The Wilderness Act: The Minimum Requirement Exception

Frank Buono

Introduction

Congress passed the Wilderness Act on September 3, 1964.[1] Forty-six years later, the federal courts continue to play the indispensable role of interpreting the act and reviewing how federal agencies apply it. The Wilderness Act is neither as complex nor as lengthy as the Clean Air, Clean Water or Endangered Species acts. There are fewer Wilderness Act court decisions than for nearly all other environmental laws.

Despite its brevity, federal courts have judged the Wilderness Act's words. Several federal Circuit Courts of Appeal have issued opinions on the administration of designated wilderness.[2] In 2001, the Eighth Circuit decided that an Indian treaty right to hunt and fish on ceded lands in Minnesota did not authorize Indians to operate motor vehicles in the Boundary Waters Canoe Area Wilderness (*U.S. v. Gotchnik*).[3] In 2003, the entire Ninth Circuit decided that salmon stocking by the state of Alaska in the Kenai National Wildlife Refuge wilderness for enhancing commercial catch outside of the wilderness was an impermissible "commercial enterprise" (*The Wilderness Society v. USFWS*).[4] In 2004, the Ninth Circuit decided that the Forest Service had violated the Wilderness Act exception that allows limited commercial services by not heeding the extent and necessity of such services in the John Muir Wilderness (*High Sierra Hikers v. Blackwell*).[5] In 2004, the Eleventh Circuit decided that the National Park Service (NPS) violated the Wilderness Act by transporting park visitors in motor vehicles across designated wilderness of Cumberland Island National Seashore, Georgia, for interpretive programs because this use of motor vehicles did not fall within the ambit of the Wilderness Act's "minimum requirement" exception, as asserted by NPS (*Wilderness Watch and Public Employees for Environmental Responsibility v. Mainella*).[6]

On December 21, 2010, the Ninth Circuit rendered a new decision: *Wilderness Watch v. USFWS*. The decision examined the Wilderness Act's minimum requirement exception. The United States Fish and Wildlife Service (USFWS) installed large structures (called "guzzlers") to provide water for desert bighorn sheep in the wilderness of Kofa National

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Wildlife Refuge in Arizona. USFWS concluded that the structures, though generally and explicitly prohibited by the Wilderness Act, section 4(c), nonetheless qualified for the minimum requirement exception.[7] The Ninth Circuit disagreed. This article is about the Ninth's Circuit decision. Before examining the Kofa decision, we must explain the minimum requirement exception.

The Wilderness Act minimum requirement exception

The Wilderness Act prohibits nine specific activities, seven of which an administering agency may waive by invoking a so-called minimum requirement exception. The prohibited activities that an agency may waive are: temporary roads, motor vehicles, motorized equipment, motorboats, landing of aircraft, mechanical transport, and structures or installations.[8] The Wilderness Act allows the exception "as necessary to meet minimum requirements for the administration of the (wilderness) area for the purpose of this Act (including measures required in emergencies involving the health and safety of persons within the area)…" (16 U.S.C. 1133(c)).

Four federal agencies administer wilderness: the Bureau of Land Management (BLM), NPS, USFWS, and US Forest Service (USFS).[9] Each agency has policies and procedures for determining when an otherwise prohibited activity may be employed because it may meet the minimum requirement exception. The agencies joined together to establish a national wilderness training center, the Arthur Carhart Center, in Missoula, Montana. One important function of the Carhart Center is to develop a systematic and consistent standard for applying the exception across agency lines.

As a former manager in Joshua Tree National Park, and now a retiree who frequently evaluates NPS wilderness management, the author attests to the difficulty of applying the minimum requirement exception. As with any statute, even words that are simple on their face are subject to many interpretations. Subjective 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.*"

Some land managers with wilderness responsibilities may regard wilderness as an impediment rather than a valued resource. Wilderness designation constrains not only how the public may use the lands (e.g., no off-road vehicles, no bicycles) but also how the agency administers it. That is the very point of wilderness. Wilderness designation intentionally constrains both the public and the federal manager.

Managers who seek to sidestep the act's severe constraints may adopt a liberal minimum requirement interpretation. A now-retired National Park Service manager known to the author 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. This convenient interpretation would remove the Wilderness Act's constraints (the seven prohibited acts) by a simple conclusion that the proposed activity is "necessary" for the purpose of wilderness administration. All that is needed to employ any of the prohibited means is for the manager to sign a minimum requirement analysis (MRA) that concludes an activity is necessary for the purpose of wilderness.[10] This interpretation of the act is both extreme and invalid because it discards the word "mini-

mum." It would render meaningless all the prohibitions for every requirement a manager deemed necessary for area administration. The Wilderness Act permits such a waiver only for the "minimum" requirements.

