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Defining Wilderness: From McCloskey to Legislative, Administrative and Judicial Paradigms

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NOTE

DEFINING WILDERNESS: FROM MCCLOSKEY TO LEGISLATIVE, ADMINISTRATIVE AND JUDICIAL PARADIGMS

INTRODUCTION

Wilderness does not exist because Nature created it as such; it exists solely because man has not yet intruded upon it.[1]

Following two hundred years of American pioneering in agricultural, industrial and urban development, very little remains of the American wilderness.[2] In response to growing environmental awareness, Congress enacted the Wilderness Act of 1964,[3] promulgating policy intended to secure the resources and attributes of wilderness areas for future generations.[4] The Act established the National Wilderness Preservation System (NWPS), composed of federally owned lands designated as wilderness by Congress.[5] The language of the Act requires that wilderness areas be "administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness."[6] The purpose of the Act is to insure that in years to come, people can enjoy wilderness areas in their natural state.[7]

In 1966, Sierra Club Chairman Michael McCloskey published an article entitled *The Wilderness Act of 1964: Its Background and Meaning*[8] which traced the changing notions of wilderness in America from the time of the early North American explorers. The article provides unique insight into the legislative history of the Wilderness Act and analyzes the statute, highlighting the shortcomings of the Act's language and describing foreseeable conflicts arising from them. Most importantly, McCloskey exposes subtle ambiguities in the Act's language.

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1. McMichael v. United States, 355 F.2d 283, 286 (9th Cir. 1965).

2. *See* Ray Wheeler, *The BLM Wilderness Review* (visited Sept. 14, 1998) <http://www.suwa.org/WATE/review.html>; *see also* GREGG EASTERBROOK, A MOMENT ON THE EARTH, 11 (1995) (noting the sentiments of Aldo Leopold who said that "[w]ilderness is a resource that can shrink but not grow"). *See generally* RODERICK NASH, WILDERNESS AND THE AMERICAN MIND (3d ed. 1982) (tracing changing attitudes of Americans toward wilderness); MAX OELSCHLAEGER, THE IDEA OF WILDERNESS: FROM PREHISTORY TO THE AGE OF ECOLOGY (1991) (offering a historical perspective on the development of the idea of wilderness).

3. Pub. L. No. 88-557, 78 Stat. 890 (codified as amended at 16 U.S.C. §§ 1131–1136 (1994)).

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

5. *See id.*

6. *See id.*

7. *See* H.R. REP. NO. 88-1538, at 8 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3615, 3617.

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

McCloskey's article identified several ambiguous elements of the wilderness act, including the prohibition of incompatible uses in wilderness areas,[9] installations,[10] nonconforming equipment and facilities,[11] and nonconforming measures to control fire, insects and disease.[12] McCloskey also pointed out ambiguities regarding limitations on grazing,[13] the role of the President of the United States in designating wilderness areas,[14] access to inholdings in wilderness,[15] and the size of the wilderness system.[16] This Note comments on McCloskey's concerns regarding the Act's definition of "wilderness" and describes legislative, administrative, and judicial reaction to parts of the Act.

Part I describes the Act's history, providing an overview of the Wilderness Preservation System and the exclusive statutory authority Congress reserved to itself to designate wilderness areas. It reviews McCloskey's concerns regarding the question of whether Congress intended to establish an exclusive statutory system for reserving "wilderness-type" areas on federal land. Part II examines the definition of wilderness developed through congressional, agency, and judicial application of wilderness designation guidelines. In analyzing the definition of wilderness, this Note pays particular attention to McCloskey's recognition of the definition's elasticity, and describes his prediction of conflicts surrounding the definition of wilderness. Part III concludes that while notions of wilderness encompass a range of ideas, pragmatism correctly qualifies idealized views of wilderness.

I. OVERVIEW

A. *The Path of Wilderness*

The Property Clause of the Constitution gives Congress the power to make all necessary rules and regulations respecting territory or other

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9. Section 2(c) of the Wilderness Act states:

> Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.

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

10. *See* McCloskey, *supra* note 8, at 308.
11. *See id.* at 309.
12. *See id.* at 311.
13. *See id.*
14. *See id.* at 312.
15. *See id.* at 313.
16. *See id.* at 314.

property belonging to the United States.[17] Congress exercised this power in 1964 when it adopted the Wilderness Act, creating the National Wilderness Preservation System.[18] Prior to 1964, national forest primitive areas were established and managed by forest administrators rather than by statute.[19] With the promulgation of the Act, Congress officially charged the federal land agencies of the executive branch with managing designated wilderness areas.[20] Congress, however, did not create or designate any single agency to manage wilderness areas.[21] By giving wilderness management authority to a variety of agencies, Congress opened the door to a variety of wilderness policies which reflect a long history of debate regarding what constitutes wilderness.

The recognition of the unique place of wilderness within nature may have originated with the writings of Ralph Waldo Emerson and Henry David Thoreau.[22] Spearheading a philosophy of wilderness,[23] Emerson and Thoreau influenced the way many Americans view nature.[24] Although their statements are sometimes amorphous, one should not presume political naiveté.[25]

The philosophies of Emerson and Thoreau spurred legislative momentum for wilderness preservation that culminated in the late-nineteenth century when Congress selected public lands for protection

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17. *See* U.S. CONST. art. IV, § 3 ("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; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."). The house report on the Wilderness Act states that "by establishing explicit legislative authority for wilderness preservation, Congress is fulfilling its responsibility under the U.S. Constitution to exercise jurisdiction over the public lands." H.R. REP NO. 88-1538, at 12 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3615, 3621.

18. *See* WILLIAM O. DOUGLAS, A WILDERNESS BILL OF RIGHTS 98 (1965). Congressional creation and regulation of wilderness areas for public recreational purposes has since been well established. *See* McMichael v. United States, 355 F.2d 283, 286 (9th Cir. 1965); Izaak Walton League of America v. St. Clair, 353 F. Supp. 698, 710 (D. Minn. 1973), *rev'd on other grounds*, 497 F.2d 849 (8th Cir. 1974); Parker v. United States, 309 F. Supp. 593, 598 (D. Colo. 1970).

19. *See* Mitchel P. McClaran, *Livestock in Wilderness: A Review and Forecast*, 20 ENVTL. L. 857, 860 (1990). Primitive areas are defined in part as "[a]ll areas so designated by the Secretary of Agriculture on the effective date of the Wilderness Act and that have not yet been permanently designated as wilderness or to other use by act of Congress." FOREST SERV., U.S. DEP'T OF AGRIC., FOREST SERVICE MANUAL ch. 2320.5(6) (1990) [hereinafter FOREST SERVICE MANUAL].

20. Congress may delegate the power to manage federal lands to the Executive. *See, e.g.*, Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963); *see also* Alva W. Stewart, *Wilderness Protection: A Bibliographic Review* 4 (Vance Bibliographies Pub. Admin. Series: Bibliography #P 1642) (noting that the National Wilderness Preservation System is composed of lands under the jurisdiction of the National Forest Service, the National Park Service, the U.S. Fish and Wildlife Service, and the Bureau of Land Management).

21. *See* Interview with Federico Cheever, Associate Professor of Law, University of Denver College of Law, in Denver, Colo. (Oct. 5, 1998).

22. *See* DANIEL G. PAYNE, VOICES IN THE WILDERNESS 29–54 (1996).

23. *Cf.* MICHAEL FROME, THE FOREST SERVICE 175 (2d ed. 1984); NASH, *supra* note 2, at 84–95.

24. *See* PAYNE, *supra* note 22, at 29.

