, in turn, provoked a debate about the relative value of wilderness and history. As Representative Kingston explained, “[t]here’s no divine right of the wilderness to come before the historic properties.”²³⁴ The head of the Georgia Trust for Historic Preservation observed that “[p]eople have lived on Cumberland Island for 3,000 years and the island was entirely cleared for much of the last 200 years.”²³⁵ Opponents insisted that more tours will bring more visitors who will compromise what makes the island’s wilderness special.²³⁶ They also worried that congressional action could create a precedent for future wilderness disputes.²³⁷ One newspaper editorialized that “[f]or staunch conservationists” the plan for motorized tours “is heresy. But if the tourism plan is handled correctly, their objections should prove unfounded.”²³⁸

²³³ H.R. REP. NO. 108-738, at 3 (2004) (“The consequence of the wilderness designation was a dissection of the Seashore into three sections—making unfettered access to the Island’s cultural and historic resources in the central and north near impossible for the typical visitor to the Island.”); *id.* at 5 (“Eliminating the national wilderness designations from the island’s roads and allowing private concessioners to use them would likely facilitate the development of Plum Orchard, an historic estate owned by the NPS that currently has little recreational use because it is only accessible to visitors by boat or on foot. The NPS has already spent more than \$2 million to restore the mansion.”); 149 CONG. REC. S19,627 (daily ed. July 25, 2003) (statement of Sen. Chambliss) (“Due to the location of the designated wilderness area, access to historic settlements such as: Plum Orchard Mansion and Dungeness, both former homes of Andrew Carnegie descendants; the First African Baptist Church established in 1893 and rebuilt in the 1930s; as well as the High Point/Half Moon Bluff historic district, is severely restricted.”).

²³⁴ Daniel Cusick, *Georgia Seashore Struggles with Balancing Conflicting Missions*, GREENWIRE, Aug. 4, 2005, <http://www.eenews.net.lawpx.lclark.edu/greenwire/stories/27565/search?keyword=Georgia+Seashore+Struggles+with+Balancing+Conflicting+Missions%2C> (last visited Apr. 12, 2014).

²³⁵ Gregory B. Paxton, *Great Access by Visitors Won’t Harm Cumberland*, http://www.georgiatrust.org/news/editorials/dec9_04.php (last visited Apr. 12, 2014) (Gregory B. Paxton is president and CEO of the Georgia Trust for Historic Preservation).

²³⁶ See H.R. REP. NO. 108-738, *supra* note 225, at 10 (“Reopening roads in wilderness and allowing commercial operations to use those roads would fragment the wilderness and undermine the fundamental purpose of the 1972 and 1982 Acts which was to permanently preserve a significant portion of this unique island in its primitive state.”).

²³⁷ Charles Seabrook, *Changes Loom for Pristine Island: Vehicle Access to Historic Sites OK’d*, ATLANTA J. CONST., Nov. 26, 2004, at 1C (reporting a conservationist’s fear that the provision “could set a precedent for removing land from other congressionally delegated wildernesses”); Greg Bluestein, *Fight Escalates Over Driving on Barrier Island; Georgia Lawmakers Enter Controversy on Isle’s Future*, WASH. POST, Nov. 7, 2004, at A06 (quoting Julie Mayfield, the vice president of the Georgia Conservancy, who asked, “If you can do it here, why wouldn’t you try to do it somewhere else?”); Stacy Shelton, *House OKs Wilderness Land Tours*, ATLANTA J. CONST., Sept. 23, 2004, at 4C (“Rep. John Lewis of Atlanta opposed the bill in a letter to the committee leaders, saying the bill ‘would set a bad precedent by allowing the first designation of a National Park Service Wilderness.’”).

²³⁸ Lyle V. Harris, Editorial, *Protect—And Enjoy; Strategic Plan Must Preserve Cumberland Island’s Natural Essence, Allow More to Experience Its Beauty*, ATLANTA J. CONST., Sept. 7, 2006, at 14A.

