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PROTECTING THE BOUNDARY WATERS CANOE AREA WILDERNESS: LITIGATION AND LEGISLATION

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Love of the land is the basis for the unending struggle of those who really care against those who only see material rewards.¹

INTRODUCTION

Minnesota's Boundary Waters Canoe Area Wilderness (BWCAW)² is one of the nation's most well-known wildernesses. An original unit of the National Wilderness Preservation System created by the Wilderness Act of 1964,³ the area received its first administrative wilderness protections as early as 1926.⁴ A part of the Superior National Forest, this lakeland canoe country has become the nation's most popular and most heavily visited wilderness area.⁵

Despite the prominence of the BWCAW, it remains the most embattled wilderness in the nation. Conservationists fought for most of this century to protect the area's wilderness character, gradually eliminating nonconforming uses that threatened it. Presidents signed executive orders protecting the area, and Congress, on four different occasions, passed major legislation addressing threats to it, each time adding new layers of wilderness protection.⁶ In 1998, however, legislative

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1. SIGURD F. OLSON, REFLECTIONS FROM THE NORTH COUNTRY 125 (1976).

2. The wilderness area was originally designated the Boundary Waters Canoe Area (BWCA), which was included in the National Wilderness Preservation System, as established by the Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (codified as amended at 16 U.S.C. §§ 1131-1136 (1994)). The Boundary Waters Canoe Area Wilderness Act of 1978, Pub. L. No. 95-495, 92 Stat. 1649, redesignated the BWCA as the Boundary Waters Canoe Area Wilderness (BWCAW). Throughout this article, both terms are used, depending on what period of time is being discussed.

3. Pub. L. No. 88-577, 78 Stat. 890 (codified as amended at 16 U.S.C. §§ 1131-1136 (1994)).

4. See National Ass'n of Property Owners v. United States, 499 F. Supp. 1223, 1228 (D. Minn. 1980), *aff'd sub nom.*, Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981); see also Izaak Walton League of Am. v. St. Clair, 353 F. Supp. 698, 703 (D. Minn. 1973), *rev'd*, 497 F.2d 849 (8th Cir. 1974).

5. See Snowbank Enter. v. United States, 6 Cl. Ct. 476, 482 (1984).

6. See National Ass'n of Property Owners, 499 F. Supp. at 1228-29.

action for the first time authorized the reintroduction of motorized vehicles into a wilderness area—the BWCAW.⁷

Historically, wilderness advocates used litigation to protect the BWCAW, both to enforce existing laws and interpret imprecise or conflicting statutes. These advocates have also recently fought legislative battles on the BWCAW in Congresses hostile to wilderness protection. This article examines the litigation history of the BWCAW and the recent legislative campaign to protect it from assaults in Congress.

HISTORICAL OVERVIEW

The BWCAW, located in northeastern Minnesota, is an irregularly shaped area within the Superior National Forest, extending approximately 110 miles from east to west along the international border with Canada, and averaging 16 miles from north to south.⁸ It is the only lakeland canoe wilderness area in the nation, consisting of over one million acres and one thousand lakes connected by hundreds of miles of streams and portages.⁹ It complements and adjoins Quetico Provincial Park on the Canadian side of the border—another one million acres of lake country wilderness—creating one of only a few international wilderness systems.¹⁰ Voyageurs National Park includes an additional 218,000 acres of lakes and boreal forest to the west of the BWCAW and completes the Quetico-Superior Ecosystem.

The BWCAW ecosystem is rich in natural resources. It exists as “home to hundreds of species of unusual birds, plants and animals settled in scores of ecological communities.”¹¹ The lakes are filled with bass, northern pike, pickerel, sucker and lake trout, and the forests harbor such wildlife as the bald eagle, osprey, otter, beaver, moose, deer, snowshoe hare, porcupine, eastern timber wolf, pine martin, fisher, lynx and loon.¹² The forest combines jackpine and balsam fir with feather mosses, stunted black spruce, labrador tea, swamp laurel and pitcher plants.¹³ Although much of the region was open to logging in the past,

7. See Inter-modal Surface Transportation Efficiency Act (ISTEA) § 1212(v)(1), Pub. L. No. 105-178, 112 Stat. 107, 198 (1998).

8. See *Minnesota Pub. Interest Research Group v. Butz* (MPIRG II), 401 F. Supp. 1276, 1285 (D. Minn. 1975), *rev'd*, 541 F.2d 1292 (8th Cir. 1976); *Izaak Walton League*, 353 F. Supp. at 700; see also *Minnesota Pub. Interest Research Group v. Butz* (MPIRG I), 358 F. Supp. 584, 594 (D. Minn. 1973), *aff'd*, 498 F.2d 1314 (8th Cir. 1974).

9. See *Hedstrom Lumber Co. v. United States*, 7 Cl. Ct. 16, 21 (1984). The area's size prior to 1978 was 1,030,000 acres; after 1978 the area encompassed 1,087,000 acres. See *Hedstrom Lumber Co.*, 7 Cl. Ct. at 21.

10. See *Izaak Walton League*, 353 F. Supp. at 701; *Hedstrom Lumber*, 7 Cl. Ct. at 20-21; see also Jonz Chr. Norine, *Boundary Waters Canoe Area Wilderness: Paradise Doesn't Come Easy*, 15 *HAMLIN J. PUB. L. & POL'Y* 323, 325 (1994).

11. *National Ass'n of Property Owners*, 499 F. Supp. at 1228.

12. See *id.*

13. See *id.*

over 540,000 acres of virgin forest remained in 1978 when the BWCAW Act finally ended this practice.¹⁴

The BWCAW is one of the largest wilderness areas in the U.S. Forest Service's portion of the National Wilderness Preservation System, and the largest wilderness area east of the Rocky Mountains and north of Florida's Everglades.¹⁵ Sometimes called the "highway of the Voyageurs," this area was the preferred route of travel for the fur traders of the eighteenth century navigating the same water routes pioneered by the Sioux and Chippewa Indians.¹⁶ "Despite the area's relative isolation, it is the most heavily visited wilderness area in the national wilderness system, and [has been described as] a hauntingly beautiful area of the United States."¹⁷

The statutory and administrative history behind the BWCA is lengthy. The federal government has long recognized the unique quality of the area, beginning nearly a century ago to set aside federal land along the Minnesota-Canada border to ensure its preservation.¹⁸ In 1902, 1905, and 1908, the federal government reserved over one million acres, from which President Theodore Roosevelt created the Superior National Forest in 1909.¹⁹ Additional lands were added to the federal forest in succeeding years.²⁰ On September 17, 1926, in response to controversy over plans to build a "road to every lake,"²¹ the Coolidge Administration, through Secretary of Agriculture William M. Jardine, created the Superior Wilderness Area in "one thousand square miles of the best canoe country."²² The Agriculture Department's policy placed severe restrictions on road construction and commercial logging.²³ The federal government renamed it the Superior, Little Indian Sioux and Caribou Roadless Areas in 1939, and promulgated a formal management plan in

14. See *id.* See generally MIRON HEINSELMAN, *THE BOUNDARY WATERS WILDERNESS ECOSYSTEM* (1996) (providing a complete natural history of the area).

15. *Snowbank Enter. v. United States*, 6 Cl. Ct. 476, 482 (1984).

16. *Izaak Walton League*, 353 F. Supp. at 701; see also *National Ass'n of Property Owners*, 499 F. Supp at 1228; Norine, *supra* note 10, at 325.

17. *Snowbank*, 6 Cl. Ct. at 482.

18. See *Hedstrom Lumber Co. v. United States*, 7 Cl. Ct. 16, 21 (1984); *Snowbank*, 6 Cl. Ct. at 482. The government acted pursuant to the Forest Reserve Act of 1891, providing that, "The President of the United States may, from time to time, set apart and reserve, in any State . . . having public land bearing forests . . . any part of the public lands . . . as national forests . . . by public proclamation." Forest Reserve Act of 1891, ch. 561, § 24, 26 Stat. 1103 (repealed 1976); see also *Izaak Walton League*, 353 F. Supp. at 702.

19. Cf. *Izaak Walton League*, 353 F. Supp. at 703; *Snowbank*, 6 Cl. Ct. at 482.

20. See *Minnesota v. Block*, 660 F.2d 1240, 1245 n.5 (8th Cir. 1981); *Snowbank*, 6 Cl. Ct. at 482.

21. Kevin Proescholdt, *BWCA: The Embattled Wilderness*, AM. FORESTS, July-Aug. 1989, at 28.

22. *Block*, 660 F.2d at 1245 n.7. For two, single-volume histories on the campaign to protect the Boundary Waters and the larger Quetico-Superior Ecosystem, see KEVIN PROESCHOLDT ET AL., *TROUBLED WATERS: THE FIGHT FOR THE BOUNDARY WATERS CANOE AREA WILDERNESS* (1995); R. NEWELL SEARLE, *SAVING QUETICO-SUPERIOR: A LAND SET APART* (1977).

23. See *MPIRG I*, 358 F. Supp. 584, 590 (D. Minn. 1973); *Snowbank*, 6 Cl. Ct. at 482.

1948.²⁴ On January 27, 1958, these roadless areas were renamed the Boundary Waters Canoe Area.²⁵

Statutory protection has also long been afforded the area. In 1930, Congress passed the Shipstead-Newton-Nolan Act,²⁶ withdrawing from public entry or appropriation the public lands in the Superior National Forest.²⁷ For the purpose of "conserving the natural beauty of shore lines for recreational use,"²⁸ the statute also prohibited logging within four hundred feet of shorelines and other actions (such as dam building) affecting water levels.²⁹ In 1948, in response to the proliferation of resort openings and the use of float planes, Congress passed the Thye-Blatnik Act,³⁰ directing the Secretary of Agriculture to purchase private inholdings scattered throughout the area.³¹ In 1949, President Truman issued Executive Order No. 10092 banning airplane flights below four thousand feet over the roadless areas of the Superior National Forest.³² This air space reservation effectively ended float plane services to the area's remaining resorts.³³ In 1956, Congress passed the Humphrey-Thye-Blatnik

24. See *Izaak Walton League*, 353 F. Supp. at 703 n.3.

25. See *id.* at 703; see also *MPIRG I*, 358 F. Supp. at 590 n.6.

26. Shipstead-Newton-Nolan Act, ch. 881, 46 Stat. 1020 (1930) (codified as amended at 16 U.S.C. § 577 (1994)).

27. See *id.* § 1; cf. *Block*, 660 F.2d at 1245 n.7; *Izaak Walton League*, 353 F. Supp. at 703. In 1933, Minnesota passed similar legislation in the Little Shipstead Nolan Act of 1933, MINN. STAT. ANN. § 110.13 (West 1976) (repealed 1990), and in 1947, by joint resolution, the state asked Congress to enact laws to preserve the wilderness area. See *Izaak Walton League*, 353 F. Supp. at 706. Beginning in the 1920s, the state also opposed a proposed hydroelectric project for the area and the so-called "Gun Lake" road. See *id.* at 707. In addition, the state passed the Little Wilderness Act, MINN. STAT. ANN. §§ 84.43-.52 (West 1976), which limited air and motorboat traffic in the area. See *Izaak Walton League*, 353 F. Supp. at 706. The boundary waters area has also been under international protection since early in the century. Canada and the United States negotiated the Root-Bryce Treaty of 1909, establishing joint regulation and limiting use of the waters along the international boundary. Also in 1909, the Province of Ontario set aside the Quetico Forest Reserve on the Canadian side of the border. See *Block*, 660 F.2d at 1245 n.6. Ontario banned "virtually all motor vehicles" in Quetico Provincial Park in 1979. *Id.* at 1247 n.11.

28. Shipstead-Newton-Nolan Act § 2, 46 Stat. at 1021.

29. See *id.* §§ 2, 3; cf. *Block*, 660 F.2d at 1245 n.7; *Izaak Walton League*, 353 F. Supp. at 703 n.4.

30. Pub. L. No. 733, 62 Stat. 568 (1948) (codified as amended at 16 U.S.C. § 577(c) (1994)).

31. See *id.* § 1, 62 Stat. at 568; cf. *Izaak Walton League*, 353 F. Supp. at 703; *Hedstrom Lumber Co. v. United States*, 7 Cl. Ct. 16, 21 (1984); *Norine*, *supra* note 10, at 327.

32. See *National Ass'n of Property Owners v. United States*, 499 F. Supp. 1223, 1228 (D. Minn. 1980), *aff'd sub nom.*, *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981); *Izaak Walton League*, 353 F. Supp. at 703. The air space reservation survived a constitutional attack in *United States v. Perko*, 108 F. Supp. 315 (D. Minn. 1952), *aff'd*, 204 F.2d 446 (8th Cir. 1953); see also *United States v. Perko*, 141 F. Supp. 372 (D. Minn. 1956) (issuing a permanent injunction against the same defendants); *United States v. Perko*, 133 F. Supp. 564 (D. Minn. 1955) (issuing a temporary injunction against defendant resort owners building roads and driving vehicles in the roadless area, but allowing them to use pack horses); *Bydlon v. United States*, 175 F. Supp. 891 (Cl. Ct. 1959) (allowing compensation to resort owners denied access to their property in the roadless area).