25. *See id.* at 30.

from uncontrolled development.[26] The movement for wilderness preservation achieved practical results with the establishment of the world's first national parks at Yosemite in 1864 and Yellowstone in 1872.[27] Wilderness preservation advanced further when Congress established national forests in 1891 under the Forest Reserve Act (FRA).[28] The impetus for this legislation was the need to effectively manage watersheds and protect timberlands from the fraudulent private acquisition of woodlands that accompanied the nation's westward expansion.[29] The FRA marked the beginning of a national preservation system, authorizing the President to designate public lands as "forest reserves."[30]

National forest management was based primarily on property and resource values until the early 1900s.[31] The Forest Service in 1924 designated the first reservation of federal land as "wilderness" when it established the Gila Wilderness in New Mexico.[32] A landmark in wilderness history, the reservation was significant because it signaled to Congress that the Forest Service would unilaterally preserve wilderness type areas. The move toward the protection of wilderness in national forests through legislative action began as early as 1948 when Congress first asked the Library of Congress's Legislative Reference Service to study the "desirability" of a federal policy and program of wilderness preservation.[33] Prepared and issued to Congress in 1949, the resulting report compiled data on wilderness preservation policies and agency views.[34] It proposed the launching of wilderness preservation programs in recognition of the

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26. *See* FOREST SERV., U.S. DEP'T OF AGRIC., AN ENDURING RESOURCE OF WILDERNESS (1989) [hereinafter FOREST SERVICE, ENDURING RESOURCE].

27. *See* McCloskey, *supra* note 8, at 295 & n.29. *See generally* C. FRANK BROCKMAN, RECREATIONAL USE OF WILD LANDS 259 (1959) (discussing the establishment of wildland recreational areas throughout the world); CHAS. E. DOELL & GERALD B. FITZGERALD, A BRIEF HISTORY OF PARKS AND RECREATION IN THE UNITED STATES 12–22 (1954) (reviewing park development in foreign countries); Lee Marriman Talbot, *Wilderness Overseas*, *in* WILDLANDS IN OUR CIVILIZATION 75–80 (David Brower ed. 1964) (discussing the worldwide trend of providing recreational wilderness areas, a trend which stemmed from the establishment of the first American national parks).

28. Law of Mar. 3, 1891, ch. 561, 26 Stat. 1095 (codified as amended in scattered sections of 16 U.S.C. and 43 U.S.C.) (repealed 1976); *see* HEROLD K. STEEN, THE U.S. FOREST SERVICE: A HISTORY 26 (1991).

29. *See* GUNDARS RUDZITIS, WILDERNESS AND THE CHANGING AMERICAN WEST 23 (1996).

30. *See* MICHAEL FROME, BATTLE FOR THE WILDERNESS 227 (1997); Richard Bury & Gary Lapotka, *The Making of Wilderness: Land Use and the National Forest System*, 21 ENV'T 12, 13 (1979).

31. *See* Federico Cheever, *The United States Forest Service and National Park Service: Paradoxical Mandates, Powerful Founders, and the Rise and Fall of Agency Discretion*, 74 DENV. U. L. REV. 625, 628 (1997) (providing a historical background on the Forest Service within a discussion of the National Park Service).

32. *Cf.* FROME, *supra* note 30, at 228 (referencing the Gila designation as "one manifestation of [Aldo] Leopold's lifelong call for a 'land ethic' and 'ecological conscience'").

33. S. REP. NO. 88-109, at 6 (1963).

34. *See id.*

devastation caused by "man's exploitation" in other parts of the world.[35] The conservationist movement strengthened in 1951 through the efforts of The Wilderness Society leader Howard Zahniser.[36] Along with David Brower of the Sierra Club, Zahniser called for the establishment of a movement to enlist public support and congressional action in the creation of a national wilderness preservation system.[37]

In 1956, Democratic Senator Hubert Humphrey of Minnesota and Republican House Representative John P. Saylor of Pennsylvania introduced the first wilderness bill.[38] Between June 1957[39] and May 1964, eighteen hearings, six hundred witness appearances, sixty-six rewrites and over six thousand pages of testimony were documented on the wilderness proposal in both Washington D.C. and the West.[40] On September 3, 1964, the Wilderness Act of 1964 became law.[41]

The Act assured that continued settlement and development did not "occupy and modify all areas within the United States . . . leaving no lands designated for preservation and protection in their natural condition . . . ."[42] One goal of establishing a system of protected lands is to give the American people the opportunity to use and enjoy the wilderness in a manner consistent with recreational, scenic, scientific, educational, conservation and historic use benefits.[43] The Act brought all federal public lands with the wilderness designation under the umbrella of the NWPS,[44] thus ensuring that the lands remained off-limits to any de-

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35. *Id.*

36. *See* LLOYD C. IRLAND, WILDERNESS ECONOMICS AND POLICY 31 (1979).

37. *Cf.* FROME, *supra* note 23, at 181.

38. *See* S. REP. NO. 88-109, at 7.

39. The first hearings were conducted by the Interior and Insular Affairs Committee on June 19 and 20, 1957, under Senator James E. Murray's chairmanship. *See* S. REP. NO. 88-109, at 7.

40. *See* Ralph Swain, USFS Region 2 Wilderness Specialist, *The Wilderness Act Revisited* 5 (presentation document prepared for wilderness managers, specialists and non-agency wilderness conservationists) (on file with the author).

41. *See* Pub. L. No. 88-557, 78 Stat. 890 (codified as amended at 16 U.S.C. §§ 1131-1136 (1994)).

42. Brian T. Hansen, Note, *Reserved Water Rights for Wilderness Areas—Current Law and Future Policy*, 9 VA. ENVTL. L.J. 423, 423 (1990) (citing 16 U.S.C. § 1131(a) (1988)). The original intent of the Wilderness Act was to designate some 14,000,000 acres of wilderness. *See* Colloquy, *Issues in Wilderness Designation on the Colorado Plateau*, 13 J. ENERGY NAT. RESOURCES & ENVTL. L. 393, 398 (1993). In 1993, there were 93,000,000 acres of designated wilderness in the United States. Nationally, this figure represents approximately four percent of the total area of the country. *See id.* at 395. Much of this area is concentrated in the West with wilderness designations covering 1.5% of Utah, 7.5% of Idaho, 9% of Washington, and more than 15% of Alaska. *See id.*

43. *See* 16 U.S.C. § 1 (1994) (stating that the purpose of national parks is to conserve and protect them, but allowing use which will leave them "unimpaired"); 43 C.F.R. § 8560.0-2 (1997).

44. The term "umbrella" represents the idea that the NWPS has no real authority. Rather, the system exists as a concept created in section 2(a) of the Wilderness Act under which a variety of administrative agencies including the Forest Service, Bureau of Land Management, National Wildlife Preservation System, and the Department of the Interior operate. *See* DYAN ZASLOWSKY & THE WILDERNESS SOCIETY, THESE AMERICAN LANDS 234–40 (1986) (arguing that the word "system" is misleading when the term articulates the notion of a broad and clearly articulated network, and arguing that the NWPS is woefully inadequate).

grading development or activity. Today, the NWPS is composed of lands under the jurisdiction of four government agencies: the Forest Service, National Park Service, U.S. Fish and Wildlife Service and Bureau of Land Management.[45] The Department of Agriculture's U.S. Forest Service and the Interior Department's National Park Service administer more than three-fourths of the System.[46] Agencies which administer wilderness areas in the NWPS began management in 1964 of a total area of 9.1 million acres;[47] and today this management responsibility has increased to over 104 million acres[48] of designated wilderness at 474 locations.[49] With these areas a mere five percent of the United States' land base has wilderness protection.[50]

The establishment of statutory wilderness designation in the Act was the result of nearly eight years of congressional debate,[51] and public debate about it has continued since its inception.[52] One example of the arguments made against the establishment of wilderness areas is that it prohibits certain uses within those lands designated as wilderness. Specifically, debate centers on the conflict between multiple use and single use paradigms of preservation.[53] Multiple use refers to a balancing of conservation principles and commercial enterprises.[54] It is the management of all renewable surface resources of the national forests, a harmonious combination of uses not necessarily based on economic return.[55]

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45. *See* Stewart, *supra*, note 20, at 4.

