This panel will review recent and ongoing litigation in this area.

Moderator: Don Neubacher (NPS-YOSE Superintendent)

Panelists: David Shilton (US Department of Justice), George Nickas (Wilderness Watch), Paul Turcke (Moore Smith Buxton & Turcke), Jamie Rosen (USDA Forest Service Office of General Counsel)

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Courts Well Suited to Answer Questions About Commercial Use of Wilderness Areas? – Some Thoughts on High Sierra Hikers Ass’n v. Blackwell

The United States Court of Appeals for the Ninth Circuit has jurisdiction over nine states (Alaska, Washington, Idaho, Montana, California, Nevada, Hawaii, Arizona) that contain most of the Nation’s designated wilderness areas, and its decisions accordingly are extremely important in any consideration of the Wilderness Act. In High Sierra Hikers v. Blackwell, 390 F.3d 630 (9th Cir. 2004), the Ninth Circuit found that the United States Forest Service’s grant of special use permits to commercial pack stations for purposes of allowing pack trips on horseback into two Sierra Nevada wilderness areas was contrary to the Wilderness Act, and specifically 16 U.S.C. § 1133, which generally prohibits commercial enterprise within wilderness areas but provides that “[c]ommercial services may be performed within the wilderness areas designated by this chapter to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.” The Court found that this requires the Forest Service not only to determine that a particular commercial service is “necessary” but also to determine the extent of the need. See 390 F.3d at 647 (“the Forest Service must show that the number of permits granted was no more than was necessary to achieve the goals of the Act”). It reversed the Forest Service’s decision and sent the case back to the trial court, which engaged in an intensive review of the Forest Service’s justification for its decision to issue permits authorizing existing levels of commercial pack services, ultimately reversing that decision. High Sierra Hikers Assn v. Weingardt, 521 F. Supp. 2d 1065, 1074-82 (N.D. Ca. 2007). The Blackwell case raises important questions about the appropriate role of the courts in reviewing federal agency compliance with the commercial services restrictions found in the Wilderness Act. Are courts well suited to determining “the extent of the need” for services like pack stations, and just what does “extent of the need” mean in this context? Does anyone really “need” to access wilderness? Did Congress intend for land management agencies to have to justify the particular level of commercial activity allowed? How much discretion should federal agencies have in making these determinations? And what role does evidence of environmental damage play in this inquiry? Blackwell provides a good jumping off point for considering the limitations of judicial review, and whether better alternatives are available for resolving disputes over commercial services in wilderness areas.

1/ The views here stated are those of Mr. Shilton, not necessarily those of the government.
George Nickas, Wilderness Watch

The Wilderness Act is designed to limit the role and influence of commerce in the wilderness system. The law prohibits commercial enterprise, with the narrow, limited exception for commercial services that may be performed to the extent necessary for activities which are proper for realizing wilderness’ recreational or other purposes. Any credible implementation of the statute must give effect to each of these key concepts: is the activity necessary, to what extent is it necessary, and is the service proper for realizing the purposes of wilderness.

The federal agencies responsible for wilderness stewardship have generally disregarded these limits. Instead market forces and political influence have caused a proliferation of commercial services allowed in wilderness, resulting in significant degradation of wilderness character. Because of the Act’s clear mandates, citizen groups have found success in turning to the courts for relief. Such cases are almost certain to multiply as citizen groups turn up the pressure on the agencies to adhere to the law and its mandate to preserve each area’s wilderness character.

For proper application of the Wilderness Act’s strict protections, several issues must be addressed: 1) what Congress intended when crafting the standard; 2) how the standard fits with the types and degrees of commercial services permitted in wilderness today; and 3) what other factors must be weighed in crafting a workable, lawful standard that realizes the benefits of wilderness and ensures its long-term preservation.