33. See *Norine*, *supra* note 10, at 327.

Andresen Act,³⁴ appropriating \$500,000 for the implementation of the Thy-Blatnik Act.³⁵

In 1956, Senator Hubert H. Humphrey introduced the first version of a bill³⁶ that ultimately became the Wilderness Act of 1964.³⁷ The Wilderness Act expressly designated the BWCA as a wilderness area within the Act's protection.³⁸ The purpose of the Act was to preserve and protect the natural condition of certain unspoiled lands designated as "wilderness areas" for present and future generations of American people.³⁹ To this end, Congress prohibited any commercial enterprise, including logging, within any designated wilderness area.⁴⁰ This prohibition, however, was not absolute. Under the 1964 Act, the general prohibition of commercial activities was "subject to existing private rights" and other exceptions.⁴¹ Included in these exceptions was one specifically addressing the BWCA.⁴²

In response to vociferous protest from commercial timber interests and other users of the BWCA, Congress added language specifically excepting the BWCA from full wilderness status. In particular, section (d)(5) of the legislation permitted the continuation of "any already established use of motorboats" in the BWCA, and allowed commercial logging to continue to the extent it remains consistent with "maintaining . . . the primitive character of the area."⁴³ The provision states in full:

Other provisions of this chapter 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 chapter shall preclude the continuance within the area of any already established use of motorboats.⁴⁴

34. Pub. L. No. 607, 70 Stat. 326 (codified as amended at 16 U.S.C. § 577(d)(1), (g), (h) (1994)).

35. See *National Ass'n of Prop. Owners*, 499 F. Supp. at 1228; *Hedstrom Lumber*, 7 Cl. Ct. at 21.

36. S. 4013, 84th Cong. (1956); see also *Hedstrom Lumber*, 7 Cl. Ct. at 21; *Snowbank Enter. v. United States*, 6 Cl. Ct. 476, 482 (1984).

37. Pub. L. No. 88-577, 78 Stat. 890 (codified as amended at 16 U.S.C. §§ 1131-1136 (1994)).

38. See Wilderness Act § 3, 16 U.S.C. § 1132 note.

39. See Wilderness Act § 2(a), 16 U.S.C. § 1131(a).

40. See Wilderness Act § 4(c), 16 U.S.C. § 1133(c); see also *MPIRG II*, 401 F. Supp. 1276, 1297 (D. Minn. 1975), *rev'd*, 541 F.2d 1292 (8th Cir. 1976).

41. Wilderness Act § 4(c), 16 U.S.C. § 1133(c).

42. See Wilderness Act § 4(d)(6), 16 U.S.C. § 1133(d)(5) (repealed 1978).

43. *Id.* The Eighth Circuit determined that "the special BWCA provision was intended to maintain the status quo with respect to management of the area." *MPIRG II*, 401 F. Supp. at 1298.

44. Wilderness Act § 4(d)(6), 16 U.S.C. § 1133(d)(5) (repealed 1978). This provision was not included in Senator Humphrey's original 1956 version of the Wilderness Act. See *National Ass'n of Property Owners v. United States*, 499 F. Supp. 1223, 1229 (D. Minn. 1980).

In 1965, pursuant to regulations promulgated by the Secretary of Agriculture, the BWCA was divided into two zones: an Interior Zone of about 618,000 acres situated mainly along the Canadian border, where logging was totally prohibited, and a Portal Zone of about 412,000 acres generally situated in the southern portion of the BWCA, where logging was historically permitted and allowed to continue.⁴⁵ A series of legal challenges to commercial logging within the BWCA ensued in the 1970s.⁴⁶

Under Secretary of Agriculture (and former Minnesota governor) Orville Freeman's 1965 management plan, sixty percent of the BWCA's surface water (including over 100 lakes) was designated for snowmobile and motorboat use.⁴⁷ The continuation of logging, mining, and motorized use in the BWCA created fifteen years of public controversy and debate, ultimately leading to the passage of the Boundary Waters Canoe Area Wilderness Act (BWCAW Act)⁴⁸ in 1978.

The BWCAW Act extended the boundaries of the BWCA to include an additional 57,000 acres and redesignated the area as the Boundary Waters Canoe Area Wilderness.⁴⁹ The BWCAW Act ended logging entirely,⁵⁰ restricted mining⁵¹ and the use of snowmobiles,⁵² and cut motorboat use from sixty-four percent to twenty-four percent of the water surface.⁵³ The 1978 Act also repealed section 4(d)(5) of the 1964 Wilderness Act, the only instance where the 1964 law was amended.⁵⁴

For the first time, a congressional act "restricted the number of lakes within the BWCAW upon which outboard motors could be used, . . . [and] imposed maximum horse-power limits . . . on certain designated lakes."⁵⁵ Nonetheless, the BWCAW Act was compromise legislation. Although it brought the area more into line with other wilderness areas,

45. See *MPIRG I*, 358 F. Supp. 584, 594 (D. Minn. 1973), *aff'd*, 498 F.2d 1314 (8th Cir. 1974).

46. As the Eighth Circuit noted, although the BWCA is highly prized by many for its recreational, scientific, and educational opportunities, it is also "highly regarded by others, like the defendant paper and logging companies, who value the thousands of acres of marketable timber it contains." *MPIRG I*, 498 F.2d at 1316-17.

47. *National Ass'n of Property Owners*, 499 F. Supp. at 1229.

48. Pub. L. No. 95-495, 92 Stat. 1649 (1978) (codified as amended at 16 U.S.C. § 1132 note (1994)); see also *Minnesota v. Block*, 660 F.2d 1240, 1246 (8th Cir. 1981) (stating that the BWCAW Act was passed "[i]n response to the confusion and litigation generated by the [motorized use] proviso" in the Wilderness Act); *County of St. Louis v. Thomas*, 967 F. Supp. 370, 373 (D. Minn. 1997), *aff'd in part and rev'd in part*, *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115 (8th Cir. 1999).

49. See *Hedstrom Lumber Co. v. United States*, 7 Cl. Ct. 16, 21 (1984); *Snowbank Enter. v. United States*, 6 Cl. Ct. 476, 483 (1984); cf. BWCAW Act § 3, 92 Stat. at 1649.

50. See BWCAW Act § 6(a), 92 Stat. at 1652.

51. See *id.* § 11(a) 92 Stat. at 1655.

52. See *id.* § 4(c) 92 Stat. at 1650.

53. See *id.* § 4(e) 92 Stat. at 1651.

54. See *id.* § 4(b) 92 Stat. at 1650.

55. *Snowbank Enter. v. United States*, 6 Cl. Ct. 476, 483 (1984).

special rules still allowed the continuation of activities banned in other wildernesses. The BWCAW Act, among other things, directed the Secretary of Agriculture to develop and implement quotas for motorboats on the many lakes where motorized use was still allowed.⁵⁶ The Act further allowed trucks and railways to continue moving visitors and gear from lake to lake at five portages.⁵⁷

Throughout this century, the United States and the state of Minnesota have increasingly sought to preserve the primitive character of the boundary waters area.⁵⁸ Although the 1978 Act was passed to end the battle between environmentalists and local business interests, "lawsuits, lingering controversy, and animosity between the competing parties are still the rule."⁵⁹ The fight is described as "a classic confrontation between preservationists and sportsmen, between natural scientists and commercial interests, and sets wilderness advocates against local residents."⁶⁰

This article offers the wilderness advocates' view on the legal and political battles to protect the BWCAW. Part I surveys the history of litigation over the management of the BWCAW. Part II describes recent legislative attacks on the BWCAW by motorized use advocates in the recent antiwilderness Congresses, and the ensuing congressional battle to determine the future of the region.

I. BOUNDARY WATERS LITIGATION

A. *Mining: Izaak Walton League of America v. St. Clair*

The first legal effort to enforce the protections of the Wilderness Act in the BWCA related to mining activity.⁶¹ In *Izaak Walton League of America v. St. Clair*,⁶² the Izaak Walton League challenged mining in the

56. See BWCAW Act § 4(f), 92 Stat. at 1651.

57. See *County of St. Louis v. Thomas*, 967 F. Supp. 370, 373 (D. Minn. 1997).

58. See *Minnesota v. Block*, 660 F.2d 1240, 1245 (8th Cir. 1981).

59. Norine, *supra* note 10, at 324.

60. *Id.* at 323.

61. *United States v. 967.905 Acres of Land*, 305 F. Supp. 83 (D. Minn. 1969), *rev'd*, 447 F.2d 764 (8th Cir. 1971), was a condemnation action arising out of the creation of the Boundary Waters Canoe Area. Although the litigation did not directly implicate the Wilderness Act, the court noted the value of preserving the BWCA in a natural state:

We think that the Congress and the Executive Branch of the Government may properly conclude that the encroachment of civilization and commercial enterprise upon a wilderness area and the navigable waters found therein militates against the broad public interests that have been mentioned, and that when the Government commands civilization and business to retreat from a given area so that it may be preserved in its natural state for the enjoyment and refreshment of all of us, it may fairly be said that the Government is acting to "improve" the area and the waterways therein.

967.905 Acres, 447 F.2d at 771.

62. 353 F. Supp. 698, 701 (D. Minn. 1973), *rev'd*, 497 F.2d 849 (8th Cir. 1974).

BWCA, notwithstanding express provisions in the Wilderness Act permitting mineral exploration.⁶³

In 1969, George W. St. Clair sent crews into the BWCA with permission from the federal government for preliminary non-invasive exploratory work.⁶⁴ In December of that year, St. Clair filed an application with the Forest Service to begin exploratory drilling. Unlike his initial exploratory work, however, St. Clair's proposal involved the use of mechanical equipment, access overland (rather than by canoe) and permanent camps.⁶⁵ In response, the Forest Service notified St. Clair that it needed proof of his claimed rights before any permit could be issued. The Forest Service further indicated that it would look for any possible way to keep him from carrying out his planned activities. Before the federal government took any action on his application, the Izaak Walton League filed a civil action seeking a declaratory judgment that St. Clair had no right to enter the BWCA for mineral prospecting purposes and to enjoin the federal and state defendants from permitting him to begin drilling.⁶⁶

The Izaak Walton League argued that Congress had zoned the BWCA against any sort of commercial activity including mining and mineral exploration.⁶⁷ St. Clair argued that Congress did not intend to ban the exercise of mineral rights in wilderness areas and, even if it had so intended, attempting to do so would constitute a taking of property without due process of law.⁶⁸ The federal government generally agreed with St. Clair's position, but also argued that the Forest Service should have been allowed to rule on the permit application prior to judicial intervention.⁶⁹

After a lengthy discussion concerning a governmental body's right to zone property against certain uses, the district court held that "Congress clearly had the power to zone the BWCA in view of the public purpose to keep it virginal and untrammled."⁷⁰ The court then held that wilderness values are "plain[ly] and simply . . . inconsistent with and an-

63. Section 4(d) of the Wilderness Act provides for mineral exploration that is "compatible with the preservation of the wilderness environment" and an extension of then extant mineral leases in wilderness areas through December 31, 1983. Wilderness Act § 4(d), 16 U.S.C. § 1133(d) (1994).

64. See *Izaak Walton League*, 353 F. Supp. at 701. Although the federal government owns over 70% of the land within the BWCA, it owns only 44% of the underlying mineral rights. See *id.* The rest is owned by the state of Minnesota (26.3%), the counties in which the BWCA is situated (1.4%), and private parties (28.3%). See *id.* The mineral rights in question in this case were situated in the middle of the BWCA. See *id.* at 714. Although they were reserved in the 1930s, St. Clair did not acquire his rights as a lessee until 1969. See *id.* at 710.

65. See *id.* at 701.

66. See *id.*

67. See *id.* at 707.

68. See *id.*

69. See *id.*

70. *Id.* at 710.

tagonistic to . . . any commercial activity such as mining,"⁷¹ and that both federal and state law showed an intent to keep the BWCAW free from such intrusive activities.⁷²

Although the court was aware of provisions in the Wilderness Act authorizing mining in national forest and wilderness areas,⁷³ it held that, "To create the wilderness and in the same breath to allow for its destruction could not have been the real Congressional intent and a court should not construe or presume an Act of Congress to be meaningless if an alternative analysis is available."⁷⁴ The court accepted the League's argument that the specific provisions of the Wilderness Act concerning management of the BWCAW overrode the general provisions of the Act,⁷⁵ ultimately holding that the BWCA "is a special area and should be treated separately."⁷⁶ After describing the irreversible effects of mineral exploration, the court concluded that "the BWCA was established by Congress to secure for future generations the beauty, pristine quality and primitiveness of one of the few remaining small areas of this Country."⁷⁷ For these reasons, the court permanently enjoined any mining activity in the BWCA, refusing even to carve out a "national emergency" exception to the injunction.⁷⁸

On appeal, the United States Court of Appeals for the Eighth Circuit reversed, holding that the doctrine of primary jurisdiction applied, and that the district court should have stayed or dismissed the action without prejudice until the Forest Service took action on St. Clair's mineral pros-

71. *Id.* at 714. Examining the definition of "wilderness area" in the Wilderness Act, the court explained why wilderness and mining are fundamentally incompatible:

Wilderness exists because man has not yet intruded upon it. As the United States was settled and frontiers vanished, wilderness disappeared except for inaccessible or otherwise then commercially useless areas. As of today but few true wilderness areas remain. Once penetrated by civilization and man made activities, it cannot be regained for perhaps hundreds of years. The recovery period is meaningless for generations to come. The destruction is irreversible. So with mining, logging off and other activities, they are anathema to all wilderness values.

Id.; see also Wilderness Act § 4(d)(2), 16 U.S.C. § 1133(d)(2) (1994).

72. See *Izaak Walton League*, 353 F. Supp. at 707-10.

73. The court determined that the Wilderness Act and its implementing regulations contained fundamental inconsistencies. See *id.* at 714. Referring to the Act's mineral rights provision, the court noted that "Congress demands that the Wilderness remain inviolate and yet at the same time appears to allow mineral development." *Id.* at 715. The court refused to equivocate, reasoning that, "[m]ineral development . . . by its very definition cannot take place in a wilderness area; else it no longer is a wilderness area." *Id.*

74. *Id.*

75. See *id.* at 712-13. The court went on to suggest that because wilderness and mining "are anathema each to the other, then it would seem that in enacting the Wilderness Act Congress engaged in an exercise of futility if the court is to adopt the view that mineral rights prevail over wilderness objectives." *Id.* at 715.