46. *See id.*

47. *See* FROME, *supra* note 23, at 183.

48. *See Implementation of Wilderness Act: Oversight Hearing Before the Subcomm. on Nat'l Parks and Public Lands and the Subcomm. on Forest and Forest Health of the Comm. on Resources House of Representatives*, 105th Cong. 1 (1997) [hereinafter *Oversight Hearing*] (statement of Rep. Hansen, Chairman, Subcomm. on Nat'l Parks and Public Lands).

49. *See* FOREST SERVICE, ENDURING RESOURCE, *supra* note 26.

50. *See* The Wilderness Society, *Stand by Your Lands, American Wilderness: The Future of Wilderness* (visited Sept. 16, 1998) <http://www.wilderness.org/standbylands/wilderness/future.htm>.

51. *See* S. REP. NO. 88-109, at 7 (1963).

52. *See, e.g.*, *Oversight Hearing*, *supra* note 48; *To Amend the Wilderness Act of 1964: Hearing on S. 1010 Before the Subcomm. on Minerals, Materials, and Fuels and the Subcomm. on Public Lands of the Comm. on Interior and Insular Affairs*, 93rd Cong. (1973). As stated in the Oversight Hearing:

> We will hear testimony today which should amaze the members of this committee. We will hear of people being punished for trying to save their own lives, of property rights being violated, of Boy Scouts being excluded from Wilderness Areas, of wildlife being allowed to perish and people simply being excluded from the "use and enjoyment" of our wilderness areas.

Oversight Hearing, *supra* note 48, at 1–2 (opening statement of Rep. Hansen, Chairman, Subcomm. on Nat'l Parks and Public Lands); *see also* Kenneth R. Sheets et al., *The Tug of War Over Use of Federal Land*, U.S. NEWS & WORLD REPORT, Mar. 8, 1982, at 57–59 (discussing the battle over federal land classification among developers, environmentalists, ranchers, and tourists).

53. For a discussion of the variables which make up the multiple use concept, see DOUGLAS, *supra* note 18, at 87–97; RUDZITIS, *supra* note 29, at 28–30.

54. *See* 16 U.S.C. § 531(a) (1994).

55. *Cf. id.*

The single use paradigm resists the potential for a free-wheeling practice of putting every section of the public domain to all possible uses.[56] Critics of the Wilderness Act claim that preservation in a manner consistent with the Act is contrary to multiple use goals,[57] that wilderness is a single use concept that excludes enterprises such as commercial forestry.[58] Proponents, however, point out that wilderness is an interdependent piece of a larger picture, and that wilderness as defined in the Act allows for multiple uses.[59]

At the forefront of the wilderness preservation movement, The Wilderness Society (TWS) believes that wilderness designation is consistent with multiple use both in fact and in law.[60] TWS notes that not only does the Act allow multiple uses such as watershed management and ecological stabilization,[61] multiple uses are consistent with public land multiple use principles established by the Multiple Use Sustained Yield Act of 1960.[62] TWS points out that existing law provides significant outdoor recreation opportunities in protected areas, including hunting, fishing, hiking and camping.[63] In other words, the Act does not prohibit all uses and all purposes contrary to the preservation of wilderness itself. Rather, its goal is to limit activities degrading to the preservation of wilderness values.[64]

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56. *See* DOUGLAS, *supra* note 18, at 97. The words of Henry David Thoreau reflect the basic premise of the single use concept: "This curious world which we inhabit is more wonderful than it is convenient; more beautiful than it is useful; it is more to be admired and enjoyed than used." FROME, *supra* note 23, at 174 (quoting Thoreau).

57. *See* Dan Goldman, *Land Use: The Multiple Use Concept*, 23 ENV'T 4 (1981).

58. *See id.* at 5.

59. *See id.* at 4 (arguing that the concept of wilderness is not contrary to multiple use).

60. *See* The Wilderness Society, *Stand by Your Lands* (visited Sept. 16, 1998) <http://www.wilderness.org/standbylands/wilderness/wildernessfaq.htm>.

61. *See id.*

62. *See id.* (referring to 16 U.S.C. § 528 (1994), which states that it is congressional policy "that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes").

63. *See id.*

64. Values include the perpetuation of high quality areas representing natural ecosystems, providing an environment for indigenous plants and animals, including those threatened or endangered, maintaining watersheds and airsheds in a healthy condition and maintaining the primitive character of wilderness as a bench mark for ecological studies. *See* FOREST SERVICE, ENDURING RESOURCE, *supra* note 26. Other philosophies include more ethereal wilderness preservation values. The Forest Service of the Rocky Mountain Region, for instance, has expressly directed the preservation of values such as the "the wilderness experience," and emphasizes the themes of education, freedom, solitude, simplicity, aesthetic and mystical dimensions. FOREST SERV., U.S. DEP'T OF AGRIC., WILDERNESS MANAGEMENT PHILOSOPHY IN THE ROCKY MOUNTAIN REGION 4 (1989). Other values recognized by the Forest Service include a mental and spiritual restoration in the absence of urban pressures, and the scientific benefits obtained through this undisturbed setting. *See id.* *See generally* IRLAND, *supra* note 36, at 1 (developing a detailed framework of balancing utilitarian objectives, such as scientific and economic values with non-utilitarian objectives, such as cultural and ethical concerns, including "man's relationship to the natural world, his ability to foresee future needs, and his ability to restrain short-term activities that threaten long-term values"); RODERICK

B. *The Power to Designate Wilderness*

A discussion of the definitions of wilderness logically begins with a review of the authority vested in Congress to designate wilderness lands and the effect of this strictly circumscribed power on public land management agencies. Section 2(a) of the Wilderness Act expressly states, "No Federal lands shall be designated as 'wilderness areas' except as provided for in this chapter or by a subsequent Act."[65] Specifically, the law directs the Secretary of Agriculture and the Secretary of the Interior to identify primitive areas and to report to the President within ten years of designating a primitive area whether that area is suitable for wilderness designation.[66] The President then submits his recommendation to Congress,[67] a public hearing is held,[68] and Congress decides whether to designate the lands as wilderness.[69] If Congress approves the designation, the areas remain roadless in perpetuity.[70]

Because several federal land management agencies set aside areas with wilderness values subsequent to the passage of the Act,[71] McCloskey questioned whether Congress intended to limit the designation of wilderness lands to those created expressly by congressional action.[72] McCloskey noted that "[n]owhere does the act actually preclude the administrative reservation of areas for wilderness purposes. The Act merely bars assignment of the label 'wilderness area' by other than [c]ongressional authority."[73] McCloskey is correct in his conclusion that the exclusive power of Congress is "crystallized" by this language.[74] The term "wilderness" is only vested with meaning and authority under the Act when Congress expressly designates land as such. McCloskey, however, based his concern on the fact that administrative agencies define wilderness areas not designated as such by Congress.[75] Although agencies generally welcome congressional mandates that relieve agency decision makers of negative fallout from politically sensitive decisions,[76] agencies have nevertheless asserted their autonomy in setting aside areas with

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FRAZIER NASH, THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS (1989) (discussing the movement away from utilitarian values).

65. Wilderness Act § 2(a), 16 U.S.C. § 1131(a) (1994).

66. *See* Wilderness Act § 3(b), 16 U.S.C. § 1132(b).

