Wilderness airstrips: A case study for using legislative history to inform wilderness management

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WILDERNESS AIRSTRIPS:
A CASE STUDY FOR USING LEGISLATIVE HISTORY
TO INFORM WILDERNESS MANAGEMENT

by
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B.A. Bowdoin College, 1992
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Wilderness Airstrips: A Case Study for Using Legislative History to Inform Wilderness Management (96 pp.)

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The Wilderness Act of 1964 created a nationwide system to protect some of the remaining "untrammeled" wildlands from development and degradation and to preserve them for future generations. Like most statutes, the Wilderness Act was the product of political compromise. This compromise allowed some anomalies to persist within the system. These so-called 'nonconforming' uses are legally permitted but conflict with the values and ideals put forth by the Act. Wilderness managers have the difficult task of translating these ambiguous and sometimes conflicting mandates into on-the-ground management decisions. This thesis will examine one such use, aircraft landing strips, sixteen of which persist in wildernesses outside of Alaska. These are all found in the states of Idaho in Montana.

The judicial system has long employed a process for interpreting ambiguous, over general, and contradictory statutes. When the meaning of a statute is uncertain from its statutory language, courts often look to the legislative history to determine what Congress intended. They examine a variety of legislative documents, from committee reports to Congressional testimony, to aid their interpretation. I present a step-by-step process for interpreting statutes, first using statutory construction and then legislative interpretation. This process can be employed by the managing agencies as well. It allows managers to make difficult and discretionary decisions that are informed by a better understanding of Congressional intent for wilderness protection.

This thesis explores the philosophical underpinnings of this process, its drawbacks, and its benefits. It examines arguments both for and against the use of legislative history for interpretive purposes, and then outlines how this process can be applied. It then looks at the legislative history of the Wilderness Act and subsequent wilderness legislation to determine how Congress intended wilderness airstrips, a seemingly nonconforming use, to be managed. Finally, I apply this process to three current management issues. Management outcomes are examined using the aforementioned methodology. These case studies provide examples of the practical management application potential of this process.
As early as the 1920s, wilderness preservationists realized that although wild areas still existed in the United States in a primitive and pristine state, they were rapidly being destroyed and degraded. The country's burgeoning population wanted more resources, more places to play, and their own private piece of paradise. As a result of these growing demands, the extractive industries, development, and increased recreation were taking their toll on the last vestiges of wild space in America. Wilderness proponents feared that the existing administrative protection of these lands was insufficient to withstand the pressures and that legislative intervention was crucial.

The road to legislative protection of wilderness, which officially began in 1956, was long and arduous. It took nine years of debate and compromise, but finally in 1964 the National Wilderness Preservation System (NWPS) was established with an initial 9.1 million acres of wilderness in the Forest Service's domain. Today, the system exceeds 104 million acres in four agencies, the Bureau of Land Management (BLM), the Forest Service (FS), the National Park Service (NPS), and the Fish and Wildlife Service (FWS). These areas are the cornerstone of outdoor recreation for 18 million visitors a year and provide a haven for biological diversity and ecological integrity.

The Wilderness Act of 1964, (the Act) was a revolutionary statement that validated the concept of wilderness on our public lands. By creating the

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4 David N. Cole and Peter B. Landres, Threats to Wilderness Ecosystems: impacts and research needs", 6 (1) ECOLOGICAL APPLICATIONS, (1996).
NWPS, Congress not only protected millions of roadless acres from consumptive usage, it also set forth standards for the designation of additional tracts of primitive federal land as wilderness. The Act was as much a preservationist proclamation as it was a substantive measure. It substantiated the idea that wild spaces had value, both inherent and to society, by their existence in a primitive state. With the Act, Congress was expressing the nation's desire to preserve this natural legacy for future generations.

The overriding goal of wilderness designation is to maintain the natural and untrammeled quality of an area. As a result, units of the NWPS were afforded a higher level of protection than other public lands. The Wilderness Act defines wilderness as a place "untrammeled by man, where man himself is a visitor who does not remain".5 However, despite this lofty definition and the values set forth as the purpose of the Act, the statute contains some anomalies that have detracted from the purity of the wilderness system.