76. *Id.* at 713.

77. *Id.* at 715.

78. *Id.* at 716.

pecting permit application.⁷⁹ Despite the lower court's impassioned defense of wilderness values and objectives, the Eighth Circuit determined:

[T]he factual questions regarding the effect of mining activity upon the wilderness, and whether a permit should issue with restrictions that would be adequate to protect the wilderness quality of the BWCA are those types of questions peculiarly within the competence of the Forest Service, and statutorily delegated to it by the Wilderness Act.⁸⁰

Unlike the district court, the Eighth Circuit refused to hold that mining activities were necessarily incompatible with wilderness values and objectives. The appeals court remanded the case, instructing the Forest Service to build a record for judicial review and holding that the Forest Service had primary jurisdiction to determine whether to grant the license for mining activity. Although the Eighth Circuit did not address the merits of the case or the future of the Boundary Waters, it noted that the Forest Service's own management plan proposed to prohibit all commercial mining exploration and extraction as far as legally possible because such activity would "jeopardize the surface resources and wilderness character of the area."⁸¹ The court concluded that judicial review would be available after final Forest Service action, but no further litigation resulted.⁸²

B. *Logging: Minnesota Public Interest Research Group v. Butz*

The next two cases testing the applicability of Wilderness Act protections to the BWCA were both entitled *Minnesota Public Interest Research Group v. Butz*.⁸³ In both, the Minnesota Public Interest Research Group (MPIRG) challenged Forest Service proposals to permit extensive logging in the BWCA, including harvesting of previously unlogged forest areas. In *MPIRG I*, MPIRG sought an injunction against any further

79. See *Izaak Walton League of Am. v. St. Clair*, 497 F.2d 849, 852-53 (8th Cir. 1974). The Eighth Circuit explained that primary jurisdiction "comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case, the judicial process is suspended pending referral of such issues to the administrative body for its views." *Izaak Walton League*, 497 F.2d at 852. The state of Minnesota also argued that the lands in which St. Clair claimed mineral rights were fraudulently patented under the federal homesteading laws then in effect, and therefore that title to these lands remained in the United States. See *id.* at 850. The district court held that the statute of limitations barred such a claim. See *Izaak Walton League of Am. v. St. Clair*, 55 F.R.D. 139, 144 (D. Minn. 1972). The Eighth Circuit likewise declined to address the merits of the state's argument, thus implicitly affirming the lower court's decision. See *Izaak Walton League*, 497 F.2d at 852.

80. *Id.* at 852-53.

81. *Id.* at 851.

82. *Cf. id.* at 853.

83. *Minnesota Public Interest Research Group v. Butz (MPIRG I)*, 358 F. Supp. 584 (D. Minn. 1973), *aff'd*, 498 F.2d 1314 (8th Cir. 1974); *Minnesota Public Interest Research Group v. Butz (MPIRG II)*, 401 F. Supp. 1276 (D. Minn. 1975), *rev'd*, 541 F.2d 1292 (8th Cir. 1976).

logging in the BWCA until the Forest Service completed an Environmental Impact Statement (EIS) pursuant to the then-new National Environmental Policy Act of 1969 (NEPA).⁸⁴ In *MPIRG II*, the Sierra Club joined MPIRG in bringing a claim that the express requirements of the Wilderness Act mandated a permanent end to logging activities in the virgin forest areas of the BWCA.⁸⁵ Thus, the first round of litigation considered the NEPA question, and the second addressed the broader question of whether logging should be banned entirely as incompatible with the wilderness values protected by the Wilderness Act.

The Forest Service's logging proposals for the BWCA were authorized by the special proviso in the 1964 Wilderness Act allowing commercial logging to continue to the extent consistent with "maintaining . . . the primitive character of the area."⁸⁶ The BWCA provision directed the Secretary of Agriculture to adopt regulations that would ensure protection of the BWCA's primitive character, but "without unnecessary restrictions on other uses, including that of timber."⁸⁷ One of the defendants, Consolidated Paper, Inc., argued that this language affirmatively required the Forest Service to allow logging in the Portal Zone of the BWCA.⁸⁸ Consolidated Paper also argued that MPIRG's request to enjoin logging within the BWCA was an "unnecessary restriction" under section 4(d)(5) of the Wilderness Act.⁸⁹ Another defendant, Kainz Logging Company, argued that MPIRG's actions so wildly disregarded certain provisions of the Wilderness Act as to be malicious, and, in a precursor to the SLAPP⁹⁰ suits that became a common tactic of development interests in the 1980s and 1990s, asserted a claim for damages in the amount of \$200,000.⁹¹

The district court held that NEPA allowed it to grant injunctive relief in favor of MPIRG, proscribing all logging in the BWCAW "pending the Forest Service's completion of its new BWCA Management Plan and accompanying impact statement."⁹² In reaching this decision, the court closely examined the ecological history of the BWCA and the effects of

84. Pub. L. No. 91-190, 83 Stat. 852 (codified at 42 U.S.C. § 4321 (1994)). At the initiation of the suit, the private defendants owned eleven active timber sales within the BWCA, consisting of 29,261 total acres, 5275 acres of which remained uncut. See *MPIRG I*, 498 F.2d at 1317-18 & n.4.

85. *MPIRG I*, 358 F. Supp. at 587-88.

86. Wilderness Act § 4(d)(6), 16 U.S.C. § 1133(d)(5) (1964) (repealed 1978); see *MPIRG II*, 541 F.2d at 1297.

87. Wilderness Act § 4(d)(6), 16 U.S.C. § 1133(d)(5) (repealed 1978).

88. See *MPIRG I*, 358 F. Supp. at 588.

89. *Id.* at 588-89.

90. Strategic Lawsuits Against Public Participation. For a detailed discussion on the history and nature of SLAPP suits, see GEORGE W. PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* (1996).

91. See *MPIRG I*, 358 F. Supp. at 589.

92. *Id.* at 630. The court held that the Forest Service's practice of modifying, extending, and supervising timber harvesting contracts in the BWCA constituted "major Federal actions significantly affecting the quality of the human environment" within the meaning of NEPA. *Id.* at 620-22 (quoting 42 U.S.C. § 4332(2) (1969)).

logging on the primitive character of the area.⁹³ The court further discussed the merits of a variety of artificial methods of reforestation, ultimately concluding that the proposed logging would ruin the primitive character of the BWCA.⁹⁴ The court determined that logging disrupts the northern forest ecosystems of the BWCA by removing nutrients and by leaving tree stumps, logging roads, skid trails and other improvements that would remain visible for decades.⁹⁵ On the basis of these factual findings of injury to the primitive character of the BWCA, the district court temporarily enjoined the defendants from logging on all or part of seven active timber sales "contiguous with the main virgin forest areas of the BWCA" until the required EIS was completed.⁹⁶ The court further held that, despite the defendants' interpretation, nothing in the Wilderness Act, including the "unnecessary restriction" clause, precluded injunctive relief.⁹⁷

On appeal, the Eighth Circuit affirmed the trial court's interpretation of NEPA, holding that timber sales, because of their adverse environmental effects, triggered NEPA's EIS requirement,⁹⁸ and that an injunction against logging was proper pending completion of the necessary EIS and Land Use Management Plan for the area.⁹⁹ The court declined to address the defendants' argument that the Wilderness Act specifically authorized timber cutting within the BWCA, holding that this was the "crucial question for determination in the further proceedings in this case."¹⁰⁰

93. See *id.* at 609-17; see also Daniel Rohlf & Douglas L. Honnold, *Managing the Balances of Nature: The Legal Framework of Wilderness Management*, 15 *ECOLOGY L.Q.* 249, 264 (1988).

94. See *MPIRG I*, 358 F. Supp. at 611-17.

95. See *id.* at 610-11.

96. *Id.* at 630.

97. See *id.*

98. See *MPIRG I*, 498 F.2d 1314, 1322-23 (8th Cir. 1974). In support of their argument that the timber sales did not "significantly affect the quality of the human environment," the defendants argued that "there [was] no evidence showing that human users of the BWCA have ever seen a timber sale." *MPIRG I*, 498 F.2d at 1322. The court rejected the defendants' anthropocentric view of NEPA:

There has been increasing recognition that man and all other life on this earth may be significantly affected by actions which on the surface appear insignificant. . . . Apart from what may be referred to as "existence value," the evidence indicated that there are direct effects on the human environment from logging. Logging creates excess nutrient run-off which causes algal growth in the lakes and streams, affecting water purity. Logging roads may cause erosion and water pollution and remain visible for as long as 100 years; this affects the rustic, natural beauty of the BWCA, recognized as unique by the Forest Service itself. Logging destroys virgin forest, not only for recreational use, but for scientific and educational purposes as well. All these are significant impacts on the human environment.

Id. The dissent, on the other hand, argued that the routine extension and supervision of timber sales did not rise to the level of major federal action significantly affecting the quality of the human environment. See *id.* at 1325 (Ross, J., dissenting). The dissent found it important that "[t]he total area in question was less than 1 percent of the BWCA and the location of the areas to be logged was not adjacent to any portion of the BWCA used for recreational purposes." *Id.*

99. *Id.* at 1323-25.

100. *Id.* at 1325 n.31.

Upon completion of the EIS, the litigation resumed, with the environmentalists arguing that the EIS and accompanying BWCA Management Plan failed to comply with the NEPA, and that the Wilderness Act prohibited logging in the virgin forest areas of the BWCA.¹⁰¹ In a lengthy opinion, the district court agreed, finding fault with the Forest Service's EIS and management plan,¹⁰² and determined that "the plaintiffs [were] entitled to an injunction against logging in those areas of the BWCA which are contiguous with the remaining large blocks of virgin forest" under both NEPA and the Wilderness Act.¹⁰³ Because of this construction, the district court declared 36 C.F.R. § 293.16, the BWCA regulation promulgated by the Secretary of Agriculture pursuant to the Wilderness Act, invalid to the extent such logging was permitted.¹⁰⁴

In reaching this decision, the district court attempted to reconcile the Wilderness Act's mandate to preserve the BWCA's primitive character with the Act's special BWCA proviso, which "contemplate[d] that some logging will occur within the BWCA."¹⁰⁵ The court resolved the inherent conflict by holding that timber harvesting restrictions are "necessary" within the meaning of the Wilderness Act "whenever timber harvesting interferes with the maintenance of the primitive character of the BWCA."¹⁰⁶ Similar to its ruling in *Izaak Walton League*, the court determined that wilderness and logging were fundamentally incompatible and, thus, permanently enjoined existing and future timber sales within or adjacent to the remaining virgin forest areas of the BWCA.¹⁰⁷

On appeal, the Eighth Circuit reversed, holding that the Wilderness Act did not prohibit logging in previously unlogged areas of the BWCAW¹⁰⁸ and that the EIS and management plan were both substantively and procedurally adequate under NEPA,¹⁰⁹ except in failing to provide criteria for permitting logging in the future.¹¹⁰ The court rejected the environmentalists' argument that the primary purpose of the Wilderness Act was to maintain the primitive character of the BWCA, holding that the BWCA "has never been managed as a pure wilderness area," and that the Act "did not change this management policy."¹¹¹ The court concluded that the word "primitive" was not added "to finesse lumbering operations out of the BWCA."¹¹² The court advised that, "If a substantive policy

101. See MPIRG II, 401 F. Supp. 1276, 1282 (D. Minn. 1975), *rev'd*, 541 F.2d 1292 (8th Cir. 1976).

102. See MPIRG II, 401 F. Supp. at 1299-1308.

103. *Id.* at 1333.

104. See *id.*

105. *Id.* at 1332.

106. *Id.*

107. See *id.* at 1333.

108. See MPIRG II, 541 F.2d 1292, 1297 (8th Cir. 1976).

109. See MPIRG II, 541 F.2d at 1299-1306.

110. See *id.* at 1306-07.

111. *Id.* at 1298.

112. *Id.*

change is to be made with respect to virgin timber cutting in the BWCA, that decision must come from Congress . . . not from the courts."¹¹³ Thus, the *MPIRG* cases acted as catalysts in generating pressure for further congressional action to protect the BWCAW.¹¹⁴ In 1978, with passage of the BWCAW Act, Congress removed the statutory exception to the prohibition of logging in wilderness areas.¹¹⁵

C. *Motorboats and Snowmobiles: Minnesota v. Block*

Almost immediately after the effective date of the BWCAW Act, the state of Minnesota and several private groups, in *Minnesota v. Block*,¹¹⁶ challenged the constitutionality of the 1978 Act's controls on the use of motorboats and snowmobiles on lands and waters not owned by the United States.¹¹⁷ *Block* involved three separate lawsuits challenging the BWCAW Act. The first alleged that the Act's limitations on motorboat and snowmobile use deprived them of their "absolute" right to travel under international treaty between the United States and Canada.¹¹⁸ Among other constitutional claims, plaintiffs in the first suit also alleged that the Act's motor use restrictions discriminated against disabled persons and persons less physically fit.¹¹⁹

In the second lawsuit, the state of Minnesota, joined by an early "wise use" group, the National Association of Property Owners, and numerous individuals, businesses and organizations, alleged that Congress had no power to restrict motorized uses on non-federal lands and waters, and that the restrictions infringed on traditional powers retained by the states under the Tenth Amendment.¹²⁰ The State of Minnesota's involvement in supporting a legal challenge to wilderness protection of the BWCAW ominously presaged twenty years of increasing antagonism of the state government to wilderness protection, an unfortunate shift in state policy.