Circuit Courts and the minimum requirement exception

The Mainella Decision: Is the activity "necessary?" The first decision that seriously examined the application of the minimum requirement exception arose in Cumberland Island National Seashore in Georgia. In 1999, NPS began a regular schedule of transporting park visitors in a 15-passenger van through designated wilderness in the park. Because the Wilderness Act provides that agencies administer wilderness for such public purposes as recreational, educational, or historical use, NPS argued that the motor vehicle transport conformed to the Wilderness Act.[11] The agency's MRA for the trips declared that the trips were "necessary" to administer the (wilderness) area. Applying common sense, the court wrote: "In no ordinary sense of the word can the transportation of fifteen people through wilderness be 'necessary' to administer the area for the purpose of the Act."[12] The 2004 Eleventh Circuit decision (*Mainella*) firmly rejected the NPS argument.

A cardinal rule of statutory construction is that every word has meaning. "Necessary" is one such word within the minimum requirement exception. Although NPS believed that the van tours served other valid or valued purposes, the court concluded that NPS van tours were not "necessary" for the administration of the Cumberland Island Wilderness for the purpose of the Wilderness Act, and were therefore impermissible. The van tours failed the first test that matters in wilderness. The court found that NPS misunderstood the Wilderness Act command that, to employ a minimum requirement exception, the agency must first correctly determine that the proposed activity is "*necessary* … for the administration of the (wilderness) area for the purpose of the (Wilderness) Act" (emphasis added). The van tours did not meet that primary and essential test.

Federal land manager determinations of what may be "necessary" to administer wilderness may vary. As a manager, the author 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. Wilderness managers make such determinations regularly. A reasonable determination will likely survive court challenge, if challenged at all. The principle remains that the determination of "necessary" is the first and indispensable test in applying the minimum requirement exception. It is not an impossible one for an agency to meet.[13] The Cumberland Island van tours did not.

A minimum requirement exception to the seven prohibitions cannot be made *if* the task itself is not "necessary … for the administration of the (wilderness) area for the purpose of the (Wilderness) Act." In short, the *Mainella* decision found the NPS van tours were *not* "necessary" for the administration of the Cumberland Island Wilderness. Therefore, NPS could not provide otherwise prohibited motor vehicle use (for public transport) in wilderness as a "minimum requirement."

The Kofa Wildlife Refuge decision: Is the activity the "minimum requirement"? Now, we cross the country to Kofa National Wildlife Refuge. The December 2010 Ninth Circuit decision (*Wilderness Watch v. USFWS*) is the most relevant case to date about the minimum

requirement exception. As described above, USFWS constructed large tanks and pipes to hold and convey water to conserve a population of desert bighorn sheep. In contrast with the Cumberland Island decision, the Ninth Circuit found that the challenged USFWS activity at Kofa was "necessary" for the administration of the wilderness area for the purpose of the Wilderness Act. But then the court found that although the goal was "necessary" for wilderness administration, USFWS employed means (the guzzlers and motorized vehicles and equipment used in connection with them) that were hardly the "minimum requirement."

USFWS administers Kofa National Wildlife Refuge in the Sonoran Desert of southwestern Arizona. Congress designated 516,200 acres of the refuge as wilderness on November 28, 1990.[14] USFWS, with the support and encouragement of the state of Arizona, installed two large structures and associated conduits to supply water to support desert bighorn sheep, a species native to Kofa and the US southwestern deserts. In 2007, USFWS constructed water tanks (called the McPherson and Yaqui tanks) in the refuge's designated wilderness. The agency MRA determined that these tanks, the use of motor vehicles (for access and transport), and mechanized equipment (for construction) were the "minimum requirement."