As with any statute, the Wilderness Act was the product of political compromise.6 The authors of the wilderness bills knew that opposition to their legislation would be severe, particularly from resource extraction industries, and that compromise would be a necessity. They sought to reduce opposition by maintaining the status quo. Only areas which met the characteristics of wilderness set forth in the Act were eligible for classification. The NWPS would then maintain these areas in the condition they were found, purportedly prohibiting any further degradation. In areas that had an

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established history of particular uses that did not fit with the idealistic language of the Act, these activities were allowed to continue. Because of this strategy, many nonconforming uses - from airstrips to livestock grazing - were allowed to continue in the newly designated NWPS.

**Problem Statement**

Wilderness areas must be managed in accordance with the original Wilderness Act, subsequent relevant wilderness enabling legislation, and agency regulations. Where ambiguity exists within a statute, this uncertainty is carried over into management. In many cases, Congress gave the agencies discretionary power to manage incompatible uses. As a result, confusion has arisen from the conflicts between the overriding goals of wilderness protection and the limited exceptions permitted by the Act. This thesis will address the assertion that Congress only intended to permit a narrow scope of previously established nonconforming uses to continue in designated wilderness. I believe that while political expediency kept wilderness proponents from eliminating some incompatible uses altogether, their intent was to maintain use at existing levels, not to allow them to expand.

After looking at the implications of incompatible wilderness uses in general, I will use wilderness airfields as a case study for this issue. I have chosen to examine airstrips for several reasons; 1) the existence of wilderness airstrips is not widely known in both the conservationist and recreationalist communities, and 2) the intrusion of a motorized flying vehicle has a uniquely visible effect on both the wilderness character of an area, and the experience of non-motorized visitors.7

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One definition of a nonconforming wilderness use is "one which, legally or otherwise, is not in harmony or agreement with wilderness as defined in the Wilderness Act". These are uses that conflict with the values and character forwarded by the Act but are permitted to continue to varying degrees. The Wilderness Act states that there shall be

no commercial enterprise and no permanent road within any wilderness area designated by this Act and ... 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 installations in any such area. However, in the interests of maintaining the status quo, these prohibitions were circumvented through special provisions allowing nonconforming uses such as motorboat use, aircraft landing, grazing, mining, administrative structures, permanent outfitter caches, and water impoundments to persist under certain circumstances.

Management of Nonconforming Uses

There are sixteen airstrips within the NWPS in the coterminous states. These landing strips, found on three wildernesses in Idaho and Montana, are governed by both the Wilderness Act and two subsequent wilderness laws. While not widespread within the system, airstrips can have a profound impact on the wilderness quality and character of the unit in which they persist. Negative impacts have been found on native flora and fauna, and the

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9 The Wilderness Act, supra note 5, § 4(c).
10 Id. at 109.
noise and presence of aircraft can significantly impact non-motorized visitors' sense of solitude and primitive recreation.\textsuperscript{11}

Before the Act's passage, aircraft were allowed to land in Forest Service roadless areas. Air access and other uses of these lands were managed under the agency's "U" Regulations. These regulations provided nominal protection from consumptive and motorized uses but allowed established uses to continue.\textsuperscript{12} Proponents of wilderness legislation wanted even stronger protection for wilderness with a system which would be permanent and not subject to the vagaries of administration changes. The Wilderness Act created such a system. While more protective of wilderness values, the Act, like the previous regulations, allowed established uses to continue. They were, however, subject to such restrictions as the Secretary of Agriculture chose to apply.

After the Act was passed, various user groups saw the negative potential that wilderness designation could have on their preferred uses. In proposed wilderness areas with well established histories of air access, aircraft users feared that the managerial discretion provided for in the Wilderness Act would overly restrict or altogether eliminate their favored mode of travel. For the two post-1964 wildernesses that currently allow air access, the further protection of this use was an issue during designation debates. There is specific language in the Central Idaho Wilderness Act of 1980 that prohibits the closure of airstrips on the Frank Church-River of No Return without due process.\textsuperscript{13} Less explicitly, the committee report for the bill creating Montana's

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{12} JOHN C. HENDEE ET AL., \textit{WILDERNESS MANAGEMENT}, at 101 (1990).
\item \textsuperscript{13} This provision provides that; "the landing of aircraft, where this use has become established prior to the date of enactment of this Act shall be permitted to continue subject to [missing text]."
\end{itemize}
\end{footnotesize}
Great Bear Wilderness contains language further protecting access to the single airstrip there.