The third lawsuit alleged that implementation of the Act constituted a "major federal action significantly affecting the quality of the human

113. *Id.*

114. *See Minnesota Fed'n of Ski Touring Clubs v. Knebel*, 7 ENVTL. L. REP. 20531 (D. Minn. Jan. 18, 1977) (challenging snowmobiling in the BWCA). The court's decision in *Knebel* upheld the Forest Service's decision to phase out snowmobiling in the wilderness area over a period of several years, and created momentum for passage of the BWCAW Act. *See id.* at 20535.

115. *See* BWCAW Act § 6, 92 Stat. 1649, 1652-54 (1978).

116. 660 F.2d 1240 (8th Cir. 1981), *aff'g sub nom.* National Ass'n of Property Owners v. United States, 499 F. Supp. 1223 (D. Minn. 1980).

117. *See Block*, 660 F.2d at 1240.

118. *See National Ass'n of Property Owners*, 499 F. Supp. at 1233.

119. *See id.* at 1227.

120. *Id.* The Tenth Amendment of the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

environment" within the meaning of the NEPA,¹²¹ and that the federal defendants were required to file an EIS prior to enforcing the Act.¹²² Obviously, such claims posed a threat not just to the BWCAW, but potentially to all federal protection of wilderness.

Ruling on cross-motions for summary judgment, the district court upheld all portions of the Act.¹²³ Considering two separate groups of appeals from the consolidation of the three cases, the Eighth Circuit affirmed.¹²⁴ In the first case, the court upheld federal regulation of boating on state waters.¹²⁵ Relying on the U.S. Supreme Court's expansive reading of the Property Clause¹²⁶ in *Kleppe v. New Mexico*,¹²⁷ the court held that Congress had the power to regulate conduct off federal land if that conduct interfered with the designated purpose of the federal land.¹²⁸ Applying this principle to the question before it, the court determined that, "If Congress enacted the motorized use restrictions to protect the fundamental purpose for which the BWCAW had been reserved, and if the restrictions . . . reasonably relate to that end, [it] must conclude that Congress acted within its constitutional prerogative."¹²⁹ After examining the legislative history of the motor use restrictions, the court determined that they were designed to preserve the wilderness character of the area, and that Congress acted within its power under the Constitution to fulfill that goal.¹³⁰

The court also rejected appellants' Tenth Amendment challenge to the motorized use restrictions, holding that such restrictions do not regulate "States as States," but rather regulated the activities of private individuals both on and off federal land for the purpose of protecting the federal land.¹³¹ The court pointed out that section 15 of the BWCAW Act permits Minnesota "to exercise its traditional jurisdiction over the waters as long as state regulation is not less strict than federal regulation."¹³² Thus, the court concluded that Congress recognized and demonstrated its respect for state sovereignty.¹³³ *Block* remains the leading modern case on

121. NEPA § 102(2)(c), 42 U.S.C. § 4332(2)(c) (1994).

122. See *National Ass'n of Property Owners*, 499 F. Supp. at 1227-28.

123. See *Minnesota v. Block*, 660 F.2d 1240, 1244 (8th Cir. 1981).

124. *Block*, 660 F.2d at 1244.

125. See *id.*

126. The Property Clause provides: "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ." U.S. CONST. art. IV, § 3, cl. 2.

127. 426 U.S. 529 (1976).

128. See *Block*, 660 F.2d at 1249-50.

129. *Id.* at 1250.

130. See *id.* at 1251.

131. *Id.* at 1252.

132. *Id.* at 1253.

133. See *id.* The court also noted that "[t]he Minnesota Supreme Court has long recognized the power of the federal government to displace state regulation of the [BWCAW] under Congress' commerce clause and treaty making powers." *Id.* at 1252 n.27 (citing *State v. Kuluvar*, 123 N.W.2d 699, 703 (1963)).

the federal government's authority under the Property Clause to regulate activities on non-federal land in furtherance of wilderness protection.

In the second case on appeal, the Eighth Circuit rejected the consolidated claims of the National Association of Property Owners.¹³⁴ First, the court held that section 5 of the 1978 Act, which gives the United States a right of first refusal in certain property in the area, did not violate the Takings Clause nor the Due Process Clause of the Fifth Amendment.¹³⁵ Second, the court held that the Webster-Ashburton Treaty of 1842¹³⁶ and the Root-Bryce Treaty of 1909¹³⁷ did not preclude the governments of Canada and the United States from enacting reasonable regulations affecting commerce along the waterways, despite language in the treaties requiring the border waterways to remain "free and open."¹³⁸ Finally, the court held that implementation of the BWCAW Act did not trigger the requirements of the NEPA.¹³⁹

D. *Motorized Portages: Friends of the Boundary Waters v. Robertson*

Following the successful defense of the 1978 Act's motorized use restrictions, a coalition of environmental groups in *Friends of the Boundary Waters Wilderness v. Robertson*¹⁴⁰ sued to enjoin the continued use of motorized portages within the BWCAW.¹⁴¹ Section 4(g) of the BWCAW Act allowed three motorized portages in the BWCAW—Prairie Portage, Trout Lake Portage, and Four Mile Portage—to continue operating until January 1, 1984, at which time they were to be closed unless no other means of transporting boats was feasible.¹⁴² When 1984 came, the truck-

134. See *id.* at 1253–54.

135. See *id.* at 1255–56; see also U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation" (Takings Clause)); *id.* ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." (Due Process Clause)). Appellants argued "that the statute . . . creates a cloud on the title of any property affected, and that the one hundred day waiting period . . . serves to diminish the value of the land by deterring potential buyers." *Block*, 660 F.2d at 1255. The court held that "the mere conditioning of the sale of property, as done with section 5 . . . cannot rise to the level of a taking." *Id.* at 1256. The court explained that the right of first refusal provision "does not interfere with the owner's use or enjoyment of his property" and that any diminution in value would be minimal. *Id.*

136. Aug. 9, 1842, U.S.-Gr. Brit., 8 Stat. 572 (setting up boundaries between the United States and Britain's land in North America).

137. Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2448 (relating to the demarcation of boundary waters between the United States and Canada).

138. *Block*, 660 F.2d at 1257–58 (noting that Canada similarly banned motor use of the waterways along much of the border).

139. See *id.* at 1259.

140. 770 F. Supp. 1385 (D. Minn. 1991), *rev'd*, 978 F.2d 1484, 1485 (8th Cir. 1992).

141. See *Robertson*, 770 F. Supp. at 1386; see also *Friends of the Boundary Waters Wilderness v. Thomas*, 53 F.3d 881 (8th Cir. 1995) (granting plaintiffs attorney fees on the motorized portage issue).

142. The Boundary Waters Canoe Area Wilderness legislation states:

Nothing in this Act shall be deemed to require the termination of the existing operation of motor vehicles to assist in the transportation of boats across the [Prairie Portage, Four Mile Portage, and Trout Lake Portage] during the period ending January 1, 1984. Following said date, unless the Secretary determines that there is no feasible non-motorized

driven portages, operated by outfitters in the Ely, Minnesota area, were not closed. After three years of administrative proceedings, the Forest Service conducted tests on the feasibility of non-motorized portaging on all three portages.¹⁴³ Although the tests proved that it was possible to successfully portage by non-motorized means, the Chief of the Forest Service issued a final agency decision determining that non-motorized portaging was not "feasible," and allowed continued motorized operation.¹⁴⁴

The resolution of the case turned on the meaning of the term "feasible" as used in the BWCAW Act.¹⁴⁵ The Friends argued that the BWCAW Act, the legislative history of the Act, Supreme Court precedent and agency precedent conclusively established that "feasible" meant "physically possible."¹⁴⁶ The Forest Service, on the other hand, argued that Congress intended the word "feasible" to mean "reasonable," "practicable" or "likely,"¹⁴⁷ and that prohibiting motorized portages would prevent many people, particularly older people, from enjoying the area.¹⁴⁸ As a fall-back position, the Chief of the Forest Service argued that "the statute [was] ambiguous[, and] the Chief's decision [was] based on a permissible construction of the Act."¹⁴⁹

The district court upheld the Forest Service's decision, but the Eighth Circuit reversed, holding that feasible means "physically possible,"¹⁵⁰ and that the Forest Service erred in ordering the portages to remain motorized.¹⁵¹ In reaching its decision, the Eighth Circuit relied on the purposes behind the BWCAW Act and the Wilderness Act.¹⁵² Noting that the BWCAW Act was passed to prevent "further road and commercial development and restore natural conditions to existing . . . roads in the wilderness," the court determined that Congress intended to discourage motorized uses, even though some motorboats were allowed on the lakes at issue.¹⁵³ The court held that the Forest Service's definition of "feasible" was overly restrictive and contrary to clear congressional intent and the plain meaning of the word "feasible."¹⁵⁴

means of transporting boats across the portages to reach the lakes previously served by the portages listed above, he shall terminate all such motorized use of each portage listed above.

Boundary Waters Canoe Area Wilderness § 4(g), 92 Stat. 1649, 1651 (1978).

143. See *Robertson*, 770 F. Supp. at 1387.

144. See *id.*

145. See *Friends of the Boundary Waters Wilderness v. Robertson*, 978 F.2d 1484, 1484 (8th Cir. 1992).

146. *Robertson*, 978 F.2d at 1486.

147. *Id.*

148. See *id.* at 1489.

149. *Id.* at 1486.

150. *Id.* at 1487-88.

151. See *id.* at 1488.

152. *Id.* at 1487.

153. *Id.* (quoting BWCAW Act § 2(5), 92 Stat. 1649, 1649).

154. See *id.*

E. *Restrictions on Visitor Use: County of St. Louis v. Thomas*

In 1992, the Forest Service recommended measures to reduce visitor use of the BWCA. The Forest Service's proposed restrictions reignited the battle between advocates of development and preservation.

*County of St. Louis v. Thomas*¹⁵⁵ involved two separate challenges to the BWCA Wilderness Management Plan and Implementation Schedule (Plan), a Forest Service plan to counter the adverse effects of high visitor use on the wilderness. The Plan imposed a number of measures to reduce visitor use. These measures included: (1) reducing maximum party sizes from ten to nine; (2) limiting each party to four watercraft; (3) reducing the percentage of camp sites available for occupancy in designated travel zones; (4) eliminating about 200 camp sites; (5) reducing overall visitor entry point quotas, day use motor permits, and overnight motor permits; (6) eliminating "overbooking," a practice by which the Forest Service issued more permits than there were available slots to account for potential visitors who secure, but ultimately do not use, issued permits; (7) reducing BWCA maintenance; (8) eliminating canoe rests; (9) requiring removal and storage of motors by visitors leaving motorized zones; and (10) defining "guest" as one who stays overnight at a host's home or commercial lodging.¹⁵⁶

County of St. Louis demonstrated, once again, the chronic management problems and dissatisfaction wrought by compromise legislation. The Forest Service found itself in the middle of a fierce battle between local economic interests and wilderness advocates. On one side, a coalition of northern counties and outfitters argued that the restrictions on access and usage were too prohibitive. On the other side, the Friends of the Boundary Waters Wilderness and a coalition of preservation groups argued that the new restrictions were not stringent enough.¹⁵⁷ The question, not surprisingly, centered on the appropriate level of motorized use in the BWCAW.

The first case, brought by the outfitters, claimed that the "newly imposed restrictions on visitor use unduly limit[ed] access to the BWCA, in violation of the [BWCAW] Act."¹⁵⁸ The second case, brought by the environmentalists, claimed that the same restrictions allowed too much motorized access to the BWCAW, also in violation of the BWCAW Act.¹⁵⁹ Ultimately the district court denied both sides relief, upholding the Forest Service's Plan.¹⁶⁰

155. *County of St. Louis v. Thomas*, 967 F. Supp. 370, 370 (D. Minn. 1997).

156. *See County of St. Louis*, 967 F. Supp. at 373-74.

157. *See id.* at 372.

158. *Id.*

159. *See id.*

160. *See id.* at 379.

In addition to their "undue restriction" argument, the outfitters argued that the measures in the Plan violated the Americans with Disabilities Act of 1990 (ADA)¹⁶¹ and a specific provision in the BWCAW Act directing the Forest Service to "provid[e] opportunities for a wide range of outdoor experiences for disabled persons."¹⁶² The district court dismissed the outfitters' ADA claim on the ground that the ADA does not provide a cause of action against the federal government.¹⁶³ The court also rejected the outfitters' claim that the visitor use reduction plan violates the BWCAW Act's directive to provide outdoor opportunities for persons with disabilities. The court found that such persons "are no more affected by the Plan's visitor restrictions than are any others,"¹⁶⁴ and reasoned that the Plan "reduces access to the BWCA for all visitors, regardless of the physical abilities of any particular visitor."¹⁶⁵ The court also determined that the Forest Service fulfilled its mandate under the BWCAW Act, noting that it adopted a plan in 1981 to provide accessible camp sites, barrier-free recreation sites, and educational programs concerning these sites.¹⁶⁶ The court further noted that the BWCAW Act "explicitly directs the Secretary of Agriculture to develop programs for disabled persons that are 'consistent with the purpose of the Act,'" and that "one such purpose is to 'protect and enhance the natural values and environmental quality' of the BWCA wilderness area."¹⁶⁷

Finally, the court held that the outfitters lacked standing to bring a NEPA claim, holding that the NEPA provides no relief for economic injury.¹⁶⁸ Focusing on their motivation for bringing the lawsuit against the Forest Service, the court held that "[b]ecause [the outfitters] raise no environmental concerns as part of their NEPA claim, the Court finds their asserted interests lie beyond the zone of interests protected by the statute."¹⁶⁹

In early 1999, the United States Court of Appeals for the Eighth Circuit affirmed the district court in part, and reversed in part.¹⁷⁰ The appellate court generally affirmed the district court's findings that the new BWCAW Management Plan's restrictions on visitor use were not arbitrary and capricious, in light of evidence that the wilderness qualities of the area were threatened by heavy visitor use.¹⁷¹ The Eighth Circuit re-

161. 42 U.S.C. §§ 12101-12213 (1994 & Supp. II 1996).