The advocates for access to the historic sites succeeded in adding a rider to the omnibus federal appropriations bill in December 2004.²³⁹ The resulting Cumberland Island Wilderness Boundary Adjustment Act of 2004 excluded the main road, two smaller roads, and a historic district from the wilderness area.²⁴⁰ The law offset the removal of those twenty-five acres from the wilderness area by designating an additional 231 acres of new wilderness land on the island.²⁴¹ The law also directed the Park Service to authorize visitor tours of the historic sites on the island, which it did beginning in 2011.²⁴²

There are several other examples of Congress adjusting wilderness boundaries to accommodate desired activities. Typically, Congress removes some land from the wilderness and then adds some adjacent land to the wilderness in order to achieve at least a no-net-loss-of-wilderness result. The Mount Naomi Wilderness Boundary Adjustment Act removed thirty-one acres in order to facilitate utility maintenance in Logan, Utah,²⁴³ and it added thirty-one new acres to the southern boundary of the wilderness “[i]n order to prevent a net loss of wilderness due to this boundary adjustment.”²⁴⁴ In 2012, Congress removed 222 acres from the Olympic National Park wilderness to resolve a longstanding boundary dispute with the Quileute Tribe.²⁴⁵ The tribe’s tiny reservation is located in a coastal flood plain and a tsunami zone, so Congress acted “to adjust the wilderness boundaries to provide the Quileute Indian Tribe Tsunami and flood protection.”²⁴⁶ In doing so, however, Congress rejected the results of a negotiation between the stakeholders that would have designated other wilderness lands to compensate for the loss.²⁴⁷

Instead of changing wilderness boundaries, Congress adopted a different approach in response to a controversy “which pits an oyster farm, oyster lovers and well-known ‘foodies’ against environmentalists aligned

²³⁹ See Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 145, 118 Stat. 2809, 3072-74 (2004) (codified as amended at 16 U.S.C. § 1132(e) (2006)).

²⁴⁰ Cumberland Island Wilderness Boundary Adjustment Act of 2004, 118 Stat. 3072-73.

²⁴¹ *Id.* at 118 Stat. 3073.

²⁴² *Id.* at 118 Stat. 3073-74; Mary Landers, *New Tour Motors Through the Wilderness of Cumberland Island*, SAVANNAH MORNING NEWS, Aug. 21, 2011, <http://savannahnow.com/accnt/2011-08-21/new-tour-motors-through-wilderness-cumberland-island#.Uurq7nddWxQ> (last visited Apr. 12, 2014).

²⁴³ Mount Naomi Wilderness Boundary Adjustment Act, Pub. L. No. 108-95, § 2(a), 117 Stat. 1165, 1165 (2003) (codified as amended at 16 U.S.C. 1132(e) (2006)); S. REP. NO. 108-23, at 1-2 (2003).

²⁴⁴ S. REP. NO. 108-23, at 2.

²⁴⁵ See Act of Feb. 27, 2012, Pub. L. No. 112-97, § 1(b)-(c), 126 Stat. 257, 257-58 (codified as amended at 16 U.S.C. § 1132(e) (2012)). The Quileute Tribe was featured in the “Twilight” books and movies. Katie Campbell & Saskia de Melker, *Climate Change Threatens The Tribe From “Twilight,”* PBS NEWSHOUR, July 16, 2012, http://www.pbs.org/newshour/updates/science-july-dec12-quileute_07-05/ (last visited Apr. 12, 2014).

²⁴⁶ Act of Feb. 27, 2012, § 1(b)(2)(D).

²⁴⁷ See H.R. REP. NO. 112-387, at 8 (2012) (additional views of Reps. Markey, Holt, Garamendi, Luján, Napolitano, Tsongas, Grijalva, & Kildee) (arguing that “the grand bargain” negotiated by Representative Dicks was rejected “based on narrow, ideological objections to wilderness”).

with the federal government.”²⁴⁸ Congress established the Point Reyes National Seashore in 1962 “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.”²⁴⁹ Point Reyes juts into the Pacific Ocean about an hour’s drive north of San Francisco. It remained relatively undeveloped despite its proximity to a major metropolitan area, instead featuring dairy farms, wild coastal lands, and—since the 1930s—an oyster harvesting operation. In 1976, Congress characterized thousands of acres within the national seashore as “potential wilderness,” a new concept that anticipated the cessation of non-wilderness activities within the area.²⁵⁰

The oyster farm changed hands over the years until the Drakes Bay Oyster Company bought it in 2004, which had full knowledge that the lease would expire in 2012. But the company hoped to keep the operation open, and it gained the support of Bay Area foodies and of Senator Diane Feinstein. Feinstein pushed to extend the lease for ten years,²⁵¹ but instead, Congress added a provision to a 2009 appropriations bill that authorized—but did not require—the Secretary of the Interior to extend the lease.²⁵² The statutory provision did not specify the criteria that the Secretary should employ, though the provision explicitly warned that it was not to be cited as precedent.

The Park Service had trouble studying the issue.²⁵³ Finally, in November 2012, Secretary of the Interior Kenneth Salazar decided to let the lease expire. He cited two “matters of law and policy” to justify the decision.²⁵⁴

²⁴⁸ *Drakes Bay Oyster Co. v. Jewell*, 729 F.3d 967, 971 (9th Cir. 2013).