67. *See* Wilderness Act § 3(c), 16 U.S.C. § 1132(c).

68. *See* Wilderness Act § 3(d)(1)(B), 16 U.S.C. § 1132(d)(1)(B).

69. *See* Wilderness Act § 3(c), 16 U.S.C. § 1132(c).

70. Perpetuity is implied by section 2(a). *See* Wilderness Act § 2 (a), 16 U.S.C. § 1131(a). However, the modification or adjustment of boundaries is permitted by section 3(e). *See* Wilderness Act § 3(e), 16 U.S.C. § 1132(e).

71. *See* McCloskey, *supra* note 8, at 305.

72. *See id.*

73. *Id.* at 306.

74. *Id.*

75. *See id.* at 305.

76. *Cf.* Robert L. Fischman, *The Problem of Statutory Detail in National Park Establishment Legislation and Its Relationship to Pollution Control Law*, 74 DENV. U. L. REV. 779, 804 (1997).

wilderness values.[77] There can be discrepancies, however, between the quality of wilderness in areas designated by Congress and by agencies because Congress, federal agencies, and the judiciary have varying interpretations regarding just what values define wilderness.

II. THE STRICTNESS OF THE QUALIFYING DEFINITION OF "WILDERNESS"

The definition of "wilderness" adopted by Congress in the Wilderness Act states:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of underdeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.[78]

In reviewing the language adopted by Congress, McCloskey addressed a major ambiguity regarding the statutory definition of "wilderness." The issue, simply stated, is by what criteria will agencies evaluate areas for potential congressional designation as wilderness, and will such criteria compromise wilderness preservation values? In his treatment of this question, McCloskey cited two points of concern. First, he pointed out that the Act's definition itself requires further congressional explanation following Congress's unqualified use of the terms "untrammeled,"[79] "undeveloped," "retaining," and "primeval."[80] Second, he found that "[t]he wording of section 2(c) vacillates between an ideal of complete naturalness and recognition that some impairment may be accepted."[81]

Most problematic in deriving a generally acceptable definition of wilderness is the subjectivity of its characteristics. Some view wilderness as the invincible and enduring western high country, adorned with ma-

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77. *See* McCloskey, *supra* note 8, at 305.

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

79. The term "untrammeled" refers to an area "where human influence does not impede the free play of natural forces or interfere with natural processes in the ecosystem." FOREST SERVICE MANUAL, *supra* note 19, at ch. 2320.5.

80. *See* McCloskey, *supra* note 8, at 307.

81. *Id.*

jestic peaks, colorful meadows and pristine evergreen forests.[82] The history of the West influences this aesthetic perspective with its images of migrating Ute tribes and mountain men while modern day fisherman and backpackers augment this perspective.[83] Still others see wilderness in concrete terms, without roads, untouched by pollution, structures or other marks of civilization, a labyrinth of downed trees, meadows and swamps as they existed prior to human effects on the land.[84] The divergence of views on the issue of what is wilderness is not a contemporary development.

Prior to any statutory definition, definitions of wilderness included terms which expressed two extremes. Some are pejorative, such as "uncultivated or barren"[85] and "pathless waste."[86] Others are laudatory phrases describing wilderness as "a garden left to nature"[87] and "devoted to wild growth."[88] Appropriately, however, descriptions of wilderness include the terms "multitudinous and confusing collection,"[89] "a large, confused mass or tangle of persons or things."[90] This common thread of confusion lends perspective to the slew of proposals and responses to the legislative definition of wilderness set forth in the Act.

A. *Congressional Interpretation*

Statutory interpretation requires analysis based on the plain meaning of the language, particularly when Congress prescribes the definition of a term.[91] Section 2(c) of the Act defines wilderness as "[a]n area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. . . . [It is a]n area of underdeveloped

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82. *See* BRIAN LITZ & LENORE ANDERSON, WILDERNESS WAYS, THE COLORADO OUTWARD BOUND SCHOOL GUIDE FOR ENVIRONMENTAL SOUND BACKCOUNTRY TRAVEL 17 (1993).

83. *See id.*

84. *See* DOUGLAS, *supra* note 18, at 29.

85. FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 2713 (1933) [hereinafter FUNK & WAGNALLS].

86. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2926 (2d ed. 1937) [hereinafter WEBSTER'S]. Colonial settlers in the seventeenth century described wilderness as a hideous and desolate place representing "a wild and savage hew." DOUGLAS, *supra* note 18, at 30 (quoting Nathaniel Morton, secretary of the Plymouth Colony, in a statement made in 1620). In fact, Daniel Webster himself, over a century prior to the passage of the Act, objected to the annexation of the Oregon, an area now comprising seventeen states. On the floor of Congress Webster asked, "What do we want of that vast and worthless area . . . ? To what use could we even put those endless mountain ranges . . . ? What could we do with the western coast of 3000 miles, rockbound, cheerless, and uninviting?" S. REP. NO. 88-109, at 37 (1963) (quoting Daniel Webster).

87. FUNK & WAGNALLS, *supra* note 85, at 2713.

88. WEBSTER'S, *supra* note 86, at 2926.

89. FUNK & WAGNALLS, *supra* note 85, at 2713.

90. WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE 2092 (Encyclopedic ed. 1977).

91. *See* United States v. Wurts, 303 U.S. 414, 417 (1938); Columbia Water-Power Co. v. Columbia Elec. Street-Railway Light & Power Co., 172 U.S. 475, 491 (1899); Arthur v. Morrison, 96 U.S. 108, 111 (1877); Union Pac. R.R. v. Hall, 91 U.S. 343, 347–48 (1875).

Federal land retaining its primeval character and influence . . . ."[92] On its face, this language suggests that wilderness exists before any of its wilderness quality is reduced or subtracted;[93] it is "an ideal concept of wilderness areas."[94] Although these concepts have been criticized as nebulous and high sounding,[95] they have in common the idea of an absence of human intervention.[96]

This idealized treatment by Congress, as McCloskey noted, is qualified by subsequent language.[97] The Act describes wilderness as:

> [W]ithout permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.[98]

In response to these qualifications, McCloskey observed:

> (1) the land apparently can have *temporary* improvements on it; (2) the land only has to *appear generally* to have been affected *primarily* by the forces of nature; and (3) the imprint of man's work merely need appear *substantially* unnoticeable. These qualifications would appear to vitiate the force of the preceding general characterizations of wilderness. How far can these qualifications go in this process of vitiation?[99]

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

93. *See* DOUGLAS, *supra* note 18, at 29.

94. S. REP. NO. 88-109, at 7 (1963).

95. *See id.*

96. *See* Daniel Rohlf & Douglas L. Honnold, *Managing the Balances of Nature: The Legal Framework of Wilderness Management*, 15 ECOLOGY L.Q. 249, 254–55 (1988).

97. *See* McCloskey, *supra* note 8, at 307–08.

98. Wilderness Act § 2(c), 16 U.S.C. § 1131(c) (1994). In the same poetic vein, in February, 1963, the Secretary of the Department of the Interior, Stewart Udall, recited what he considered "a very forceful statement of the case for wilderness legislation." *National Wilderness Preservation Act: Hearing on S. 4 Before the Comm. on Interior and Insular Affairs*, 88th Cong. 19 (1963). Secretary Udall read from an article written by the chairman of the Committee on Interior and Insular Affairs, Henry M. Jackson:

> There is a spiritual value to conservation and wilderness typifies this. Wilderness is a demonstration by our people that we can put aside a portion of this which we have as a tribute to the Maker and say, "This we will leave as we found it."
>
> Wilderness is an anchor to windward. Knowing it is there we can also know that we are still a rich nation, tending to our resources as we should, not a people in despair searching every last nook and cranny of our board or cupboard for a blade of grass or a tank of water.