Wilderness Watch, an organization devoted to public oversight of wilderness, challenged the USFWS decision. In 2008, the federal District Court in Arizona rejected the Wilderness Watch claim and supported USFWS. Wilderness Watch appealed to the Ninth Circuit. The Ninth Circuit first determined whether conserving desert bighorn sheep was "necessary" for administering the Kofa wilderness for the purpose of the act. The Ninth Circuit was satisfied that it was.[15] As the act puts it, wilderness is "an area where earth and *its community of life* are untrammeled by man…" (16 U.S.C. 1131(c), emphasis added). A wilderness without its natural resources, processes, plants, animals, or waters would be like a "pub with no beer." Wilderness is to be "managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature…" (16 U.S.C. 1131(c)). The Wilderness Act, as the above quotes demonstrate, recognizes that wilderness is not a blank space on a map. Conserving native plants and animals is critical to preserving wilderness.

But the court found that USFWS erred in determining that the large water tanks were the "minimum requirement" that served an otherwise necessary administrative purpose. The agency's error was procedural; i.e., it had performed a sloppy, insubstantial, and perfunctory MRA. USFWS employed an approach used in too many MRAs: it failed to analyze the alternatives in relationship with one another rather than in isolation. This had the effect of making the desired action (installing the guzzlers) the minimum, if not the only, action.[16] USFWS also erred even more fundamentally by failing to consider a range of far more minimal actions that could alternatively serve the necessary goal of conserving bighorn sheep at Kofa. Foremost among these actions, USFWS failed to consider actions that did not involve any of the seven Wilderness Act prohibitions.[17]

Among the actions that USFWS could have considered, said the court, was to put a hold on future sheep translocations by the state of Arizona from the refuge until populations reached an optimal level. USFWS could also have considered limiting the take of bighorn sheep by recreational sport hunters.[18] As the court said:

> Due to the population's stability, the Service and other government agencies have permitted certain activities that generally are viewed as inconsistent with population conservation. For example, since 1979, the area has served as a primary source of sheep for translocation programs to re-establish populations of bighorn sheep in Arizona, Colorado, New Mexico, and Texas. For decades, the Service translocated sheep from the refuge on a nearly annual basis. The area also has been a hunting ground for bighorn sheep, and the Service has issued a limited number of hunting licenses (between 9 and 17) each year. The Service also permits hiking in known lambing areas, despite the sheep's strong aversion to human disturbance.

None of the management actions to conserve bighorn sheep cited by the court would involve any of the Wilderness Act prohibitions. Yet, instead of considering or applying any or all of them, USFWS immediately adopted actions that implicated three of the Wilderness Act prohibitions (the use of motor vehicles, use of motorized equipment, and building of structures). USFWS acknowledged that the guzzlers transgressed the Wilderness Act prohibitions but proceeded because the agency asserted they were the minimum requirement. Rejecting this conclusion, the Ninth Circuit Court decided that the USFWS actions could not possibly qualify as the "minimum requirements," since the USFWS had failed to consider or adopt actions within its power that were truly minimal. None of the actions ignored by USFWS transgressed any of the Wilderness Act's seven prohibitions. Thus they, and not the guzzlers, were truly the "minimum."

Conclusion

In the decisions that affect wilderness, USFWS is not alone. Other agencies, including the National Park Service, have made similar errors. NPS may soon repeat that error at Mojave National Preserve in California. There, in 1994, NPS inherited several water sources for desert bighorn sheep, constructed on Bureau of Land Management lands, now transferred to NPS and within designated park wilderness. NPS committed to evaluate the guzzlers in the 2000 General Management Plan for Mojave.[19] Some may say that it will be a freezing July day in the Mojave Desert before NPS honestly considers the truly "minimum" requirement for conserving the desert bighorn sheep of that park. But they must.

Few animals are as integral and symbolic of America's Southwest desert wilderness than the bighorn sheep. Just as in Kofa, conserving the bighorn of Mojave is necessary to administering the wilderness of that park. The Ninth Circuit Kofa decision, analogous in so many respects to the Mojave situation, should guide NPS to intelligently weigh the real minimum requirements for conserving desert bighorn sheep as part of a living wilderness. That would require both courage and insight.

Endnotes

1. 16 U.S.C. 1131 *et seq*.
2. Other Circuit Court decisions address agency management of lands that are not yet wilderness but are instead in wilderness study status. An example is *Norton v. Southern Utah Wilderness Alliance*, 2003. This article does not examine or discuss such cases.
3. "[T]here shall be … no use of motor vehicles … within any such (wilderness) area" (16 U.S.C. 1133(c)).