²⁴⁹ Act of Sept. 13, 1962, Pub. L. No. 87-657, § 1, 76 Stat. 538, 538 (1962) (codified as amended at 16 U.S.C. § 459c (2006)).

²⁵⁰ Act of Oct. 18, 1976, Pub. L. No. 94-544, § 1, 90 Stat. 2515, 2515 (codified as amended at 16 U.S.C. § 1132(e) (2006)).

²⁵¹ See *Drakes Bay Oyster Co.*, 729 F.3d at 974 (providing “the Secretary of the Interior shall extend the existing authorization” of the oyster farm for ten years (quoting H.R. 2996, 111th Cong. § 120(a) (as reported in Senate, July 7, 2009))).

²⁵² Act of Oct. 30, 2009, Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932 (2009). The provision states: “Prior to the expiration on November 30, 2012 of the Drake’s Bay Oyster Company’s Reservation of Use and Occupancy and associated special use permit (“existing authorization”) within Drake’s Estero at Point Reyes National Seashore, notwithstanding any other provision of law, the Secretary of the Interior is authorized to issue a special use permit with the same terms and conditions as the existing authorization, except as provided herein, for a period of 10 years from November 30, 2012.” *Id.*

²⁵³ See *Drakes Bay Oyster Co.*, 729 F.3d at 975 (“Congress expressed ‘concerns relating to the validity of the science underlying the DEIS’ and therefore ‘direct[ed] the National Academy of Sciences to assess the data, analysis, and conclusions in the DEIS in order to ensure there is a solid scientific foundation for the Final Environmental Impact Statement expected in mid-2012.’” (quoting H.R. Conf. Rep. No. 112-331, at 1057 (Dec. 15, 2011))); see also *id.* (observing that the NAS study “concluded that the available research did not admit of certainty” regarding the impact of the oyster farm).

²⁵⁴ Memorandum from Ken Salazar, U.S. Sec’y of the Dep’t of the Interior to the Director of the Nat’l Park Serv. (Nov. 29, 2012), available at <http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&pageid=332286>. See also *id.* at 5 (“I gave great weight to matters of public policy, particularly the public policy inherent in the 1976 act of Congress that identified Drakes Estero as potential wilderness.”).

First, he noted that the current owners purchased the oyster farm knowing that its permit would expire in 2012. Second, Salazar concluded that the operation of the oyster farm “would violate the policies of NPS concerning commercial use within a unit of the National Park system and nonconforming uses within potential or designated wilderness, as well as specific wilderness legislation for Point Reyes National Seashore.”²⁵⁵ Salazar insisted that the 2009 statute “in no way override[s] the intent of Congress as expressed in the 1976 act to establish wilderness at the estero.”²⁵⁶ Salazar seemed to be much more concerned about the intent of the 1976 Congress than the actual impact of the oyster farm. He found that removing the oyster farm “would result in long-term beneficial impacts to the estero’s natural environment,” though he acknowledged the “scientific uncertainty and a lack of consensus in the record regarding the precise nature and scope” of those impacts.²⁵⁷ Salazar also maintained that the 2009 statute exempted his decision from the National Environmental Policy Act’s (NEPA) Environmental Impact Statement (EIS) requirement, so the EIS that had been prepared was merely advisory.²⁵⁸

The oyster farm’s owners have challenged that decision in court, so far unsuccessfully. The district court denied the motion for a preliminary injunction against the closure of the oyster farm, and the Ninth Circuit affirmed 2–1.²⁵⁹ The majority agreed that Salazar had reasonably exercised the broad policy discretion afforded him by the 2009 statute. But Judge Watford dissented. He concluded that Salazar “denied Drakes Bay’s permit request based primarily on the very same misinterpretation of the Point Reyes Wilderness Act that Congress thought it had overridden.”²⁶⁰ Judge Watford thought it bizarre for Salazar to conclude “that by designating Drakes Estero as a potential wilderness addition in the Point Reyes Wilderness Act, Congress had ‘mandated’ elimination of the oyster farm,” especially in light of the favorable view of the oyster farm evidenced by the legislative history of the 1976 Act.²⁶¹ If the 1976 Congress did not intend to eliminate the oyster farm in favor of expanding the wilderness area, then Salazar erred by concluding otherwise and by failing to read the 2009 statute as a repudiation of that view.²⁶²

Congress took a similar approach with respect to a dispute about a proposed road through the wilderness area in Izembek National Wildlife Refuge. The 2009 Omnibus Public Lands Management Act, while generally

²⁵⁵ *Id.* at 1.