The ambiguity surrounding this use, and the discretion given to managers, has led to conflicts and confusion on the ground. While the language of the Wilderness Act indicates that motorized use is incompatible with wilderness values, section 4(d)(1) creates an exception stating that "where these practices have already become established [they] may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable." The discretion contained within this clause puts the onus on managers to determine the acceptability of access or levels of access to a particular area. The specific language of the Central Idaho Wilderness Act creates an additional level of Congressional intervention into management which is even more contradictory to the purposes of the Wilderness Act.

Analytical Framework

To answer the question of how Congress intended nonconforming uses to be managed, I propose putting to new use an analytical framework that is commonly used in courts of law. Courts have historically used loose variations of this framework to determine Congressional intent for contested statutes. I will show how agencies can use this method to resolve controversial management issues. A better understanding of Congressional intent gives wilderness managers a basis for consistent and appropriate

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such restrictions as the Secretary deems desirable: Provided, however, that the Secretary shall not permanently close or render unserviceable any aircraft landing strip in regular use on national forest lands on the date of enactment of the Act for reasons other than extreme danger to aircraft, and in any case not without the express written concurrence of the agency of the State of Idaho charged with evaluating the safety of backcountry airstrips." The Central Idaho Wilderness Act of 1980, Pub. L. No. 96-312 § 7(a)(1); 16 U.S.C. § 1132. 14 The Wilderness Act, supra note 5, § 4(d)(1).

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decision-making regarding nonconforming wilderness uses. To do this I will use two complementary analytical frameworks, the rules of statutory construction and the interpretation of legislative history. I will apply these to both the original and subsequent wilderness acts and their legislative histories. The goal of this undertaking is to provide a substantive foundation that wilderness managers can base management decisions on that will be true to the intent of the Wilderness Act. I will then apply this process to wilderness airstrips, one of many nonconforming wilderness uses. The case study of wilderness airfields illustrates the complexities inherent in managing a use which is not clearly defined by law.

The confusion resulting from the Wilderness Act's ambiguity and the conflicting mandates of subsequent Congresses, is manifested in several current management conundrums. The Frank Church-River of No Return Wilderness has released a draft management plan that addresses alternative management schemes for the Wilderness' twelve airstrips. The Forest Service has interpreted the Central Idaho Wilderness Act as requiring full use of all airstrips and has so far rejected alternatives that would emphasize wilderness values over air access. In a decision which more accurately reflects the intention of the Wilderness Act, the Alaskan Regional Forester recently rejected a proposal to permit helicopter access on twelve existing Alaskan wildernesses. In Oregon, the Forest Service recently acquired a private inholding on the Eagle Cap Wilderness that contained both a guest ranch and an airstrip. While air access has been an established use on this previously private land, the federal wilderness has no history of air access. The Forest Service must determine how to manage this airfield in the context of the Wilderness Act.
With this thesis I hope to provide a template for solving wilderness management uncertainties through the use of this analytical framework. This is a process that could be very useful to both wilderness managers and conservationists interested in maintaining management of the NWPS that is consistent with the ideals of the Wilderness Act. While this paper will use wilderness airstrips as a case study, this process can be applied to many other incompatible uses of wilderness, as well as to other issues and statutes.
CHAPTER 2
ANALYTICAL FRAMEWORK

Introduction

To determine what Congress' intentions were regarding the continuation of nonconforming uses of wilderness, I will apply an analytical process that I have adapted from the practices of judicial interpretation. This process involves the use of both statutory construction and legislative interpretation to discover the meaning and purpose of a particular law. I will apply the rules of statutory construction to all the relevant laws then use the applicable legislative documents to better analyze Congressional intent. For the case study in this thesis, I will focus this process on the discussion and treatment of nonconforming uses of wilderness in the Wilderness Act and subsequent wilderness legislation. This process provides a sound basis for making management decisions in ambiguous areas of policy.