162. *County of St. Louis*, 967 F. Supp. at 376 (quoting BWCAW Act § 18(d), 92 Stat. 1649, 1658-59 (1978)).

163. *See id.*; *see also* 42 U.S.C. § 12131(1)(A)-(B) (1994).

164. *County of St. Louis*, 967 F. Supp. at 376.

165. *Id.*

166. *See id.*

167. *Id.* (quoting BWCAW Act § 2(2), 92 Stat. 1649, 1649).

168. *See id.* at 377.

169. *Id.* (citing *Nevada Land Action Ass'n v. United States Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993)).

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

171. *Friends of the Boundary Waters Wilderness*, 164 F.3d at 1131.

versed the district court's finding that the outfitter groups did not have standing under NEPA to challenge the adequacy of the Forest Service's EIS, but then found the EIS adequate, upholding the Forest Service planning process.¹⁷²

The Eighth Circuit also reversed the district court on one issue appealed by the environmental group plaintiffs. The appellate court held that, under the plain language of section 4(f) of the BWCAW Act, homeowners and resort owners on lakes within (or partially within) the wilderness were entitled to motor use exempt from the statutory quota system only on lakes directly abutting their property.¹⁷³ The Eighth Circuit held that the Forest Service's twenty year practice of allowing such users to motor through entire chains of lakes exempt from the quota system contradicted the language and purpose of the BWCAW Act. The appellate court reiterated what it had held in its earlier *Minnesota v. Block* and *Friends v. Robertson* decisions: "The premise of the BWCA Wilderness Act of 1978 is that motorboat use is prohibited in the wilderness area, except to the extent that Congress specifically authorized motorboat use on specifically designated lakes, portions of lakes, and rivers."¹⁷⁴ Despite this clear statement that Congress intended to minimize motor use in the wilderness by the BWCAW Act, as this article goes to press the Forest Service has announced that it will initiate an administrative process to consider raising motor quotas to appease cabin owners and resort owners unhappy that they can no longer motor freely through wilderness lakes.

II. RECENT LEGISLATIVE CAMPAIGN

The year after the U.S. Supreme Court denied a petition for writ of certiorari in the truck portage litigation, the Republicans swept into power in both houses of Congress with the 1994 election. This change of power placed many antiwilderness ideologues such as Alaska members Representative Don Young (R-AK) and Senator Frank Murkowski (R-AK) in key positions of power. The appointments of these Alaskans as chairs of the House Resources Committee and the Senate Energy and Natural Resources Committee, respectively, unleashed a nationwide assault on wilderness areas,¹⁷⁵ and the Boundary Waters Wilderness, unfortunately, quickly became a target.

A. 1994 Congressional Elections

In Minnesota, the race for the open U.S. Senate seat being vacated by David Durenberger (R-MN) pitted long-time Democratic state legislator Ann Wynia (D-MN) against freshman U.S. Representative Rod

172. *Id.* at 1127, 1129.

173. *Id.* at 1124-25.

174. *Id.* at 1124.

175. See, e.g., *The Multiple Assault on Alaska's Wilderness*, SEATTLE TIMES, Sept. 22, 1995, at B4 (reporting on Young and Murkowski's assault on Alaska's wilderness areas).

Grams (R-MN). Grams, a former news anchor at a Twin Cities television station, had the support of the far right political and social conservatives on such issues as abortion, gun control, and other so-called "family values."¹⁷⁶ He made a conscious attempt to use these issues and his opposition to the BWCA Wilderness and Voyageurs National Park to divide the traditionally strong Democratic vote on northeastern Minnesota's Iron Range.¹⁷⁷

Grams sought and received support for his political plans in northeastern Minnesota from some nominally Democratic state legislators.¹⁷⁸ State Senator Bob Lessard (D-MN) of International Falls, for example, long an opponent of federal public lands, crossed party lines and even publicly endorsed Grams for the U.S. Senate seat as a result of their pact on wilderness and national parks.¹⁷⁹ Grams' political strategy succeeded, and he carried Lessard's County of Koochiching, and cut into the vote in traditionally Democratic St. Louis County, the heart of the Iron Range, in the general election, helping to account for his margin of victory statewide.¹⁸⁰

Nationally, the Republican surge brought the G.O.P. to power in both the House and the Senate for the first time in four decades. Georgian Newt Gingrich, architect of the "Contract with America," became Speaker of the House, and Senator Bob Dole took over as Senate Majority Leader. As noted earlier, Don Young and Frank Murkowski of Alaska, legendary for their opposition to wilderness and parks, took over from George Miller (D-CA) and J. Bennett Johnston (D-LA) as chairs of the key policy committees in the House and Senate.

B. *Congressional Field Hearings*

In March 1995, Lessard appeared before Don Young's committee in Washington.¹⁸¹ Young was looking for new wilderness targets to attack, and Lessard helped provide them.¹⁸² Lessard suggested downgrading Voyageurs National Park into a state or county park, and turning it over to local control. He suggested doing the same with the BWCA Wilderness.¹⁸³

176. See Sharon Schmickle & Dennis J. McGrath, *Meet the Candidate*, STAR-TRIB., Aug. 25, 1994, at 1B (profiling U.S. Senate candidate, Rod Grams).

177. See Carol Byrne & Dean Rebuffoni, *Voyageurs' Future a Litmus Test for Parks Regulation*, STAR-TRIB., Aug. 23, 1995, at 1A.

178. See *id.*

179. See *id.*

180. See Dane Smith, *Winds of Changes Blow Softly in Minnesota*, STAR-TRIB., Nov. 10, 1994, at 1A.

181. See Kris Henry, *Voyageurs National Park Could Become State's*, STAR-TRIB., March 3, 1995, at 10A.

182. Cf. *id.*

183. See Friends of the Boundary Waters Wilderness, *Voyageurs Park and BWCAW Attacked!*, BWCA WILDERNESS NEWS, Winter 1995, at 4; see also Richard Chin, *Lawmaker Wants to Ease Restrictions on Voyageurs*, ST. PAUL PIONEER PRESS, Mar. 3, 1995, at 1C.

Shortly after his testimony, Lessard and seven other northern Minnesota legislators (including state senator Douglas Johnson (D-MN), another parochial antiwilderness Democratic demagogue who has made a career out of fighting against the BWCA Wilderness) sent a formal letter to the Minnesota congressional delegation requesting field hearings "to address the issue of regulation of federal lands in northeastern Minnesota."¹⁸⁴ Grams only too willingly complied with this request, and scheduled a joint Senate-House field hearing for International Falls in August of 1995. Representative James Hansen (R-UT), the new chair of the House National Parks and Lands Subcommittee and an ardent opponent of wilderness in his own state of Utah, agreed to chair the hearing.

The antipark and antiwilderness agitators believed, with some justification, that the field hearing was a slam dunk. International Falls was a hotbed of antipark and antifederal sentiment, located at the far northern edge of Minnesota, a six-hour drive from the Twin Cities where many wilderness and park supporters live. Antipark agitators tried to ignite the interest of the local populace, predicting a massive turn-out of nearly five thousand people.¹⁸⁵ Propaganda sheets published in the local newspaper made wild claims, calling National Park Service rangers an "armed federal police force" who "carry automatic weapons" when they invade park campsites "brandishing their guns" to terrorize innocent visitors.¹⁸⁶

The actual hearing was far less tumultuous than anticipated. The environmental community worked hard to turn out wilderness and park supporters. Though the hearing was predictably raucous, only 1000 to 1100 people actually attended, with wilderness and park supporters accounting for forty to fifty percent of the crowd. The congressional panel consisted of James Hansen, who chaired the hearing; Grams; Representative Jim Oberstar (D-MN), who nursed a grudge against the BWCA Wilderness dating back to 1978 when Congress over-rode his plan to dismantle the BWCAW by passing prowilderness legislation;¹⁸⁷ Representative Bruce Vento (D-MN), who helped pass that legislation and who for a decade chaired the subcommittee now chaired by Hansen; and U.S. Senator Paul Wellstone (D-MN), who would run for reelection the following year and who felt split between some of his northern Minnesota labor supporters who wanted more motors, and wilderness supporters from throughout the state. Consequently, Wellstone, according to one

184. See Letter from Minnesota State Senator Bob Lessard et al. to U.S. Senator Paul Wellstone (March 30, 1995) (on file with authors).

185. See Letter from Don Carey, Spokesman, Citizen's Task Force on Alternatives for Voyageurs National Park, to International Falls Chamber of Commerce (June 19, 1995) (on file with authors).

186. GREATER NORTHLAND COALITION, CASE FOR TRANSFERRING VOYAGEURS NATIONAL PARK TO THE STATE OF MINNESOTA AND/OR THE COUNTIES OF ST. LOUIS AND KOOCHECHING (1995).

187. For more information on the politics and passage of the 1978 BWCA Wilderness Act, see PROESCHOLDT ET AL., *supra* note 22.

account of the hearing, "resembled a driver weaving back and forth across the center line."¹⁸⁸

The BWCAW witnesses included a number of antiwilderness speakers. State Senator Johnson angrily proclaimed that, in 1978, the "so-called Friends of the Boundary Waters won for their friends, and [my] friends lost."¹⁸⁹ Johnson wanted to "see returned some of the economic and recreational opportunities that they lost."¹⁹⁰ He then went on, though with a transparent denial that he was not really after such things, to describe the economic opportunities he sought:

[C]ould you imagine if you could go log the Boundary Waters and the Voyageurs? Could you imagine if you could go mine the Boundary Waters and the Voyageurs? Could you imagine if you could go and build resorts and cabins in the Voyageurs and the Boundary Waters, the tremendous economic boom?¹⁹¹

Todd Indehar of Conservationists with Common Sense (CWCS), an antiwilderness wise use group based near Ely, continued with Johnson's theme. Though Indehar proclaimed initially that CWCS was "not advocating the rollback of wilderness in the BWCAW,"¹⁹² he then went on to describe how it would like wilderness rolled back, including allowing trucks and jeeps on wilderness portage trails, and opening all the international boundary lakes in the wilderness from Lac La Croix to Saganaga to motorboats and snowmobiles.¹⁹³

Wilderness proponents also spoke, including Sawbill Canoe Outfitters owner Bill Hansen. Hansen referred to the area as "a crucial part of the northeastern Minnesota economy."¹⁹⁴ Echoing Hansen's sentiments was Ely business owner and arctic explorer Paul Schurke, who spoke of the marketing edge that Ely has "as the principal gateway to the largest wilderness without motors found north of the Everglades or east of the Rockies."¹⁹⁵

Grams only wanted to hold the International Falls hearing. At the request of the environmental community, however, Vento and Wellstone

188. *Wellstone Walks Thin Line, McAllister Drops the Bomb*, ELY ECHO, Aug. 21, 1995, at 5. See generally Dean Rebuffoni, *All Sides Are Passionate About Future of Wilderness*, STAR-TRIB., Aug. 19, 1995, at 1A (discussing testimony given by Minnesota state representatives and senators at the congressional field hearing in International Falls, Minnesota).

189. *Federal Land Management of Voyageurs National Park and Boundary Waters Canoe Area: Oversight Hearings Before the Subcomm. on National Parks, Forests, and Lands of the Comm. on the Resources and the Subcomm. on Parks, Historic Preservation and Recreation*, 104th Cong. 70 (1995) [hereinafter *Oversight Hearings*] (statement of Sen. Douglas Johnson, Minnesota).

190. *Id.*

191. *Id.* at 79.

192. *Id.* at 243 (statement of Todd Indehar, Chairman of the Legislative Committee, Conservationists with Common Sense).

193. *Id.* at 242-50.

194. *Id.* at 258 (statement of William F. Hansen, Owner, Sawbill Canoe Outfitter, Inc.).