²⁵⁶ *Id.* at 6.

²⁵⁷ *Id.* at 5.

²⁵⁸ *Id.* at 4.

²⁵⁹ See *Drakes Bay Oyster Co. v. Salazar*, 921 F. Supp. 2d 972 (N.D. Cal. 2013), *aff’d sub nom.* 729 F.3d 967 and *aff’d sub nom.* *Drakes Bay Oyster Co. v. Jewell*, No. 13-15227, 2014 WL 114699 (9th Cir. Jan. 14, 2014).

²⁶⁰ *Drakes Bay Oyster Co.*, 729 F.3d at 987 (Watford, J., dissenting).

²⁶¹ *Id.* at 990 (Watford, J., dissenting).

²⁶² See *id.* at 991 (Watford, J., dissenting) (doubting that “Congress, having overridden the Department’s misinterpretation of the Point Reyes Wilderness Act, nonetheless authorized the Secretary to rely on that misinterpretation as a basis for denying Drakes Bay a permit”).

praised by environmentalists for establishing new conservation lands, also authorized the Secretary of the Interior to exchange lands within Izembek for lands owned by the State of Alaska and the King Cove Corporation for the purpose of constructing a single lane gravel road between the communities of King Cove and Cold Bay, Alaska.²⁶³ The provision in the 2009 Omnibus Act replaced the dictates of the Wilderness Act and other statutes and instead directs the Secretary of the Interior to decide only whether the road is in “the public interest.”²⁶⁴ King Cove residents want the road in order to obtain reliable access to and from Cold Bay, which has the area’s only medical facilities and airport. But conservationists object to the proposed road because it would cross the Izembek National Wildlife Refuge, including the Izembek Wilderness Area. They are worried about the impact of a road on Izembek’s vast bird and wildlife populations and because “[t]his precedent could open the door for other destructive practices on wilderness areas.”²⁶⁵

In February 2013, the FWS indicated that the road will not be built. The FWS released an environmental impact statement which concluded that the project would cause irreparable environmental harm.²⁶⁶ Alaska Senator Lisa Murkowski responded to the EIS by suggesting that she would block President Obama’s nominee to replace Salazar as Secretary of the Interior unless the road was approved.²⁶⁷ According to Murkowski, the public safety concerns for the residents of King Cove should outweigh the environmental concerns, whereas the FWS decision’s understanding of the “public interest” presumes that “the public is made up solely of birds and sea otters.”²⁶⁸ Outgoing Secretary of the Interior Kenneth Salazar acknowledged that “the 2009 Act does not provide a process for making a public interest determination,” so he agreed that it is necessary to conduct additional

²⁶³ Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 6402(a), 123 Stat. 991, 1178 (2009).

²⁶⁴ *Id.* § 6402(d)(1).

²⁶⁵ NATIONAL WILDLIFE REFUGE ASS’N, THE ROAD TO NOWHERE: GRAVEL ROAD FULL OF POTHoles FOR WILDLIFE AND TAXPAYERS 4, *available at* http://www.refugeassociation.org/new-pdf-files/Izembek_report09.pdf.

²⁶⁶ *See* U.S. FISH AND WILDLIFE SERV., U.S. FISH AND WILDLIFE SERVICE ANALYSIS DOES NOT SUPPORT PROPOSED LAND EXCHANGE AND ROAD CORRIDOR THROUGH IZEMBek NATIONAL WILDLIFE REFUGE (2013), *available at* <http://www.fws.gov/news/ShowNews.cfm?ID=075CCBFE-0AB0-8969-C83911F5BB214E6E> (quoting FWS Director’s Dan Ashe’s statement “that building a road through the refuge would irretrievably damage the ecological functions of the refuge and impair its ability to provide vital support for native wildlife”); *see also* U.S. FISH AND WILDLIFE SERV., IZEMBek NAT’L WILDLIFE REFUGE, IZEMBek NATIONAL WILDLIFE REFUGE LAND EXCHANGE/ROAD CORRIDOR FINAL ENVIRONMENTAL IMPACT STATEMENT: EXECUTIVE SUMMARY ES 23–24 (2013), *available at* http://www.fws.gov/uploadedFiles/Region_7/NWRS/Zone_1/Izembek/PDF/01%20Executive%20Summary.pdf.

²⁶⁷ *See* Phil Taylor, *Murkowski Mulling Hold On Jewell Over Alaska Road Decision*, ENV’T & ENERGY DAILY, Feb. 8, 2013, <http://www.eenews.net/EEDaily/2013/02/08/1> (last visited Apr. 12, 2014).