Id. at 18–19 (quoting Henry M. Jackson, Chairman, Committee on Interior and Insular Affairs).

99. McCloskey, *supra* note 8, at 307.

McCloskey was concerned that the Act's language would not resolve the historical tension between the idea of wilderness as pristine and undefiled and the practical acceptance that wilderness is affected by human contact. Wilderness advocate and member of the Forest Service, Robert Marshall, however, presented a thread of principles in his own definition of "wilderness" which later would run through the statutory definition codified in the 1964 Wilderness Act.[100] Like the Act, Marshall began with idyllic prose, stating, "'Wilderness areas' are regions which . . . are sufficiently spacious for a person to spend at least a week of active travel in them without crossing his own tracks."[101] Marshall did, however, set out two specific attributes of wilderness. First, visitors to the wilderness must depend solely on their own efforts for survival.[102] Second, the areas must preserve as nearly as possible the features of a primitive environment.[103] These attributes require that wilderness areas be without roads, settlements and mechanized transportation, but not to the extent that areas with trails and temporary shelters existing prior to the advent of the "white race" be excluded.[104]

Passage of the Act did not result in a unified concept of wilderness. In a 1965 speech at the Soil Conservation Society of America, Associate Chief of the Forest Service Arthur Greeley implicitly acknowledged the varying concepts of wilderness in his attempt to guide wilderness management. He said, "Wilderness areas have different characteristics. They are not all alike. Some differences are the products of nature. Others are the result of human attitudes or of traditional patterns of use of a particular area."[105] Cognizant of the variations in agency-prepared field regulations and guidelines, Greeley clearly identified the difficulty precedent to management: defining the characteristics of wilderness.

Congress has demonstrated the tension McCloskey and Greeley pointed out. In legislation, Congress has adopted qualifications beyond those prescribed in the statute. In fact, Congress has shown that it will designate an area a "wilderness area" notwithstanding its failure to satisfy the definition of wilderness.[106] The Eastern Wilderness Act of 1975[107] is representative of Congress's use of its discretion to revise its application of the definition of wilderness. Recognizing the populous element of

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100. For background information on Robert Marshall, see ZASLOWSKY & THE WILDERNESS SOCIETY, *supra* note 44, at 209–12.

101. ROBERT MARSHALL, THE PEOPLE'S FORESTS 177–78 (1933).

102. *See id.* at 178.

103. *See id.*

104. *Id.*

105. FROME, *supra* note 23, at 184–85 (quoting from a speech delivered before the annual meeting of the Society on August 22, 1965).

106. *See* 2 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 14B.02(1)(a)(iii) (Release #12, Feb. 1996).

107. *See* Pub. L. No. 93-622, 88 Stat. 2096 (originally codified at 16 U.S.C. §§ 1131 note, 1132 note, and subsequently eliminated).

the eastern half of the United States, Congress was concerned that large scale industrial and economic growth and development were threatening the protection of wilderness-type areas.[108] As a result, Congress accepted fifteen new eastern areas into the NWPS,[109] many with characteristics clearly evidencing the effects of man's influence, such as areas previously subject to timber harvesting.[110]

B. *Agency Interpretation*

1. Forest Service

The definition of wilderness Congress included in the Wilderness Act serves as a template for the rules and regulations used by the various agencies charged with evaluating potential wilderness areas. Although the Act vests Congress with exclusive authority to designate wilderness areas, the Secretary of Agriculture is directed to recommend "primitive" areas to Congress for such designation.[111] Under the auspices of the Secretary, the Forest Service is required to protect the character of areas it recommends until further designation. Therefore, using the statutory definition of wilderness as the foundation of agency policy, the Forest Service Manual and Handbook represent examples of attempts to reconcile inconsistencies between the statutory approach to wilderness and notions of pure wilderness by establishing general wilderness designation principles.[112]

As the guidebooks by which the Forest Service evaluates wilderness characteristics for recommendation to Congress, the Manual and Handbook provide insight into the process of wilderness designation. The Manual states that, in absolute wilderness, human influence prevents an area from "retaining its purest natural form," and it characterizes absolute wilderness as being untrammeled by human foot and absent the effects of pollution.[113] The Forest Service Manual admits that few places, if any, exist which conform to these criteria.[114] In fact, the Manual states that the Act defines wilderness to be "at some point below absolute wilderness."[115] The question remains, at what point?

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108. *See* Eastern Wilderness Act, § 2(a)(1), (3), 88 Stat. at 2096.

109. *See id.* § 3(a)(1)–(15), 88 Stat. at 2097–98.

110. *See* Interview with Ralph Swain, Regional Wilderness Specialist, United States Forest Service, in Lakewood, Colo. (Oct. 1, 1998); *cf. infra* notes 154–58 and accompanying text (discussing the flexible standard by which areas with a potential to return to a natural condition are assessed).

111. Wilderness Act § 3(b), 16 U.S.C. § 1132(b) (1994).

112. *See* FOREST SERVICE MANUAL, *supra* note 19, ch. 2320.6; FOREST SERV., U.S. DEP'T OF AGRIC., FOREST SERVICE MANAGEMENT HANDBOOK ch. 7.11 (1992) [hereinafter FOREST SERVICE HANDBOOK].

113. FOREST SERVICE MANUAL, *supra* note 19, ch. 2320.6.

114. *See id.*

115. *Id.*; *see* Videotape: Wilderness Colorado's Enduring Resource (U.S. Forest Service, Region 2 (Colorado)) (on file with the University of Denver Law Library) (emphasizing the characteristic of wildness, where cycles and processes are the way of the earth).

Despite ambiguities regarding the pristineness necessary to establish an area as wilderness, Congress has continued to designate wilderness areas.[116] Attempting to deal with these ambiguities, the Forest Service seeks to establish the level of acceptable human influence in wilderness areas.[117] Ultimately, the balance between human influence and nature represents a pragmatic acceptance of wilderness characteristics somewhere between absolute wilderness and non-naturally occurring conditions on the land.[118] To strike this balance, the Forest Service sets out a specific inventory for the evaluation of potential wilderness.[119]

The inventory process for identifying and evaluating potential wilderness areas is set forth in the Forest Service Management Handbook.[120] The Handbook provides a checklist of criteria used by Forest Service officials to evaluate specific areas for wilderness designation.[121] The goal of the agency regulations is to effectuate the ideal of wilderness set forth in section 2(c) of the Wilderness Act.[122] Foremost in the Forest Service's evaluation of potential wilderness is the identification and inventory of all roadless areas.[123] In order to receive a roadless classification, the area must be undeveloped and satisfy the definition of wilderness provided in section 2(c).[124] After having received a "roadless area classification" pur-

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116. *See, e.g.*, 16 U.S.C. § 1132 note (Supp. II 1997) (listing all designated wilderness areas).

117. *See* FOREST SERVICE MANUAL, *supra* note 19, ch. 2320.6.

118. *See id.* chs. 2320.2 to .3, 2323.11 to .12. (establishing objectives and policies of the Forest Service that cause confusion in the same manner as the statutory definition of wilderness by qualifying the definition with provisions contradictory to wilderness values).

119. *See id* chs. 7.1–.11(b) (identifying the procedures for obtaining public review and comment upon proposed wilderness).

120. *See id.*

121. *See id.* chs. 7.2–.23(b).

122. *See id.* ch. 7.1.