195. *Id.* at 262 (statement of Paul Schurke, Citizen Spokesman for Ely, Minnesota).

insisted on holding a second field hearing in the Twin Cities. Despite the opposition of Grams and Oberstar, the hearing was scheduled for a Saturday in October at the St. Paul Central High School auditorium.¹⁹⁶

The hearing garnered a large crowd estimated at over 1200 attendees, 1100 of which were wilderness and park supporters. A rally of wilderness supporters was also held outside the school just prior to the hearing. Several dozen canoes portaged down Lexington Avenue and ended at the high school, at which time Representative Vento exhorted the crowd to continue the fight for wilderness. Inside, the crowd was so large that the fire marshal stopped the hearing in mid-testimony to chase out people who had jammed into the aisles and stairs. The best that the outnumbered antiwilderness and pro-motor contingent could do was to parade several members in black-and-white striped pajamas as "prisoners" of federal regulations, and send a semi-truck loaded with Polaris snowmobiles driving past the school.¹⁹⁷

At the hearing, Oberstar angrily told the audience not to call his constituents "jack pine savages," although he was the only one to do so.¹⁹⁸ Bill Erzar of CWCS made the claim of "broken promises" to justify more motorboat routes and a locally dominated management council.¹⁹⁹

Bruce Vento urged Congress not to micro-manage, but to protect the areas because "Minnesotans want our children and our children's children to hear the cry of the loon in the stillness of the wilderness."²⁰⁰ John Galland, a wheelchair user and nationally recognized expert on wilderness accessibility for people with disabilities, spoke in favor of protecting the BWCAW. He described the area as "a gem" which is "such an available and accessible area" for him.²⁰¹ Expressing the concerns of wilderness advocates everywhere, Becky Rom of the Boundary Waters Wilderness Foundation asked the panel, "Where will the canoeists, hikers and skiers go if the motor and local control advocates prevail? There is nowhere else."²⁰²

196. See Philip Brasher, *Over Wellstone's Objections, Senate Committee Opts Not to Attend Voyageurs Hearing*, ST. PAUL PIONEER PRESS, Oct. 24, 1995, at 2B. Technically, the Senate committee pulled out of the St. Paul hearing due to Grams' objections, but the hearing occurred anyway under the auspices of the House committee. See *id.*

197. See Dennis Lien, *Second Hearing on BWCAW Is Again Divisive*, ST. PAUL PIONEER PRESS, Oct. 29, 1995, at 1B; see also Friends of the Boundary Waters Wilderness, *Congressional Field Hearings Focus on BWCAW, Voyageurs*, BWCA WILDERNESS NEWS, Autumn 1995, at 1, 1-3; Dean Rebuffoni, *Future of the Wilderness Still on Shaky Ground*, STAR-TRIB., Oct. 29, 1995, at 1B.

198. See *Oversight Hearings*, *supra* note 189, at 110 (statement of Jim Oberstar, Minnesota State Representative).

199. *Id.* at 116 (statement of Bill Erzar, Member, Conservationists with Common Sense).

200. *Id.* at 108 (statement of Bruce Vento, Minnesota State Representative).

201. *Id.* at 124 (statement of John Galland, Citizen Spokesman for Minneapolis, Minnesota).

202. *Id.* at 127 (statement of Becky Rom, Spokeswoman, Boundary Waters Wilderness Foundation).

C. Grams and Oberstar Bills

Despite the strong showing by the environmental community, Grams and Oberstar proceeded to draft legislation attacking both the Boundary Waters and Voyageurs Park. By April of 1996, they were ready to launch their assault. Vento and the environmental community, however, also prepared to respond.²⁰³

In late April, Oberstar introduced new bills for both the BWCA Wilderness and Voyageurs National Park. His Boundary Waters bill would place trucks back on the contested portages, dramatically open up the amount of water surface area within the wilderness to motorboat use, and create a locally-dominated management council to dictate policies to the U.S. Forest Service.²⁰⁴

The first week in May brought an onslaught of reaction to Oberstar's attack on wilderness. That Monday, Bruce Vento announced his Boundary Waters and Voyageurs Park bill. The Vento bill would close three wilderness lakes to motorboat traffic (Jackfish Bay of Basswood Lake, Loon Lake, and Lac La Croix) and add about 14,000 acres to the Boundary Waters in nineteen key wilderness additions.²⁰⁵

The next day, Paul Wellstone announced that he would throw this political hot potato to a federal mediation process in an attempt to bring Minnesotans together to solve the issue outside of the legislative process.²⁰⁶ And, on Wednesday, Rod Grams announced his BWCAW bill, a companion bill to Oberstar's legislation.²⁰⁷

D. Minnesota Wilderness and Parks Coalition

The environmental community began working together in early 1995 to meet the threat to the Boundary Waters and Voyageurs Park posed by Grams, Oberstar and the new Republican Congress. The organizations formed the Minnesota Wilderness and Parks Coalition to combat the detrimental legislation. The members of the coalition in-

203. See Dane Smith & Robert Whereatt, *Battle Joined over Wilderness*, STAR-TRIB., May 7, 1996, at 1A.

204. See H.R. 3297, 104th Cong. (1996) (providing for motorized access to and use of the BWCAW); H.R. 3298, 104th Cong. (1996) (providing for the establishment of the Voyageurs National Park Intergovernmental Council); see also Dean Rebuffoni, *Whose Wilderness Is It?*, STAR-TRIB., Apr. 24, 1996, at 1B; Tracey A. Reeves, *Bills Would Relax Limits at BWCAW*, ST. PAUL PIONEER PRESS, Apr. 24, 1996, at 1A.

205. See H.R. 3470, 104th Cong. (1996); see also Bill Salisbury, *Bill Would Expand Wilderness Area*, ST. PAUL PIONEER PRESS, May 7, 1996, at B1; Smith & Whereatt, *supra* note 199, at 1A.

206. See Bill Salisbury, *Mediators to Tackle Parks Issue, Congressman's Dueling Proposals Personify a Decade-Long Feud*, ST. PAUL PIONEER PRESS, May 8, 1996, at A1; Dane Smith & Robert Whereatt, *BWCA Mediation Sought*, STAR-TRIB., May 8, 1996, at 1A.

207. See Bill Salisbury, *Grams Floats BWCAW Plan*, ST. PAUL PIONEER PRESS, May 9, 1996, at A1; see also S. 1738, 104th Cong. (1996) (providing for motorized access of the BWCAW); S. 1805, 104th Cong. (1996) (providing for the management of Voyageurs National Park); Tracey A. Reeves, *Grams, Oberstar: BWCA Allies*, DULUTH NEWS TRIB., May 9, 1996, at A1.

cluded large national environmental organizations (such as the Sierra Club, The Wilderness Society, and National Parks and Conservation Association), regional conservation organizations (such as the Friends of the Boundary Waters Wilderness, Minnesota Center for Environmental Advocacy, and Superior Wilderness Action Network), and public interest organizations such as MPIRG.²⁰⁸ The coalition eventually grew to include more than thirty organizations and a combined membership of over three million Americans.²⁰⁹

The coalition conducted a series of public demonstrations, events and rallies to attract media attention and to educate the broader public of the dangers posed by Grams and Oberstar. These activities included demonstrations outside Grams' senatorial office, a rally at the State Capitol in St. Paul, a rally and demonstration outside the St. Paul high school and an innovative "21 canoe salute" on the Mississippi River.²¹⁰ In conjunction with the Voyageurs Senate hearing on July 18th, the Coalition's national member organizations also staged a canoe portaging rally in Washington up the Mall to the steps of the Capitol building.

In the spring and summer of 1996, Coalition member organizations also began to lobby more aggressively in Washington, D.C., to broaden the awareness of the threat to a more visible national level. The coalition raised money to help wage the campaign and hired a coalition staff director to help coordinate work on it. The coalition also brought dozens of citizen lobbyists to Washington to help lobby the issue and reach scores of congressional offices. During one week alone, nearly forty prowilderness volunteers roamed the halls of Congress making lobby visits.

E. *Washington Hearings*

Grams and Oberstar scheduled hearings in Washington on their bills during a one-week span in July 1996. Grams arranged Senate subcommittee hearings for the BWCA Wilderness on July 11, and for Voyageurs Park on July 18.²¹¹ Oberstar scheduled a House subcommittee hearing for both areas on July 16.²¹²

208. See *Boundary Waters Canoe Area Wilderness Accessibility and Partnership Act of 1996: Hearing on S. 1738 Before the Subcomm. on Forests and Pub. Land Management of the Senate Comm. on Energy and Natural Resources*, 104th Cong. 102 (1996) [hereinafter *S. 1738 Hearings*] (statement of Becky Rom, Spokeswoman, Boundary Waters Wilderness Foundation).

209. See Dean Rebuffoni, *Sweeping BWCA Changes Proposed: Attorney's Plan Calls for "Swapping" Two Parts of Popular Basswood Lake*, STAR-TRIB., Nov. 19, 1996, at 1B.

210. See Bei Hu, *U Canoe Enthusiasts Protest BWCA Changes*, MINN. DAILY, July 1, 1996, at 1; see also *Canoeing to Congress?*, ROLL CALL, July 22, 1996, at 1; Friends of the Boundary Waters Wilderness, *Congressional Field Hearings Focus on BWCAW, Voyageurs, BWCA WILDERNESS NEWS*, Autumn 1995, at 1, 1-3; Dean Rebuffoni, *Environmentalists, Snowmobilers Hold Competing Rallies at Capitol*, STAR-TRIB., Oct. 8, 1995, at B1; Karen Winegar, *Can-too Spirit*, STAR-TRIB., Aug. 28, 1997, at 16A.

211. See Carol Byrne, *Managing the Wilds*, STAR-TRIB., July 11, 1996, at 1A.

212. See *id.*

The Senate hearing on the Boundary Waters occurred on July 11th. The appearance of certain public officials and citizen witnesses was similar to the earlier field hearings. State Senator Doug Johnson, Lake County Commissioner Sharon Hahn, and Ely Mayor Ed Steklasa supported the Grams bill. State Representatives Dee Long (D-MN), Spencer Black (D-WI), and Bill Witt (D-IA) testified against Grams. Bruce Kerfoot, Gary Gotchnik, and Mike Madden testified in favor of the Grams bill on the citizens panel. Bill Hansen, Becky Rom, and Kevin Proescholdt all testified against it. Gray Reynolds of the U.S. Forest Service also testified in opposition to the Grams bill, firmly establishing the position of the Clinton Administration.²¹³

What made the hearing most interesting were the statements and testimony of the other Senators present. All of the Democratic members of the full committee attended the hearing and fiercely opposed the Grams bill, in part because of its bad policy and in part because of the Republicans' use of it to sabotage Wellstone in his reelection bid.²¹⁴ Of particular note were two additional prowilderness Senators, Russ Feingold (D-WI) and Tom Harkin (D-IA), who testified against the Grams bill and evidenced some of the national opposition to Grams' legislation.²¹⁵

The House hearing on July 16th covered both the BWCAW and Voyageurs.²¹⁶ Representative Jim Hansen again chaired the subcommittee hearing. Representative Helen Chenoweth, a member of Hansen's subcommittee, set the tone for the majority of legislators on the panel. She asked Paul Schurke, the Ely Arctic explorer and wilderness adventure businessman, "Mr. Schurke, are you an eco-terrorist?"²¹⁷

The Boundary Waters panel proffered the expected testimony. Paul Schurke of Ely, Maggie Wille of Wilderness Inquiry, and former U.S. Senator Gaylord Nelson of The Wilderness Society testified in favor of wilderness protections; state Representative Tom Bakk, Gunflint Lodge owner and CWCS spokesperson Bruce Kerfoot, and Adena Cook of the Blue Ribbon Coalition (one of the national antiwilderness organizations in the Wise Use movement) favored Oberstar's legislation. Gray Reynolds of the U.S. Forest Service testified against the Oberstar bill as he had against the Grams bill in the Senate.

213. See *S. 1738 Hearings*, *supra* note 208, at 37 (statement of Gray Reynolds, Deputy Chief, National Forest System, U.S. Forest Service).

214. See Bill Salisbury, *Senators Say BWCAW Bill Will Not Pass*, ST. PAUL PIONEER PRESS, July 12, 1996, at 1A.

215. See *S. 1738 Hearings*, *supra* note 208, at 3-9 (statements of Sen. Russ Feingold, Wisconsin, and Sen. Tom Harkin, Iowa); see also Carol Byrne, *Democrats Say Grams' BWCA Bill Is Dead*, STAR-TRIB., July 12, 1996, at 1B.

216. See *Voyageurs National Park: Hearings on H.R. 3297, 3298 & 3470 Before the House Subcomm. on Nat'l Parks, Forests and Lands*, 104th Cong. (1996) [hereinafter *H.R. 3297 Hearings*] (not included in CIS microfiche; available at <<http://web.lexis-nexis.com/congcomp>>).

217. *Id.*

Two other members of the Minnesota delegation also testified against Oberstar's bill at the hearing. Representative Jim Ramstad (R-MN) testified that "the original compromise of the 1970s that created Voyageurs and the BWCA should be preserved."²¹⁸ Representative David Minge (D-MN) told the panel "I support non-motorized, low-intensity use. I do not support the bill of my colleague, Mr. Oberstar."²¹⁹

The Senate hearing on Voyageurs Park proceeded in similar fashion to the hearing on the Boundary Waters. Of note, however, is that, in conjunction with the July 18 hearing, a new poll was released showing overwhelming support for protecting the BWCA Wilderness.²²⁰ The non-partisan Minnesota Poll showed that seventy-four percent of Minnesotans opposed legislation to further motorize the BWCAW, and sixty-nine percent favored legislation that would increase wilderness protections for the Boundary Waters.²²¹ This new poll followed three other statewide polls showing similar strong support for protecting the canoe country wilderness.²²²

F. *Session-Ending Fireworks*

Grams and Oberstar had little time remaining in the legislative session before Congress adjourned to go home and campaign. Just prior to the August recess, Oberstar announced a modified version of his bill in late July and boldly pronounced—incorrectly—that his new bill satisfied the concerns of the Clinton Administration.²²³ Oberstar's "modification" only slightly expanded the membership on his proposed local control committee to represent interests broader than just the local area. Ultimately, local interests would still dominate the council.²²⁴

Running out of legislative time to pass their wilderness motorization bills, Grams and Oberstar attached the truck portage provisions as a rider to an unrelated legislative vehicle, the Omnibus Parks bill.²²⁵ The massive parks bill encompassed 500 pages and contained many provisions that both the environmental community and the Administration wanted. Senator Murkowski, the committee chair and author of the parks bill,

218. *Id.* (statement of Jim Ramstad, Minnesota State Representative).

219. *Id.* (statement of David Minge, Minnesota State Representative).