²⁶⁸ 159 CONG. REC. S495 (daily ed. Feb. 7, 2013) (statement of Sen. Murkowski).

studies of the proposed road's impact on public health and native Alaskans.²⁶⁹

Salazar thus punted the dispute to his successor, Sally Jewell, who visited King's Cove in September 2013. Jewell issued her decision rejecting the road two days before Christmas.²⁷⁰ "Nothing is more contradictory with, or destructive to, the concept of Wilderness than construction of a road," Jewell proclaimed.²⁷¹ She concluded "that construction of a road through the Izembek National Wildlife Refuge would lead to significant degradation of irreplaceable ecological resources that would not be offset by the protection of other lands to be received under an exchange."²⁷² Roads and wildlife often coexist, Jewell noted, but "uses of the habitat of the Izembek Refuge by the large number of species that are dependent on the isthmus would be irreversibly and irretrievably changed by the presence of the road."²⁷³ Jewell observed that wilderness is "the most protective statutory designation of public lands, which is reserved for pristine areas where natural processes prevail with few signs of human presence."²⁷⁴ She explained that the road "will lead to increased human access and activity, including likely unauthorized off-road access, which will strain Refuge management resources."²⁷⁵ She also "conclude[d] that other viable, and at times preferable, methods of transport remain and could be improved to meet community needs."²⁷⁶

Alaska's congressional delegation blasted the decision. Senator Lisa Murkowski was "angered and deeply disappointed by Jewell's decision to continue to put the lives of the people of King Cove in danger, simply for the convenience of a few bureaucrats and the alleged peace of the birds in the refuge, despite the fact that many thousands of birds are killed by hunters annually."²⁷⁷ She contended that it was "emblematic of what's going on with (the Obama) administration view of Alaska. They don't think we can take care of our communities, our families and the land that we have."²⁷⁸ She

²⁶⁹ Memorandum from Ken Salazar, Sec'y of the Interior, to Assistant Sec'y, Indian Affairs & Dir., U.S. Fish & Wildlife Serv. (Mar. 21, 2013), *available at* <http://www.doi.gov/news/press-releases/upload/Memo-3-21-13.pdf>.

²⁷⁰ See U.S. FISH AND WILDLIFE SERV., RECORD OF DECISION, IZEMBEK NATIONAL WILDLIFE REFUGE LAND EXCHANGE/ROAD CORRIDOR FINAL ENVIRONMENTAL IMPACT STATEMENT 1 (2013), *available at* <https://www.federalregister.gov/articles/2014/02/20/2014-03605/record-of-decision-for-final-environmental-impact-statement-izembek-national-wildlife-refuge>.

²⁷¹ *Id.* at 9.

²⁷² *Id.* at 3.

²⁷³ *Id.* at 4.

²⁷⁴ *Id.* at 9.

²⁷⁵ *Id.* at 7.

²⁷⁶ *Id.* at 3.

²⁷⁷ Amanda Peterka, *Jewell Rejects Road Through Alaska Wildlife Refuge*, E&E NEWS PM, Dec. 23, 2013, <http://www.eenews.net/eenewspn/stories/1059992274/> (last visited Apr. 12, 2014) (quoting Sen. Murkowski).

²⁷⁸ Elwood Brehmer, *Alaskans Blast Jewell Decision to Deny King Cove Road*, ALASKA J. OF COMMERCE, Dec. 24, 2013, <http://www.alaskajournal.com/Alaska-Journal-of-Commerce/December-Issue-5-2013/Alaskans-blast-Jewell-decision-to-deny-King-Cove-road/> (last visited Apr. 12, 2014) (quoting Sen. Murkowski).

added that she regretted her vote to confirm Jewell as Secretary of the Interior earlier in the year.²⁷⁹ Representative Don Young opined that “[t]his shameful and cowardly decision by Secretary Jewell, just two days before Christmas, to place eelgrass and waterfowl above human life is exactly what I would have expected from the Grinch, but not from an Administration that preaches access to quality healthcare for all.”²⁸⁰ Alaska’s Democratic Senator Mark Begich faulted “Washington bureaucrats [who] have determined that the environmental impact of a single lane road somehow outweighs the health of Alaskans.”²⁸¹ In response, four former Department of the Interior officials who served in both Democratic and Republican administrations insisted that the Izembek road was “a terrible idea” that Jewell “heroically rejected.”²⁸²

The outcomes in Izembek and Point Reyes offer new lessons for partisans on all sides. For wilderness advocates, the Secretary of the Interior’s decisions show that wilderness conservation can prevail in specific local disputes. This is a contrast from the familiar pattern of general support for environmental policies—say, saving endangered species—but opposition to specific applications of that policy—such as closing beaches to protect rare shorebirds or blocking wind farms because they harm bald eagles. By contrast, Secretary Salazar’s Point Reyes decision and Secretary Jewell’s Izembek decision articulate why the wilderness and broader environmental values at stake in a specific dispute can outweigh the benefits of a project that some desire.