Jamie Rosen, USDA Forest Service Office of General Counsel

1) Wilderness is an idea. The Wilderness Act is a law. The two are not the same. Undoubtedly, the wilderness ideal underlies the Wilderness Act and influences legal interpretations of the Act. However, the Wilderness Act was a legislative compromise that was passed with – and could not have passed without – several provisions that are in tension with the wilderness ideal in its purest sense. I believe that in order to best understand and faithfully implement the Wilderness Act, the parties engaged in the debate over Wilderness management should keep these legislative compromises in mind and avoid framing the Wilderness Act in absolute terms.

2) The commercial services section of the Wilderness Act is about commerce and economic activity; it is not about restraining the use horses, mules, or other packstock. Indeed, non-commercial packstock use is on the same legal footing as hiking under the Wilderness Act. However, the High Sierra Hikers litigation, which underlies this conference, was fundamentally about the environmental impacts of packstock, not the commercialization of Wilderness Areas. I believe that the parties to the debate over commercial packstock services in Wilderness Areas will have a higher chance of reaching common ground if the parties keep in mind that the Wilderness Act does not include a prohibition on, or bias against, packstock use.

3) The commercial services section of the Wilderness Act is simply drafted, but difficult to understand and implement. The Act states that commercial services are authorized “to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.” However, the Act does not define “extent,” “necessary,” “proper,” or other important terms. And, the terms’ meanings are not self-evident. This ambiguity has put federal agencies in the difficult position of trying to figure out what types and amounts of commercial services are permissible, and what sort of analysis is necessary to authorize such services. The “extent necessary” phrase has been the most problematic for the agencies, given the way some courts have interpreted it. I plan to briefly discuss the complexities and practical difficulties that have arisen from the commercial services provision and share my belief that a strict interpretation of the commercial services provision – such as that applied in the High Sierra Hikers litigation – imposes a nearly unattainable standard upon federal agencies, is inconsistent with the judicial deference that is supposed to be afforded to federal agencies on methodological matters, and is not required by the Wilderness Act.
It may be useful to consider wilderness from two perspectives: practical and legal. The evolving role of the legal affects the practical. Some of these impacts seem intentional, others are likely not. Participants in wilderness dialogues should be mindful of these interactions.


Analytic and strategic patterns have become apparent in litigation. The person finding fault with the agency’s outcome will highlight the omission of a required procedural element, such as a failure to make a necessary finding of the extent of necessity. Or will play snippets of the agency’s prior analysis against its ultimate conclusion, which may be portrayed as “arbitrary and capricious” agency behavior triggering the need for judicial guidance. When wilderness is the subject these techniques play against a complex backdrop of practical, political or psychospiritual notions of wilderness arising from the individual or context more so than any formal definition under the 1964 Act or controlling law.

Answers from our legal institutions often come slowly and at great collective expense. The substance of these answers, the associated risk, and the mere grinding of the legal process all create leverage. Even the most unsophisticated litigants/counsel feel empowered by merely bringing a lawsuit. Their counterparts’ reactions may range from amusement to abject terror, but virtually any plaintiff will be noticed. Environmental lawsuits today are rarely waged by unsophisticated litigants who will simply be noticed. They are conducted through a network of skilled lawyers working in coordinated fashion with elected officials, constituents, corporate interests, and current/former agency employees. Some have referred to a “conflict industry” which surrounds and shapes environmental issues, including wilderness.

Private businesses, outfitters, the majority of user groups and land managers must largely react to these litigatory agents of change. They want to focus on broader, generally acceptable outcomes which can be implemented in a cost effective manner. Their time, energy, funds, and commitment to the cause can be tapped by litigation.

Litigation can have a large influence in the land management process. Land managers no longer naively hope to avoid litigation, but most would acknowledge they design management prescriptions along the path of perceived least resistance. One might question whether this dynamic, often driven by the user(s) least willing to acquiesce in any sense of common benefit, is consonant with sound principles of managing human behavior or public lands and the values ostensibly promoted by wilderness.