123. *See id.* The analysis for wilderness protection originally involved two stages. In 1971, the Forest Service initiated its own study known as RARE I. *See* Bury & Lapotka, *supra* note 29, at 14. Under RARE I the Forest Service recommended to Congress three kinds of allocations of National Forest lands. *See id.* Some were labeled multiple-use, available for timber harvesting and mineral extraction. *See id.* Others were recommended for wilderness designation, and still others were withheld from final disposition through designation as a wilderness study area. *See id.* Ultimately, RARE I recommended 12.3 million acres for wilderness designation, double the current total. *See id.* In response to President Jimmy Carter's commitment to an expanded wilderness system, the Forest Service in 1977 initiated a nationwide program called RARE II. *See id.* at 15. Its purpose was to accelerate additions to the National Wilderness Preservation System and simultaneously clarify the role of commercial interest in National Forest lands. *See id.* Ultimately, RARE II identified 62 million acres as meeting the threshold requirements for wilderness designation. *See id.*; *see also* Douglas E. Booth, *Timber Dependency and Wilderness Selection: The U.S. Forest Service, Congress, and the RARE II Decisions*, 31 NAT. RESOURCES J. 715, 719 (1991) (describing an empirical analysis of wilderness selection under RARE II).

124. *Cf.* Wilderness Act § 2(c), 16 U.S.C. § 1131(c) (1994); BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, WILDERNESS INVENTORY HANDBOOK: POLICY, DIRECTION, PROCEDURES AND GUIDANCE FOR CONDUCTING WILDERNESS INVENTORY ON THE PUBLIC LANDS 5 (1978) [hereinafter WILDERNESS INVENTORY HANDBOOK] (defining "roadless" as "the absence of roads which have been improved and maintained by mechanical means to insure relatively regular

suant to section 2(c), the undeveloped area must also satisfy one of several criteria to qualify for wilderness designation.[125] The area must contain 5000 acres or more.[126] If the area cannot satisfy this requirement, it may qualify if it is a "roadless island of public land."[127] Alternatively, an area may be considered if it is contiguous with another federally managed wilderness or potential wilderness area, or the public has indicated strong support for wilderness study in an area where such study is practicable, or the area is contiguous with another federally managed area subject to study and preservation such that the combined acreage of the two areas is greater than 5000 acres.[128]

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and continuous use," and stating that "[a] way maintained solely by the passage of vehicles does not constitute a road").

125. *See* WILDERNESS INVENTORY HANDBOOK, *supra* note 124, at 11–14.

126. *See id.* at 12. Many areas designated as wilderness are actually less than five thousand acres, such as: Maurelle Islands, Alaska (4,937 acres); Bogoslof, Alaska (175); Chamisso, Alaska (455); Forrester Island, Alaska (2,832); Hazy Island, Alaska (32); Saint Lazaria, Alaska (65); Baboquivari Peak, Arizona (2,040); Big Lake, Arkansas (2,144); Havasu, California (3,195); Farallon, California (141); Ishi, California (240); Machesna Mountain, California (120); Saddle Peak Hills, California (1,440); Santa Lucia, California (1,733); Trinity Alps, California (4,623); Platte River, Colorado (743); Leadville, Colorado (2,560); Little Lake George, Florida (2,833); Cedar Keys, Florida (397); Florida Keys, Florida (1,900), (2,019) and (2,278); Island Bay, Florida (20); J.N. Ding Darling, Florida (2,619); Lake Woodruff, Florida (1,066); Passage Key, Florida (36); Pelican Island, Florida (6); Big Frog, Georgia (83); Ellicott Rock, Georgia (2,181); Blackbeard Island, Georgia (3,000); Frank Church–River of No Return, Idaho (720); Bay Creek, Illinois (2,866); Burden Falls, Illinois (3,723); Clear Springs, Illinois (4,730); Garden of the Gods, Illinois (3,293); Lusk Creek, Illinois (4,796); Panther Den, Illinois (940); Crab Orchard, Illinois (4,050); Beaver Creek, Kentucky (4,791); Lacassine, Louisiana (3,346); Moosehorn, Baring Unit, Maine (4,680); Moosehorn, Birch Islands Unit, Maine (6); Moosehorn, Edmunds Unit, Maine (2,706); Monomoy, Massachusetts (2,420); Horseshoe Bay, Michigan (3,949); Nordhouse Dunes, Michigan (3,450); Round Island, Michigan (378); Huron Islands, Michigan (147); Michigan Islands, Michigan (12); Agassiz, Minnesota (4,000); Tamarac, Minnesota (2,180); Leaf, Mississippi (994); Rockpile Mountain, Missouri (4,131); Fort Niobrara, Nebraska (4,635); Arc Dome, Nevada (20); Currant Mountain, Nevada (3); Great Swamp, New Jersey (3,660); Bisti, New Mexico (3,968); Fire Island, New York (1,363); Ellicott Rock, North Carolina (4,022); Pond Pine, North Carolina (1,685); Chase Lake, North Dakota (4,155); West Sister Island, Ohio (77); Wichita Mountains, North Mountain Unit, Oklahoma (2,847); Menagerie, Oregon (4,800); Red Buttes, Oregon (3,750); Oregon Islands, Oregon (480); Three Arch Rocks, Oregon (15); Hells Canyon, Oregon (1,038); Oregon Islands, Oregon (5); Allegheny Islands, Pennsylvania (368); Ellicott Rock, South Carolina (2,809); Hell Hole Bay, South Carolina (2,180); Wambaw Creek, South Carolina (1,937); Wambaw Swamp, South Carolina (4,767); Bald River Gorge, Tennessee (3,721); Cohutta, Tennessee (1,795); Gee Creek, Tennessee (2,493); Joyce Kilmer-Slickrock, Tennessee (3,832); Little Frog Mountain, Tennessee (4,684); Unaka Mountain, Tennessee (4,700); Big Slough, Texas (3,455); Beaver Dam Mountains, Utah (2,600); Bristol Cliffs, Vermont (3,738); Little Dry Run, Virginia (2,858); Little Wilson Creek, Virginia (3,613); Peters Mountain, Virginia (3,328); Shawyers Run Virginia (3,665); Thunder Ridge, Virginia (2,344); Glacier View, Washington (3,123); Wonder Mountain, Washington (2,349); San Juan Islands, Washington (353); Washington Islands, Washington (60), (125) and (300); Mountain Lake, West Virginia (2,721); Porcupine Lake, Wisconsin (4,446); Wisconsin Islands, Wisconsin (27) and (2). *See* KENNETH A. ROSENBERG, WILDERNESS PRESERVATION: A REFERENCE HANDBOOK 167–86 (1994).

127. WILDERNESS INVENTORY HANDBOOK, *supra* note 124, at 12.

128. An exception is made for those areas east of the 100th meridian because of the abundance of roads across otherwise qualifying areas, thus allowing at least some contiguous preservation in the

Qualifying the "roadless" criterion is a lengthy series of exceptions. Exceptions to roadless classification include presence of airstrips, heliports, plantations, electronic installations,[129] areas with evidence of historic mining,[130] certain mineral leases,[131] National Grassland areas,[132] areas with only seventy percent federal ownership, minor structural improve-

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eastern United States. Chapter 7.11(b) of the Forest Service Handbook establishes criteria for roadless areas in the East:

> National Forest System lands in the eastern United States have been acquired over time from private ownership. Criteria for inventorying roadless areas in the East recognize that much, if not all of the land, shows some signs of human activity and modification even though they have shown high recuperative capabilities. Roadless areas east of the 100th meridian qualify for inventory as potential wilderness if:
>
> 1. The land is regaining a natural, untrammeled appearance.
> 2. Improvements existing in the area are being affected by the forces of nature rather than humans and are disappearing or muted.
> 3. The area has existing or attainable National Forest System ownership patterns, both surface and subsurface, that could ensure perpetuation of identified wilderness values.
> 4. The location of the area is conducive to the perpetuation of wilderness values. Consider the relationship of the area to sources of noise, air, and water pollution, as well as unsightly conditions that would have an effect on the wilderness experience. The amount and pattern of Federal ownership is also an influencing factor.
> 5. The area contains no more than a half mile of improved road for each 1,000 acres, and the road is under Forest Service jurisdiction.
> 6. No more than 15 percent of the area is in non-native, planted vegetation.
> 7. Twenty percent or less of the area has been harvested within the past 10 years.
> 8. The area contains only a few dwellings on private lands and the location of these dwellings and their access needs insulate their effects on the natural conditions of Federal lands.