The lesson for supporters of the Point Reyes oyster farm and the Izembek road is simpler. Those congressional supporters expected that the projects would prevail based on an individualized assessment of each project’s benefits and harms. But they were wrong. So now members of Congress, who advocate a project that runs afoul of an existing environmental regulation, have two choices—both of which are illustrated by the contrasting positions of Alaska’s two senators. Alaska’s Democratic Senator Mark Begich has introduced legislation that would simply direct the federal government to build the road and authorize the wilderness land exchange described in the 2009 Act.²⁸³ If you want to do something right, Begich reasons, you have to do it yourself. The State of Alaska is poised to

²⁷⁹ *Id.* Additionally, Senator Murkowski faulted the report prepared by Kevin Washburn, whom Murkowski described “as a leading legal scholar on Native trust responsibility” whose “heart clearly is in the right place” but whose “report falls woefully short of his duty to the Aleut people.” 160 CONG. REC. S217 (daily ed. Jan. 9, 2014) (statement of Sen. Murkowski).

²⁸⁰ Manuel Quiñones, *Road Decision Largest Pile of Horse Manure—Rep. Young*, GREENWIRE, Dec. 24, 2013, <http://www.eenews.net/greenwire/stories/1059992294/> (last visited Apr. 12, 2014). Senator Murkowski also complained about the timing of Jewell’s decision. See 160 CONG. REC. S218 (daily ed. Jan. 9, 2014) (statement of Sen. Murkowski) (“[Jewell] announced this devastating news only hours before Christmas Eve—a heartless decision delivered at a heartless time.”).

²⁸¹ Press Release, U.S. Sen. Mark Begich (Dec. 23, 2013), available at <http://www.begich.senate.gov/public/index.cfm/2013/12/begich-critical-of-interior-decision-on-king-cove>.

²⁸² See Phil Taylor, *Former Interior Officials Dub Izembek Road “A Terrible Idea,”* E&E NEWS, Mar. 19, 2014 (quoting Letter from Nathaniel P. Reed et al. to Sally Jewell, Mar. 14, 2014).

²⁸³ See King Cove All-Weather Road Corridor Act, S. 1929, 113th Cong. (2014).

follow this approach, too, by filing a quiet title lawsuit claiming that the state already owns title to the land on which the road would be built, thanks to the controversial Revised Statute 2477.²⁸⁴ But Senator Murkowski is “not willing to concede” that the 2009 law entrusting the decision to the Secretary of the Interior’s judgment failed.²⁸⁵ She has asked “[w]ho knows how and whether the courts may address that injustice” perpetrated by Secretary Jewell’s decision to reject the road.²⁸⁶ And Senator Murkowski added that “[w]e’ve got nominations that are out there, we have appropriations that are out there, we have legislation, we have just the powers of friendly persuasion or perhaps persistent persuasion.”²⁸⁷ Either way, Senator Murkowski insists that “[t]his fight is not over.”²⁸⁸

VI. CONCLUSION

“The Wilderness Act requires a delicate balancing between Congress’ desire to maintain lands untouched by humans and Congress’ recognition that such an idealistic view is subject to some practical limitations,”

²⁸⁴ See Letter from Attorney General of Alaska Michael C. Geraghty to Secretary of the Interior Sally Jewell and Secretary of Homeland Security Jeh Johnson (Apr. 7, 2014), available at http://gov.alaska.gov/parnell_media/resources_files/jewell_040714.pdf (providing the State’s “Notice of Intent to Sue Regarding Izembek National Wildlife Refuge R.S. 2477 Right-of-Way” and asserting that the road from King Cove to Cold Bay has been used by the public “beginning in the 1920s”). See generally James R. Rasband, *Questioning the Rule of Capture Metaphor for Nineteenth Century Public Land Law: A Look at R.S. 2477*, 35 ENVTL. L. 1005 (2005) (describing the application of R.S. 2477).

²⁸⁵ 160 CONG. REC. S218 (daily ed. Jan. 9, 2014) (statement of Sen. Murkowski).