220. See Dean Rebuffoni, *Most Favor Mediating Wilderness Dispute*, STAR-TRIB., July 18, 1996, at 1B [hereinafter Rebuffoni, *Mediating Wilderness*]; see also Jim Ragsdale, *70% Favor Same, Tougher Limits for BWCA*, ST. PAUL PIONEER PRESS, May 22, 1996, at 1A; Dean Rebuffoni, *Opposition Deep to Park Proposals*, STAR-TRIB., Sept. 27, 1995, at 1A.

221. See Rebuffoni, *Mediating Wilderness*, *supra* note 220, at 1B.

222. See *id.*

223. Cf. Carol Byrne, *Oberstar Alters BWCA Proposal*, STAR-TRIB., July 26, 1996, at 1B (explaining and discussing Representative Oberstar's new bill).

224. See H.R. 3880, 104th Cong. (1996); see also Byrne, *supra* note 223.

225. See Friends of the Boundary Waters Wilderness, *Oberstar, Grams Blocked in Congress*, BWCA WILDERNESS NEWS, Autumn 1996, at 1.

added the Boundary Waters truck provisions as a section at the very end of the bill.²²⁶

The antiwilderness legislators, however, underestimated the resolve of both the environmentalists and the Clinton Administration. Representatives of the national environmental community, including the Friends of the Boundary Waters Wilderness, met with Administration officials to discuss Murkowski's bill. They unanimously identified the BWCAW truck portage provision as one of the unacceptable riders.²²⁷

Two days later, the Clinton Administration issued a formal response, stating that the President would veto the entire parks bill if it contained either the Boundary Waters truck provision or another provision dealing with Alaska's Tongass National Forest.²²⁸ Murkowski immediately dropped both sections, and the bill passed. The Boundary Waters escaped unharmed from the notorious 104th Congress!

Grams and Oberstar were left livid and fuming over the outcome. "It is absolutely outrageous that the people of northern Minnesota have become the victims of a last-minute, backroom sabotage by the high rollers in the preservationist movement and their friends in Congress,"²²⁹ Grams said, denouncing the very tactics he himself had used in attaching his truck portage provisions to the conference committee bill. Oberstar angrily spoke that his hope to motorize the portages had been "buried under a White House veto threat and a promised Senate filibuster."²³⁰

G. Mediation and Wellstone

Paul Wellstone's reelection bid overshadowed the attempt at federal mediation of the Boundary Waters/Voyageurs Park issue from the very start. Jim Oberstar and Rod Grams sought to damage Wellstone with this issue and continually undercut the mediation process. Noting Wellstone's obviously divided interests, Oberstar, for example, ruthlessly gloated at the CWCS annual meeting in August 1996, that "I'd love to see Wellstone have to vote on [Gram's Boundary Waters] bill."²³¹ Todd Indehar and Bruce Kerfoot, the Republican leaders of CWCS, also sought to defeat Wellstone over this issue by refusing to participate in the process and attacking it from the outside.²³²

226. See *id.*

227. See *id.*

228. See Letter from Franklin D. Raines, Director, Office of Management and Budget, to U.S. Senator Frank Murkowski, and U.S. Representative Don Young (Sept. 20, 1996) (on file with authors).

229. See Carol Byrne, *Grams Concedes BWCA Fight, for Now*, STAR-TRIB., Sept. 26, 1996, at 1B.

230. See Carol Byrne, "Horse Trading" Commences in BWCA Talks, STAR-TRIB., Sept. 27, 1996, at 3B.

231. D.C. Sorensen, *Event Brings Out Politicians*, ELY ECHO, Aug. 26, 1996, at 1.

232. See Robert Whereatt, *Major Group Won't Attend Wellstone's BWCA Talks*, STAR-TRIB., May 11, 1996, at 1A.

The Federal Mediation and Conciliation Service (FMCS) conducted the mediation. The process began in August 1996, and immediately broke into two parallel mediations, one for the Boundary Waters and one for Voyageurs. Selecting the participants to sit at the mediation table significantly affected the ensuing process.

FMCS staff screened applicants for the mediation table, trying to represent all significant interests with those they selected. Critics of the process, however, alleged that the BWCAW panel contained mostly Wellstone supporters who merely wanted to delay the public and congressional debate until after Wellstone's reelection bid in November. Many participants did have Wellstone ties, including AFL-CIO labor leader George Sundstrom, AFSCME labor representative Mitch Brunfelt, Ely residents Paul Forsman and Barb Berglund, and St. Louis County lobbyist John Ongaro (all of whom caucused with the pro-motor caucus). The wilderness caucus included such Wellstone Democratic partisans as Duluth environmentalist and Democratic-Farmer-Labor (DFL) party activist Alden Lind (a former college professor of Wellstone's), and canoe outfitter Bill Hansen (also a DFL party activist).²³³

The Minnesota Wilderness and Parks Coalition also participated, though with trepidation—wilderness advocates had no choice politically but to participate. While the environmental community generally expressed a willingness to discuss the issues, its leaders held out little hope that the mediation process would reach a settlement. Brian O'Neill, Chuck Dayton, and the author Rick Duncan, long-time environmental attorneys, represented the coalition at the table.

The Boundary Waters mediation panel embarked upon an ambitious schedule, meeting for two-day sessions every two weeks. By election day in early November, no agreements on major issues were in sight. Wellstone breezed to a surprisingly easy reelection over former Senator Rudy Boschwitz. The Boundary Waters dilemma had not significantly harmed Wellstone on the Iron Range, demonstrating the lack of true popular support even in that Democratic stronghold for antiwilderness policies.²³⁴

The mediation continued through the fall and winter. In late November, the Ely representatives ultimately rejected a proposal forwarded by the environmental caucus, and in April, the wilderness coalition rejected a proposal to open two portages to truck traffic.²³⁵ Motor proponents never demonstrated any real reason why trucks should return to the wilderness portage trails, especially when hundreds of motorboat parties

233. See FEDERAL MEDIATION AND CONCILIATION SERV., BOUNDARY WATERS CANOE AREA WILDERNESS: FINAL REPORT OF THE MEDIATION PANEL § 3 (1997).

234. Cf. Dean Rebuffoni, *Wellstone Has a Solid Lead on Iron Range*, STAR-TRIB., Oct. 20, 1996, at 1A.

235. See Dean Rebuffoni, *BWCA Negotiators Nix Each Other's Plans*, STAR-TRIB., Jan. 16, 1997, at 7B.

traversed the trails each year without trucks.²³⁶ The mediation process ended in late April amid high acrimony after a frenzied day of proposals by the wilderness coalition that were all rejected by the motor caucus.

In a prepared statement, Wellstone blamed the wilderness coalition who, from his perspective, "scuttled" one tentative proposal.²³⁷ In reference to the mediation panel not resolving the most contentious issues, Wellstone stated, "I deeply regret that." The wilderness coalition, however, could not compromise its wilderness values for political expediency, particularly when motor proponents failed to demonstrate any need for the trucks. Still, Wellstone indicated that he would move ahead and begin to craft legislation regarding one of the proposals favored by motor advocates but rejected by the wilderness coalition.²³⁸

H. *New Bills*

As noted previously,²³⁹ Oberstar and Grams continued to undercut the mediation process throughout the period it took place. Both made pointed announcements in local northeastern Minnesota newspapers that they would introduce truck portage legislation, in effect telling motor advocates not to give up anything in mediation because the legislators would give them trucks and motorboat lakes through Congress.²⁴⁰ Once mediation concluded, they struck again, introducing new versions of their old bills in the 105th Congress.²⁴¹

Oberstar and Grams scaled back their attack on the wilderness with their new legislation. For example, they dropped their demand for the local control management council, as well as the list of wilderness lakes they would open to motorboats. Instead, their new bills addressed only opening wilderness portage trails to truck and jeep traffic, and eliminating the phase-out of motorboat use for Seagull Lake that Congress had scheduled as part of the 1978 BWCA Wilderness Act.²⁴²

Representative Vento responded in kind in July with a scaled-back version of his prowilderness Boundary Waters bill.²⁴³ The new Vento bill would close parts of three lakes to motorboats, add about 7000 acres to

236. See Friends of the Boundary Waters Wilderness, *Fact Sheet: The Need for Truck Portages*, BWCA WILDERNESS NEWS, Autumn 1997, at 6.

237. Dean Rebuffoni, *Wellstone Vows "Common Ground" BWCA Plan*, STAR-TRIB., Apr. 30, 1997, at 2B.

238. See *id.*

239. See *supra* Part III.G.

240. Cf., e.g., Tom Coombe, *Grams Traverses Trout Lake Portage*, ELY ECHO, Nov. 4, 1996, at 1; *Grams Plans Portages Bill*, MESABI DAILY NEWS, Jan. 11, 1997, at A9; Charles Ramsay, *Oberstar Makes Rounds*, MESABI DAILY NEWS, Dec. 16, 1996, at A1.

241. See H.R. 1739, 105th Cong. (1997); S. 783, 105th Cong. (1997); see also Friends of the Boundary Waters Wilderness, *Boundary Waters Threatened Again in Congress!*, BWCA WILDERNESS NEWS, Winter 1997, at 1, 1-2.

242. See H.R. 1739, 105th Cong.; S. 783, 105th Cong.

243. See H.R. 2149, 105th Cong. (1997).

wilderness in fifteen separate parcels, and eliminate all towboat use within the wilderness.²⁴⁴

I. Senate Action

Grams moved quickly to schedule a Senate hearing on his BWCAW legislation. The hearing occurred in late June 1997. Greg Lais of Wilderness Inquiry, Bill Reffalt of The Wilderness Society and David Jenkins of the American Canoe Association testified against Grams' bill; Bob LaTourell, Jr., of the Prairie Portage concession, former Ely Mayor Frank Salerno, and Guy Holmes of CWCS testified in favor of the bill.²⁴⁵

Senator Paul Wellstone testified against the measure, while announcing that he would draft his own compromise legislation.²⁴⁶ Lyle Laverty of the U.S. Forest Service also testified against the Grams measure, again establishing the Clinton Administration as squarely in opposition to truck portages and increased motorboat use in the canoe country wilderness.²⁴⁷ Senator Russ Feingold of neighboring Wisconsin also strongly opposed the Grams bill, saying "[w]e need to protect the wilderness character of this spectacular area" not add "motor use to the area called within Wisconsin 'the canoe country.'"²⁴⁸

By the end of July, Murkowski scheduled a mark-up session for the full Senate Energy and Natural Resources Committee on Grams' Boundary Waters bill. As expected, the committee approved the Grams bill on an 11-9 party-line vote on July 30th.²⁴⁹

Wellstone finally announced the introduction of his own BWCAW bill just prior to the senate committee vote. His legislation called for opening two of the three contested portage trails to truck and jeep traffic, increasing motorboat quotas on Basswood Lake, allowing a motorized piston bully to groom a ski trail within the wilderness, and lending support for a new snowmobile trail in the Echo Trail corridor along the edge of the wilderness.²⁵⁰ The positive aspects of Wellstone's bill included closing small Canoe Lake to motorboat use, eliminating towboat use on Basswood Lake, and adding about 21,000 acres to the wilderness (though allowing timber access roads in these wilderness additions).²⁵¹

244. See *id.*; see also Friends of the Boundary Waters Wilderness, *Fact Sheet: Comparison of Existing Law to New Legislation*, BWCA WILDERNESS NEWS, Summer 1997, at 5, 5; *The Three Bears*, STAR-TRIB., Sept. 7, 1997, at 24A.

245. See *Boundary Waters Canoe Area Wilderness: Hearings on S. 783 Before the Subcomm. on Forests and Public Lands of the Senate Comm. on Energy and Natural Resources*, 105th Cong. (1997).

246. See *id.* at 9.

247. See *id.* at 22 (statement of Lyle Laverty, U.S. Forest Service).

248. *Id.* at 19 (statement of Sen. Russell D. Feingold, Wisconsin).

249. See S. Rep. No. 105-80, at 3 (1997).

250. See S. 1085, 105th Cong. §§ 2-4 (1997).

251. See *id.*; see also Friends of the Boundary Waters Wilderness, *supra* note 244, at 5.

The Senate committee did not consider the Wellstone bill, nor did it play a role in subsequent Senate action. None of the major players in the BWCAW dispute endorsed the Wellstone bill; the wilderness community opposed it, and CWCS condemned it. Wilderness supporters, however, continued to work with Wellstone in opposing Grams' bill, which Wellstone vowed to block.

J. House Action

On the weekend just prior to the Senate committee action, in late July 1997, Representative Helen Chenoweth (R-ID) set the stage for the forthcoming House action on Oberstar's legislation. Chenoweth, a right wing, antiwilderness conservative with close ties to the wise use militia movements, chaired the new House Subcommittee on Forests and Forest Health.²⁵² Chenoweth announced an official subcommittee tour to the Trout Lake portage arranged not by the U.S. Forest Service, but by Oberstar, CWCS and a local county land commissioner with ties to the Wise Use movement, a loose national antienvironmental movement to which CWCS belonged.²⁵³ Chenoweth, Grams, Oberstar, and Vento visited the Trout Lake Portage where they found a heavily loaded motorboat (with three outboard motors) waiting for them. CWCS expected them to be unable to push the boat across the portage on portage wheels. Despite the heavy load, however, and in large part due to Vento's energetic effort, the congressional delegation pushed the boat across the portage with relative ease.²⁵⁴ Following the motorboat, wilderness advocates easily transported an extra-long 26-foot voyageur canoe on portage wheels across the portage to Trout Lake to demonstrate the ease of portaging even big boats without trucks in the wilderness.