FOREST SERVICE HANDBOOK, *supra* note 112, ch. 7.11(b). The Eastern Wilderness Act of 1975 recognized that in the "more populous eastern half of the United States there is an urgent need to identify, study, designate, and preserve areas for addition to the National Wilderness Preservation System." Pub. L. No. 93-622, § 2(a)(1), 88 Stat. 2096, 2096 (originally codified at 16 U.S.C. § 1131 note and subsequently eliminated). For a discussion of wilderness in the East, see FROME, *supra* note 23, at 187–92; IRLAND, *supra* note 36, at 36–38. For a conservationist essay on eastern wilderness, see MICHAEL FROME, CONSCIENCE OF A CONSERVATIONIST: SELECTED ESSAYS 81–102 (1989).

129. *See* FOREST SERVICE HANDBOOK, *supra* note 112, ch. 7.11(a)(1)–(3); *see also* 47 C.F.R. §§ 1.1301–.1319 (1997) (providing Federal Communication Commission procedures implementing the National Environmental Policy Act of 1969 with regard to exposure limits of transmitters, facilities and operations).

130. *See* FOREST SERVICE HANDBOOK, *supra* note 112, ch. 7.11(a)(4). The section states:

> Do not include areas of significant current mineral activity, including prospecting with mechanical earthmoving equipment. The inventory may include areas where the only evidence of prospecting is holes that have been drilled without access roads to the site. Inventoried roadless areas also may include:
>
> a. Areas that otherwise meet inventory criteria if they are covered by mineral leases having a "no surface occupancy" stipulation.
> b. Areas covered by minerals leases that otherwise meet inventory criteria only if the lessee has not exercised development and occupancy rights. If and when these rights are exercised, remove the area, or portion affected, from the inventory unless it is possible to establish specific occupancy provisions that would maintain the area in a condition suitable for wilderness.

Id.

131. *See id.*

132. *See id.* at ch. 7.11(a)(5). The area may include structures or evidence of past vegetative manipulation, vegetation reverting to its native characteristics, and less than one mile of interior fence per section. *See id.*

ments such as fences and water troughs, recreational improvements such as hunting and outfitter camps, areas of historical timber harvest, ground-return telephone lines, and watershed treatment areas absent evidence of mechanical equipment.[133] These exceptions reflect the administrative response to the need to balance the ideal of wilderness with human demands on the land, and they reflect the basis of McCloskey's concerns over the Act's ability to effect true wilderness protection,

Forest Service Specialist, Ralph Swain, suggests that the Act's definition of wilderness comprises two main elements. First, wilderness requires a balance between what is wild and what commercial commodities can be extracted from the land.[134] It requires "a balance, a harmony of using the land and protecting the land."[135] The quantifiable percentage of this harmony, however, is the foundation of debate.[136] The second element, according to Swain, is "restraint."[137] Recognizing that man has the technology to modify every landscape on earth, Swain cautions that ecosystems are directly influenced by the balance of uses and protection; urging confinement of our desire to compromise the inherent qualities of wild lands.[138]

2. Bureau of Land Management

Following in the footsteps of the Forest Service, the Bureau of Land Management, in its Wilderness Inventory Handbook (WIH), also provides policy, direction, procedures, and guidance for the inventory portion of the wilderness program.[139] The WIH employs the language of section 2(c) and sets out a detailed explanation of how the definition's requirements are weighed against the characteristics of an area. As with the Forest Service analysis, the BLM analysis begins with a review of roadless areas. This review focuses on three key factors: size, naturalness, and the outstanding opportunity for solitude or primitive recreation.[140] First, with regard to size, the area must be at least 5000 contiguous roadless acres of public land.[141] As with Forest Service qualifications, however, if the area is geographically distinct and manageable, a wilderness area of less than 5000 acres is acceptable.[142]

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133. *See id.* at ch. 7.11(a)(6)–(11).

134. *See* Interview with Ralph Swain, Regional Wilderness Specialist, United States Forest Service, in Lakewood, Colo. (Oct. 1, 1998).

135. *Id.*

136. *See id.*

137. *Id.*

138. *Id.*

139. *See* WILDERNESS INVENTORY HANDBOOK, *supra* note 124, at 4–6.

140. *See id.* at 6.

141. *See id.*

142. *See id.* The BLM requires an area of public land under 5000 contiguous roadless acres to be either:

1. Contiguous with land managed by another agency which has been formally determined to have wilderness or potential wilderness values, or

Second, naturalness exists where the imprint of man's work is substantially unnoticeable.[143] An evaluation of human effects often involves an evaluation of livestock management facilities and mining debris.[144] Fences and vehicle routes do not necessarily preclude recognition as a wilderness study area.[145] The BLM evaluates vehicle routes based on their cumulative effect on wilderness, making a distinction between a road and a two-wheeled track known as a "way."[146]

The third and most problematic of the criteria is that the land under consideration must either provide an "outstanding" opportunity for solitude, or an outstanding opportunity for a primitive and unconfined type of recreation.[147] Interpretation of the word "outstanding" fuels debate regarding this element of wilderness evaluation. Because interpretation of the word is subjective, determination of whether an area qualifies for wilderness study often hinges upon an evaluator's notion of what "outstanding" means. More problematic, however, is the question of whether satisfaction of the requirement to be "outstanding" is based on national significance or regional criteria.[148] There is no answer to the question whether a national or regional standard applies. For instance, BLM desert lands in Arizona may be designated for wilderness study based on different criteria from those used in classifying BLM mountain lands in Colorado.[149] Concerns over regional significance are also well founded where a regional inventory may compare one area to another in the same region, thus allowing for adoption of a wilderness study area that on the whole is incompatible with national wilderness values.[150]

The final criterion the BLM considers is "supplemental values."[151] This broad category includes considerations of "ecological, geological,

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2. Contiguous with an area of less than 5,000 acres of other Federal lands administered by an agency with authority to study and preserve wilderness lands, and the combined total is 5,000 acres or more, or
3. Subject to strong public support for such identification and it is clearly and obviously of sufficient size as to make practicable its preservation and use in an unimpaired condition, and of a size suitable for wilderness management.

Id.

143. *See id.* at 12.

144. Interview with Eric Finstick, Officer in the Colorado Office of Bureau of Land Management, in Lakewood, Colo. (Sept. 22, 1998) [hereinafter Finstick Interview].

145. *See id.*

146. *See id.* The BLM defines a "way" as "[a] two-wheel track created only by the passage of vehicles. A 'way' is not a road." BUREAU OF LAND MANAGEMENT (COLORADO), U.S. DEP'T OF THE INTERIOR, INTENSIVE WILDERNESS INVENTORY: ANALYSIS OF PUBLIC COMMENT AND FINAL WILDERNESS STUDY AREAS 16 (1980) [hereinafter INTENSIVE WILDERNESS INVENTORY].

147. *See* WILDERNESS INVENTORY HANDBOOK, *supra* note 124, at 13.

148. *See* Finstick Interview, *supra* note 144.