²⁸⁶ *Id.*

²⁸⁷ Darren Goode, *Lisa Murkowski Still Fuming Over Sally Jewell’s ‘Callous’ Izembek Decision*, POLITICO PRO, Jan. 10, 2014, <http://www.politico.com/story/2014/01/lisa-murkowski-still-fuming-over-sally-jewells-callous-izembek-decision-102040.html> (last visited Apr. 12, 2014) (quoting Sen. Murkowski). See also 160 CONG. REC. S218 (daily ed. Jan. 9, 2014) (statement of Sen. Murkowski) (“I have not yet identified every opportunity I may have to draw attention to, resist, and seek redress from Secretary Jewell’s bad decision. . . . I am not ruling out any possible remedy.”); Press Release, Sen. Lisa Murkowski, Sen. Murkowski Presses Interior Secretary Jewell on Need for Lifesaving Road (Mar. 26, 2014) (explaining how Senator Murkowski “blasted Jewell for failing to offer a single viable alternative to the road solution in Interior’s budget proposal – nearly four months after Jewell specifically promised to find another option”); Phil Taylor, *Sen. Begich’s Bill Would Approve Izembek Road*, E&E NEWS, Jan. 16, 2014, <http://www.eenews.net/eedaily/stories/1059993026/> (last visited Apr. 12, 2014) (“[Senator Murkowski] has already called for a second hearing on President Obama’s nominee to become Interior assistant secretary in order to continue the discussion on Izembek, among other Alaskan issues.”). Senator Murkowski has also echoed the plea of local officials for Secretary Jewell to reconsider her decision. See Letter from Etta Kuzakin et al. to Sec’y of the Interior Sally Jewell (Jan. 15, 2014), available at http://www.alutianseast.org/vertical/sites/%7BEEDABE05-9D39-4ED4-98D4-908383A7714A%7D/uploads/Request_for_Reconsideration_Letter_to_Sec._Jewell_-_11514.pdf; see also Phil Taylor, *Sen. Murkowski Suggests Jewell’s Rejection of Izembek Road Was Illegal*, E&E NEWS, Jan. 20, 2014, <http://www.eenews.net/greenwire/stories/1059993184/> (last visited Apr. 12, 2014).

²⁸⁸ U.S. Senate Comm. on Energy & Natural Res., *Sen. Murkowski Blasts Interior’s Decision on King Cove Access Road*, <http://www.energy.senate.gov/public/index.cfm/republican-news?ID=9e1bf1ad-2f3d-4aae-8ed3-76a870b1006c> (last visited Apr. 12, 2014).

explained the Ninth Circuit as it adjudicated the Kofa wilderness dispute.²⁸⁹ After fifty years, there is still a conflict between the idealist view and the practical limitations. Perhaps surprisingly, wilderness icon Aldo Leopold recognized those practical limitations. “Wilderness is a relative condition,” he wrote in 1926. “As a form of land use it cannot be a rigid entity of unchanging content, exclusive of all other forms. On the contrary, it must be a flexible thing, accommodating itself to other forms and blending with them in that highly localized give-and-take scheme of land-planning which employs the criterion of ‘highest use.’”²⁹⁰

Congress has only amended the Wilderness Act once in fifty years,²⁹¹ the Supreme Court has never interpreted the Act,²⁹² and it has become “virtually repeal-proof.”²⁹³ Yet we continue to struggle with the relative priority given to wilderness and other values. Historic preservation advocates take exception to the priority that the courts give to wilderness values that conflict with historic values.²⁹⁴ Recreational users demand greater access to wilderness areas. The House of Representatives, for example, passed the “Sportsmen’s Heritage Act” in 2012 that would have encouraged many recreational uses in wilderness areas.²⁹⁵ One provision of that bill would specify that “[t]he provision of opportunities for hunting, fishing and recreational shooting, and the conservation of fish and wildlife to provide sustainable use recreational opportunities on designated wilderness areas on Federal public lands shall constitute measures necessary to meet the” Wilderness Act’s minimum requirements exception.²⁹⁶ Wilderness advocates condemned the bill precisely because it “would give hunting, fishing, recreational shooting, and fish and wildlife management top priority in Wilderness, rather than protecting the areas’ wilderness character, as has been the case for nearly 50 years.”²⁹⁷

²⁸⁹ *Wilderness Watch v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1040 (9th Cir. 2010).

²⁹⁰ Aldo Leopold, *Wilderness As a Form of Land Use*, 1 J. LAND & PUB. UTIL. ECON. 398, 399 (1925).

²⁹¹ The amendment repealed the Act’s special provisions governing the Minnesota Boundary Waters and replaced it with a new wilderness area there. *See* Boundary Waters Canoe Area Wilderness Act of 1978, Pub. L. 95-495, § 4(b), 92 Stat. 1649, 1650 (1978).