Later that afternoon, Chenoweth held a town hall listening session at Lake Vermilion, not too far from Trout Portage, where CWCS had hoped to dominate the event. Local prowilderness residents also turned out, however, accounting for about one-third of the crowd. Still, Chenoweth used the weekend as a pretense for holding hearings in her subcommittee on Oberstar's BWCAW legislation in Washington.

Chenoweth scheduled her subcommittee hearing on BWCAW legislation for early September. In preparation for the hearing, the Boundary Waters received significant new help from two other members of the Minnesota congressional delegation.

252. See Jim Oberstar, Press Release, *Oberstar, Chenoweth to Visit BWCAW*, June 19, 1997, available in 1997 WL 4434087.

253. *Id.*

254. See *Boundary Waters Canoe Area Wilderness: Hearings on H.R. 1739 and H.R. 2149 Before the House Subcomm. on Forests and Forest Health*, 105th Cong. (1997) (statement of Sen. Helen Chenoweth, Idaho) [hereinafter *H.R. 1739 Hearings*] (not included in CIS microfiche; available at <<http://web.lexis-nexis.com/congcomp>>).

Representatives Jim Ramstad and David Minge circulated a "Dear Colleague" letter to fellow House members in opposition to the Oberstar bill.²⁵⁵ They quickly garnered thirty signatures on this letter, mostly from Republican members, as a strong show of opposition to Oberstar's legislation from the majority party. Ramstad, a member of the moderate proenvironment House Republican block, brought his group's influence to bear on the Boundary Waters; Minge, who has personally visited the BWCAW, brought his ties with moderate House Democrats. This letter took some political courage, since Oberstar, as the ranking Democrat on the House Transportation Committee, sat in a powerful position to reward friends or punish enemies with transportation projects on the massive Inter-modal Surface Transportation Efficiency Act (ISTEA)²⁵⁶ which was working its way through committee. Still, both Minnesotans felt strongly enough about protecting the BWCAW to initiate the Dear Colleague letter.²⁵⁷

Both Ramstad and Minge formally testified against Oberstar's legislation at the hearing, further heightening their opposition to the measure.²⁵⁸ John Galland, Pam Leschak of Northeastern Minnesotans for Wilderness, Becky Rom, and Carl Zichella of the Sierra Club all testified in favor of Vento's bill and in opposition to Oberstar's bill.²⁵⁹ Guy Holmes, veterinarian Edward Pavek, Seagull Lake resident Ardis David, Tom Bakk, and long-time Ely wilderness foe John Smrekar all testified in favor of Oberstar's bill.²⁶⁰ No votes on Oberstar's bill were held during the subcommittee hearing in September. The votes would not occur until a subcommittee mark-up session in October.

Chenoweth's subcommittee met on October 7th to mark up Oberstar's bill. Vento's Boundary Waters bill was not used as a vehicle for the mark-up session. Representative Vento, a member of the subcommittee, vigorously objected to the Oberstar bill and offered several amendments. These amendments were all defeated, however, mostly on party-line votes controlled by Chenoweth.²⁶¹ Though not a member of the panel, Oberstar was allowed to participate and debate Vento as if he was

255. See Friends of the Boundary Waters Wilderness, *Congressional Motor Bills Still Threaten Boundary Waters in 1998*, BWCA WILDERNESS NEWS, Winter 1998, at 1.

256. Pub. L. No. 105-178, 112 Stat. 107 (1998).

257. See Letter from Rep. Jim Ramstad (R-MN) and Rep. David Minge (D-MN) to Colleague (Sept. 4, 1997) (on file with authors).

258. See *H.R. 1739 Hearings*, *supra* note 245 (statements of Rep. Jim Ramstad, Minnesota, and Rep. David Minge, Minnesota); see also Gregg Aarnot, *2 Congressmen Want BWCA Rules Left As Is*, STAR-TRIB., Sept. 10, 1997, at 3B.

259. See *H.R. 1739 Hearings*, *supra* note 245.

260. See *id.*

261. See H.R. Rep. No. 105-500, at 3-4 (1998).

a member of the subcommittee.²⁶² Oberstar's bill was approved and passed on to the full committee.²⁶³

On October 22nd, Don Young's full Resources Committee approved Oberstar's bill on a 22-7 vote.²⁶⁴ Chenoweth put forward a package of Vento's amendments that she had helped defeat at the subcommittee, which were approved. Chenoweth's package included, for example, a provision forbidding any direct or indirect federal subsidy for portage operations.²⁶⁵

Oberstar again was allowed to sit and debate the issue as if a member of the full committee. He had embraced many of the other anti-environmental bills pushed by Young, Chenoweth, and other right-wing Republicans in order to advance his own legislation,²⁶⁶ literally kissing Chenoweth to thank her for her support after the final committee vote.²⁶⁷

The Resources Committee vote came the day after The Wilderness Society released a new nation-wide survey showing huge opposition to increasing motorized uses in the BWCAW.²⁶⁸ By nearly a five-to-one margin (74%-15%), Americans indicated that they opposed increasing the use of motorized boats, trucks, and jeeps inside the Boundary Waters Canoe Area Wilderness.²⁶⁹

Congress did not take up the BWCAW motorization bills again in 1997, since the first session of the 105th Congress adjourned in November. Just prior to adjournment, however, the Clinton Administration released a new Statement of Administration Policy (SAP) showing strong opposition to the Grams and Oberstar legislation, stating: "The quality of the wilderness setting has improved by the portages' closure."²⁷⁰

262. See Philip Brasher, *House Committee Clears BWCA Portage Bill*, ASSOC. PRESS, Oct. 22, 1997, available in 1997 WL 2556812.

263. See *id.*

264. See H.R. Rep. 105-500, at 7.

265. See *id.* at 5.

266. See H.R. Rep. 105-500; see also *BWCAW Portages Bill Cleared by House Panel*, MESABI DAILY NEWS, Oct. 23, 1997, at A1. Oberstar took a number of bad environmental votes on such issues as forest road subsidies, limiting national monuments, grazing, and more, and his environmental voting record from the League of Conservation Voters plummeted from a score of 80 percent in the 103d Congress to just 31 percent in the first sessions of the 105th Congress. See League of Conservation Voters, *1998 National Environmental Scorecard* (visited Nov. 13, 1998) <<http://scorecard.lcv.org/member.cfm?id=3693>>; League of Conservation Voters, *1994 National Environmental Scorecard* (visited Nov. 13, 1998) <<http://www.lcv.org/lcv94/House/oberstar.html>>.

267. See Brasher, *supra* note 262.

268. See Friends of the Boundary Waters Wilderness, *National Poll Shows 5-1 Opposition to More Motors in Boundary Waters Wilderness!*, BWCA WILDERNESS NEWS, Autumn 1997, at 5, 5 [hereinafter *National Poll*]; see also Wilderness Society Press Release, *By Five-to-One Margin, Americans Oppose Increase of Motorized Activities in Boundary Waters Wilderness*, Oct. 21, 1997.

269. See *National Poll*, *supra* note 268, at 5.

270. Friends of the Boundary Waters Wilderness, *Clinton Administration Steps Up Opposition to Grams, Oberstar Bills*, BWCA WILDERNESS NEWS, Winter 1998, at 3, 3.

K. *The Inter-modal Surface Transportation Efficiency Act (ISTEA)*²⁷¹

Congress reconvened for its second session in late January 1998. Action on the Grams and Oberstar bills did not occur early in the session, as some wilderness advocates had feared. The opposition to this legislation from the Administration, the moderate House Republicans, individual Senators and others, all helped to slow down any momentum for the bills.

Opposition to the legislation surfaced in other ways around the nation, particularly in various magazines and newspapers. The Washington Post ran a front-page story on the day of the House committee vote, and magazines like *Audubon*, *Canoe & Kayak*, *Paddler*, and others ran articles or updates on the Boundary Waters controversy.²⁷² Even the venerable *National Geographic* reported on the conflict.²⁷³

The environmental community had long feared that the massive \$200 billion ISTEA transportation bill would give Oberstar his opportunity to pass his Boundary Waters motorization bill. But still, as the spring progressed and as ISTEA passed the House and Senate, nothing appeared in ISTEA related to the BWCA Wilderness.

Finally, in May 1998, as the House and Senate finished final negotiations in the ISTEA conference committee, Oberstar (one of the three House conferees) saw his opportunity. When the lead Senate conferee opened the way for unrelated riders on the conference committee bill, Oberstar struck.

Even with his considerable clout on the pork barrel bill, however, Oberstar knew he could not automatically attach his Boundary Waters bill to ISTEA. He therefore approached Representative Bruce Vento, his long-time adversary on the BWCAW, to see if he could work out a compromise. Vento feared that Oberstar might sooner or later pass the entire bill and reluctantly agreed. The compromise opened two of the three contested portage trails (Prairie and Trout Portages) to motor vehicle use, and closed two small lakes in the eastern BWCAW (Canoe and Alder Lakes) to motorboat traffic.²⁷⁴ The phase-out of motorboat use on much

271. Pub. L. No. 105-178, 112 Stat. 107 (1998).

272. See, e.g., Kevin Proescholdt, *Boundary Waters Wilderness Attacked in Congress*, WILD EARTH, Spring 1998, at 54; Kevin Proescholdt, *Extremists Threaten Boundary Waters*, CANOE & KAYAK MAGAZINE, May 1998, at 38; Kevin Proescholdt, *Minnesota's Boundary Waters Wilderness Threatened in Congress*, PADDLER MAGAZINE, June 1998, at 51; Karl Vick, *Ripples of Discontent: Fight Resurfaces over Motorboat Access in Minnesota Wilderness*, WASH. POST, Oct. 22, 1997, at A1; Ted Williams, *Compromising Wilderness: Incite*, AUDUBON, Sept. 19, 1996, at 28.

273. See, e.g., *Paddles or Propellers?*, NATIONAL GEOGRAPHIC, May 1998, at 139.

274. See Bill Salisbury & John Myers, *Legislators Reach Deal on BWCA*, ST. PAUL PIONEER PRESS, May 19, 1998, at 1A.

of Seagull Lake that Oberstar had earlier tried to eliminate remained unaffected and in place.²⁷⁵

The environmental community strongly opposed the Oberstar-Vento compromise for allowing truck and jeep traffic in the wilderness, as did Minnesota's leading newspaper.²⁷⁶ Representatives Ramstad and Minge fought it as well, as did Senators Feingold, Wellstone, Harkin, and others, but with Vento's acquiescence, could not prevail. Oberstar succeeded in attaching his rider to ISTEА in the conference committee, and both the Senate and House passed the bill on May 22nd.²⁷⁷ President Clinton signed the measure into law in early June, but not without mentioning his opposition to the Boundary Waters rider.²⁷⁸

L. *The Future*

Passage of the BWCAW rider on the ISTEА transportation bill did not end the debate over the Boundary Waters, the nation's most embattled wilderness. Within weeks of the passage of ISTEА, for example, The Wilderness Society listed the BWCA Wilderness as one of the fifteen most endangered wildlands in the nation, threatened by continued motorboat and truck access.²⁷⁹

In the short-term, the struggle continues over the implementation of the new amendment. The language of the amendment allows motor vehicles on the wilderness portage trails, but does not require the trucks and jeeps.²⁸⁰ The U.S. Forest Service, to its credit, announced that in implementing the new amendment, the agency will consider a range of options, including motorized and non-motorized alternatives. The environmental community continues to advocate implementation strategies that favor non-motorized over motorized uses, and those that have the least impact on wilderness values. As this article goes to press, however, the Forest Service has amended its Superior National Forest Plan to allow motorized use of the Prairie and Trout Lake portages, and is expected to award motorized concessions for summer 1999.

In the long term, wilderness supporters recognize that the existence of continued motorboat and truck access to the Boundary Waters Wilderness will always engender further conflict and controversy while con-

275. See *id.*; see also Greg Gordon & Tom Hamburger, *Oberstar, Vento Strike Compromise on BWCA*, STAR-TRIB., May 19, 1998, at 1A.

276. See *Truck Portages*, STAR-TRIB., May 21, 1998, at 24A.

277. See ISTEА § 1212, 112 Stat. 107, 198 (1998).

278. See Friends of the Boundary Waters Wilderness, *Oberstar Deal with Vento Allows Trucks on Two Wilderness Portages!*, BWCA WILDERNESS NEWS, Spring/Summer 1998, at 1, 1-2.

279. See The Wilderness Society, *Report: 15 Most Endangered Wildlands* (visited Dec. 16, 1998) <<http://www.wilderness.org/standbylands/15most/>>.

280. The amendment reads: "Nothing in this Act shall be construed to prevent the operation of motorized vehicles to transport boats across the portages between the Moose Lake Chain and Basswood Lake, Minnesota, and between Vermilion Lake and Trout Lake, Minnesota." ISTEА § 1212, 112 Stat. at 198.

tinuing to degrade and cheapen the wilderness character of the canoe country. Supporters believe the ultimate destiny of the BWCA Wilderness is a full, complete wilderness, a true wilderness free from all motors and all other uses incompatible with wilderness.

After the ISTEPA amendment appeared, for example, long-time wilderness attorney Brian O'Neill predicted, "[We] will embark on a 10-year campaign to get every single motor out of the Boundary Waters."²⁸¹ Advocates like O'Neill want to finally pull the Boundary Waters completely into the National Wilderness Preservation System and eliminate all current exceptions to the standards of the 1964 Wilderness Act. They will not rest until that protection is achieved and true wilderness is preserved for future generations as a priceless legacy, an "enduring resource of wilderness."²⁸²

281. See Greg Gordon, *Vento: Making BWCA Deal Was Painful*, STAR-TRIB., May 20, 1998, at 3B.

282. Wilderness Act § 2(c), 16 U.S.C. § 1131(c) (1994).