149. *See* WILDERNESS INVENTORY HANDBOOK, *supra* note 124, at 13.

150. *See* Finstick Interview, *supra* note 144.

151. *See* INTENSIVE WILDERNESS INVENTORY, *supra* note 146, at 19. As a reference and not a criterion, ecosystems are often used in recommending the designation of wilderness areas to Congress. *See* Interview with Eric Finstick, Officer in the Colorado Office of Bureau of Land Management, in Lakewood, Colo. (Sept. 22, 1998). For instance, because many BLM lands are of lower

or other features of scientific, educational, scenic, or historical value."[152] Although the presence or lack of supplemental values will not determine whether an inventory unit becomes a wilderness study area, the presence of supplemental values is often beneficial because they contribute to opportunities for primitive recreation.[153]

In addition to the foundational characteristics of size, naturalness, solitude, or recreation, the BLM also considers areas that have the potential to return to a natural condition.[154] The criterion by which "return" is judged is that the land will return to a state where human imprint will be "substantially unnoticeable."[155] By this standard, if a portion of an inventory unit contains an imprint substantially noticeable, yet the unit is capable of returning to a substantially unnoticeable condition by natural processes[156] or hand labor,[157] the area may meet requirements for wilderness study.[158]

C. *Judicial Interpretation*

Judicial interpretation of the definition of wilderness is limited and very mixed. In 1970, a federal district court in Colorado decided one of the two leading cases interpreting the scope of wilderness designation. In *Parker v. United States*,[159] plaintiffs brought suit to enjoin the Secretary of Agriculture and the Forest Service from selling timber from the East Meadow Creek area near Vail, Colorado.[160] The court specifically rejected the government's contention that the condition of the land foreclosed the possibility of wilderness classification of this area.[161] The court found that the construction of an access road, the existence of mining claims, and a Denver Water Board survey for a potential water diversion project did not preclude wilderness designation.[162] Rather, the court held the issue of suitability must be left open until the President and Congress were able to review the area's characteristics.[163] The Tenth Circuit Court

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elevation than other wilderness areas in Colorado, a designation of BLM lands as wilderness study areas would double the number of species protected. *See id.*

152. INTENSIVE WILDERNESS INVENTORY, *supra* note 146, at 19.

153. *See id.* at 19.

154. *See* WILDERNESS INVENTORY HANDBOOK, *supra* note 124, at 14.

155. *Id.*

156. This determination is dependent on factors such as the kind of imprint, the topography, the vegetation, the amount of rainfall, and so forth. *See* INTENSIVE WILDERNESS INVENTORY, *supra* note 146, at 20.

157. *See* WILDERNESS INVENTORY HANDBOOK, *supra* note 124, at 14. The BLM handbook states that "where imprints of man require artificial rehabilitation by the use of power machinery to return them to a natural condition . . . [the area] will not be considered as meeting wilderness characteristic criteria." *Id.*

158. *See id.*

159. Parker v. United States, 309 F. Supp. 593 (D. Colo. 1970).

160. *See Parker*, 309 F. Supp. at 594.

161. *See id.* at 600–01.

162. *See id.* at 596, 601.

163. *See id.* at 601.

of Appeals affirmed the lower court's decision that deferring wilderness designation to the President and Congress is in full accord with the Act and Forest Service Manual section 2321.[164]

In 1997, the Seventh Circuit, in *Sierra Club v. United States Department of Agriculture*,[165] addressed whether the Forest Service violated a settlement agreement by failing to designate an area in Illinois for wilderness study.[166] Basing its decision on a Forest Service Environmental Impact Statement (FSEIS), the Forest Service had decided not to recommend it as a wilderness study area. Relying on the findings set forth in the FSEIS, the court cited a regional forester's justifications for declining the wilderness designation.[167] The forester pointed to characteristics of the area which militated against a wilderness study area designation: the existence of a dense system of improved and unimproved roads; the need for extensive burning, shade removal, and vegetation management; the presence of non-native pine plantations; and the potential for fluorspar mining.[168] As a result of the presence of these characteristics, the court found that the Forest Service decision not to classify the area a wilderness study area was not arbitrary or capricious.[169]

The courts have been justified in limiting their interpretation of the definition of wilderness derived from the Wilderness Act. As the Ninth Circuit stated, "The choice of what shall be preserved is an administrative choice in which geographical and topographical considerations are certainly germane but hardly are subject to judicial review."[170] Though judicial deference to agency authority appears to drive these cases, courts in different regions may be more or less inclined to decide questions of wilderness study designation.[171] One cannot, however, speculate with any

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164. Parker v. United States, 448 F.2d 793, 797 (10th Cir. 1971).

165. No. 96-2244, 1997 WL 295308 (7th Cir. May 28, 1997).

166. *See Sierra Club*, 1997 WL 295308, at *29–*31.

167. *See id.* at *29.

168. *See id.* at *30. (stating that "[f]luorspar is classified as being of compelling domestic significance by the U.S. Bureau of Mines and production of fluorspar is important to the local economy").

169. *See id.* at *31.

170. McMichael v. United States, 355 F.2d 283, 286 (9th Cir. 1965).

171. One may argue that regional paradigms for defining wilderness are the catalysts for judicial decisions. The court in *Parker* was seated in Colorado, a state rich in preservation tradition, even in the midst of strong commercial resource interests. The court in *Sierra Club*, however, was seated in the Seventh Circuit, which is composed of Illinois, Wisconsin, and Indiana—an area that does not contain large tracts of public lands and that has very few areas of wilderness. The language of the Tenth Circuit in *Parker* reveals regional sensibilities. Preceding the court's citation of section 2(c) of the Act, the court uses a preservationist tone. Recognizing the purpose of the Act, the court states that "[the Act] is simply a congressional acknowledgement of the necessity of preserving *one* factor of our natural environment from the *progressive, destructive and hasty roads of man*, usually commercial in nature." Parker v. United States, 448 F.2d 793, 795 (10th Cir. 1971) (emphasis added).

Though the foundation of both the Tenth and Seventh Circuit decisions is agency discretion, both cases, read together, imply a stronger sense of preservation in the West than in the Great Lakes Region. Whether this apparent bias for preservation leads to a willingness of western courts to accept areas as wilderness that do not meet wilderness criteria is unclear based on such limited case law.

certainty about the motivation of courts to refrain from deciding such a thorny issue by examining just two cases.

III. CONCLUSION

Wilderness is defined on many levels. Basing decisions on idealized notions or pragmatic considerations, those who are charged with applying the definition Congress incorporated in the Wilderness Act seem incapable of achieving a common interpretation. Though the statutory definition attempts to exclude the imprint of man from wilderness, the very process of deciding what wilderness is, and how to manage it, is one which imposes the imprint of man on nature. In the end, we trust our legislatures, federal agencies and the judiciary—composed as they are of individuals with their own ideas of the character of wilderness—to make decisions guided by a compromise made thirty-five years ago. Wilderness may be an ideal which excludes the role of men, but the process by which men define wilderness is necessarily humanistic and pragmatic. As Roderick Nash once wrote, "The emphasis here is not so much what wilderness is but what men *think* it is."[172] Our challenge is to temper our traditionally dominative thoughts of nature, preserving our threatened lands and their indefinable characteristics.

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The temporal difference between the cases may also be significant. *Parker* was decided by the trial court in 1970 and on appeal in 1971, just six years after the passage of the Act. *Sierra Club* was heard in 1997, thirty-three years after the Act was enacted. One must wonder, Does the timing of these cases mean that contemporary courts are more stringent in their definition of wilderness? Does the fact that over 104 million acres of designated wilderness already exist compel courts to discourage designation?

172. NASH, *supra* note 2, at 5.

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