²⁹² *See* Appel, *supra* note 6, at 67. Nor has the Supreme Court ever interpreted the Organic Act that has governed the national parks for 98 years. *See* John Copeland Nagle, *How National Park Law Really Works*, 10 (unpublished manuscript) (on file with author).

²⁹³ Rodgers, *supra* note 4, at 1013.

²⁹⁴ *See, e.g.*, Nikki C. Carsley, Note, *When Old Becomes New: Reconciling the Commands of the Wilderness Act and the National Historic Preservation Act*, 88 WASH. L. REV. 525, 529 (2013) (“[T]he Wilderness Act should be reconciled with the [National Historic Preservation Act] so as to ensure that historic structures within wilderness areas be preserved.”).

²⁹⁵ Sportsmen’s Heritage Act of 2012, H.R. 4089, 112th Cong. (2012).

²⁹⁶ *Id.* § 104(e)(1). The bill’s supporters insisted that the provision was necessary to “foreclose[] opportunities for continued nuisance lawsuits by classifying hunting, fishing and recreational shooting as ‘necessary’ to meet the minimum requirements for the administration of wilderness.” H.R. REP. NO. 112-426, at 7 (2012).

²⁹⁷ *Wilderness Watch, How the Sportsmen’s Heritage Act of 2012 (HR 4089) Would Effectively Repeal the Wilderness Act, America’s Foremost Conservation Law*, 1 (2012), available at <http://wildernesswatch.org/pdf/HR%204089%20Analysis--WW.pdf>. Most of the bill’s congressional opponents were less alarmed; they viewed the bill as “a solution in search of a

But it is hard to maintain that the wilderness values always enjoy top priority when the Wilderness Act allows helicopters—helicopters!—in some circumstances. That suggests that there are circumstances in which other values trump wilderness values. Those circumstances are rare, but their existence implies that the hierarchy of values does not always favor untrammeled lands, even in designated wilderness areas. And wilderness values lack a claim to priority on lands that Congress has declined to name as wilderness, even if they possess the singular wilderness values of the Arctic National Wildlife Refuge or of southern Utah.

Perhaps we should have anticipated that the passage of the Wilderness Act fifty years ago would not put an end to these debates. Even the Act's singularly eloquent and distinctive reference to "untrammeled" lands is frustratingly unclear. "Untrammeled" does not mean "untrampled."²⁹⁸ The dictionary definition of "untrammeled" connotes unrestrained, not untouched.²⁹⁹ The word was surprisingly common in the years preceding the enactment of the Wilderness Act; the Supreme Court used the term fourteen times during the years that Congress was debating the Wilderness Act. Most tellingly, in the school prayer case decided the year before the Wilderness Act finally became law, Justice Brennan referred to the need for "untrammeled religious liberty"—yet we are no closer to that ideal fifty-one years later than we were then.³⁰⁰

The passage of the Wilderness Act resulted from the compromises formed during nearly a decade of congressional debate. Similar compromises accompanied the statutes establishing wilderness areas since then. The law now provides a powerful tool for protecting wilderness values, except when it does not. The careful decisions regarding those areas that should be entitled to the law's protections, and the circumstances in which those protections may give way to other values, demonstrate the ability to identify and prioritize wilderness values in a way that was never possible before. The Wilderness Act thus gives us much to celebrate, exceptions and all.

problem" because "[t]here is broad agreement that hunting, fishing, trapping, and other wildlife-dependent activities have always taken place on our federal lands and should continue to take place on our federal lands." H.R. REP. NO. 112-426, *supra* note 296, at 20 (dissenting views of Reps. Markey, Grijalva, Tsongas, Napolitano, Kildee, Bordallo, Sablan, Tonko & Holt). *But see* 158 CONG. REC. H1888 (daily ed. Apr. 17, 2012) (statement of Rep. Heinrich) (arguing that the bill "would eliminate long-standing protections against logging, oil and gas drilling, and motor vehicle use in wilderness areas. It would create a loophole in the Wilderness Act for anything that would provide 'opportunities for hunting, fishing, and recreational shooting.'").

²⁹⁸ See DAWSON & HENDEE, *supra* note 9, at 98.

²⁹⁹ See Webster's Third New Int'l Dictionary 2513 (Philip Babcock Grove ed. 1971) (defining "untrammel" as "not confined or limited" or "being free and easy"); *see also* DAWSON & HENDEE, *supra* note 9, at 98 (defining "untrammeled" as "not subject to human controls and manipulations that hamper the free play of natural forces").

³⁰⁰ School Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 246 (1963) (Brennan, J., concurring).