4. "Except, as specifically provided for in this chapter, and subject to private existing rights there shall be no commercial enterprise … within any wilderness area…" (16 U.S.C. 1133(c)).
5. "Commercial 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" (16 U.S.C. 1133(d)(5)).
6. "[E]xcept as necessary to meet the minimum requirements for the administration of the area for the purpose of this Act" (16 U.S.C. 1131(c)).
7. "[T]here shall be … no structure or installation within any such (wilderness) area" (16 U.S.C. 1133(c)).
8. Note that the minimum requirement exception never allows an agency to permit permanent roads or commercial enterprises. Other exceptions may apply to these two, such as "existing private rights."
9. BLM, NPS, and USFWS are in the Department of the Interior; USFS is in the Department of Agriculture.
10. Often MRAs are the sole environmental compliance document completed, with no further analyses done because agencies invoke a widely used categorical exclusion under the National Environmental Policy Act (NEPA). The public may not learn of the agency's conclusion because, without NEPA, there is often neither public announcement nor involvement in the MRA process.
11. "Except as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use" (16 U.S.C. 1133(b)).
12. Note that the minimum requirement exception is to be made *only* if necessary to serve the "purpose" of the act, not "purposes." Further, the statute's text that describes the other "public purposes" to which wilderness "shall be devoted," is prefaced by the phrase "except as otherwise provided in this Act." If this were not so, an agency could build, say, an astronomical observatory, unrelated to administering wilderness, on a wilderness peak because it serves a "scientific" purpose. No agency has dared attempt to push the law to so ludicrous an outcome, although the NPS van tours came very close. They served, according to NPS, recreational, educational, and historical purposes.
13. When I administered park wilderness I judged that activities deemed "necessary" in them, besides tamarisk removal, included 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.). Not all would agree with my judgment, and there is room for vigorous debate.
14. P.L. 101-628; 104 Stat. 4478.
15. The court noted that the Wilderness Act is "within and supplemental to the purposes for which … units of the national park and national wildlife systems are established and administered…" (16 U.S.C. 1133(a)). The court further noted that "wilderness areas

shall be devoted to the public purposes(s) of … conservation….” (16 U.S.C. 1133(c)). One of the essential purposes of Kofa is the conservation of desert bighorn. Some may misapply these provisions as automatically waiving the Wilderness Act prohibitions. They do not and the Ninth Circuit did not. The Wilderness Act text that describes the several “public purposes” of wilderness is conditioned by the phrase “except as otherwise provided in this Act.” The very next provision of the act prescribes the prohibitions.

16. Another premise that often creeps in to minimum requirement determinations (as it did at Kofa) is to mistakenly believe that an action that an agency *alleges* to have lesser “impacts” therefore satisfies the minimum requirements test. “Lesser impacts” are not equivalent to “minimum requirements.” The teeth of the Wilderness Act are the nine prohibited acts and the limited exceptions it allows to them. The Wilderness Act does not contain a “lesser impact” exception to the prohibited acts. The Wilderness Act proscriptions *are* the impacts. To reason, for example, that supplying a project in wilderness by landing an aircraft (prohibited by the Wilderness Act) has less “impact” than a string of mules (which does not trouble the Wilderness Act in the least) and therefore must be the “minimum requirement” represents a common and oft-repeated *non sequitur*. But that discussion we save for another day.
17. Again, the Wilderness Act prohibits nine specific things but only the latter seven may avail themselves of the “minimum requirement” exception.
18. Kofa National Wildlife Refuge is a unit of the national wildlife refuge system. The National Wildlife Refuge System Administration Act of 1966 is the Organic Act of the US Fish and Wildlife Service. As amended in 1997, the act contains a “Savings Clause” that states: “Nothing in this Act shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area of the System. Regulations permitting hunting or fishing of fish and resident wildlife within the System shall be, to the extent practicable, consistent with State fish and game laws, regulations, and management plans” (16 U.S.C. 668dd(m)). Courts, most recently the Tenth Circuit (*Wyoming v. United States*, 2002) hold that the clause does not wrest from USFWS power to regulate management or hunting of wildlife. While this issue was neither raised nor discussed in the Ninth Circuit Kofa decision, the Ninth Circuit certainly assumed that the alternative of freezing State translocations of sheep, or reducing hunting take by Arizona-licensed hunters, were within the realm of alternatives open to, and within the power of, USFWS.
19. In the interest of full disclosure, the author served as the first assistant park superintendent at the Mojave. Also, the author serves on the board of the advocacy group PEER (Public Employees for Environmental Responsibility), a successful litigant against NPS for wilderness mismanagement. PEER is not a party to the Ninth Circuit Kofa decision.

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