This type of statutory analysis is commonly used by courts to address ambiguities or uncertainties in statutes. Analysis of this depth is less frequently used by administrative agencies to inform their managerial decisions. Yet this process can be extremely useful for providing a substantive and legally informed basis for resolving management conflicts. The conflicts inherent in the statutory language of the Wilderness Act between the mandate to preserve wilderness character and exceptions that permit nonconforming uses of wilderness are just one place where this process can assist interpretation and implementation of on-the-ground management. I have laid out a process that is explicit and legally grounded. This process involves all of the steps employed at different points by the judiciary in its interpretive work. The analytical framework I am suggesting to managers is a
systematic, step-by-step progression from construction to interpretation, that provides a thorough and politically defensible basis for difficult administrative decisions.

The Nature of Statutory Construction

The purpose of a statute is to provide general guidance on a topic or topics. In most cases, statutes speak to "the great mass of ordinary uses" but do not provide the necessary clarity for application to specific circumstances.1 It is the role of the administrative agencies, the courts, and lawyers to interpret statutes so that they may be applied to individual fact situations.2 According to the United States Constitution, the only legally effective way to express the will of Congress is through a statute.3 However, when a statute is ambiguous, overly general, or contradicts either itself or another statute, the courts may turn to the methods of statutory construction and interpretation to determine Congressional intent.

Statutory construction involves the application of both rigid linguistic and grammatical rules together with precedent and common law to the plain language of a statute.4 When construction is insufficient, interpretation may be necessary. The author of The Construction of Statutes, distinguishes between construction and interpretation. He defines construction as;

the drawing of conclusions with respect to subjects that are beyond the direct expression of the text, from elements known and given in the

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2 Id. at 132.
4 Frederick J. de Sloovere Extrinsic Aids in the Interpretation of Statutes. 88 U. PA L. REV. 527, 528 (1940).
text, while interpretation is the process of discovering the true meaning of the language used.\textsuperscript{5}

Other authors expand their use of the word interpretation to include the use of the legislative history of a statute. For the purposes of this thesis, I will be focusing on both construction and interpretation in the broader sense, utilizing all aspects of a statute, its history, and its context in the search for clear meaning.

At the heart of the process of interpretation is the presumption that Congress has a purpose for enacting statutes. This purpose stems from the legislature's intention to cause something to happen or to correct some evil. Although widely used by courts and legal scholars, the concepts of legislative purpose and intent are not without controversy and confusion. Therefore, prior to an examination of how this interpretative process works, I will first explore the philosophical underpinnings of the process beginning with the debate over legislative intent.

**Legislative Intent versus Legislative Purpose**

There has been debate in legal circles for decades as to whether legislative intent can actually exist. The question at issue is whether a disparate group of individuals such as a legislature can have a cohesive and discoverable intent. A famous debate in 1930 between two legal scholars, Max Radin and James Landis, examines this issue.\textsuperscript{6} Radin argues that the notion of legislative intent is a fallacy. He says;

\begin{quote}
A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving
\end{quote}

\textsuperscript{5} EARL T. CRAWFORD, THE CONSTRUCTION OF STATUTES, at 241 (1940).

\textsuperscript{6} See generally, Gerald C. Mac Callum, Legislative Intent, 75 YALE L. J. 754-787 (1966).
majority might have had, and often demonstrably did have, different ideas and beliefs.  

He asserts that even if one could presume that the hundreds of individuals comprising a legislature could have the same intent, there is no acceptable means of determining it. He goes on to argue that in the rare circumstances that a legislative intent might exist it would not be determinable from the legislative history of a statute.

Landis disagrees with Radin's terminology and responds by noting that there are two distinguishable types of legislative intent; that of intended meaning and that of intended purpose. The former is, according to Landis, a normal but not inevitable aspect of the legislative process which is readily discernible from legislative proceedings when it exists. The latter is often clearly stated within the text of a statute. In the ensuing years, the academic and judicial debate over legislative intent has often referred to this dispute, with most authors on the subject aligning themselves with one viewpoint or the other.

Within this debate, supporters of Radin have abandoned the use of the term legislative intent but generally have replaced it with a discussion of legislative purpose without clearly distinguishing the difference between the two. Supporters of Landis on the other hand, have relied heavily on general statements about the meaninglessness of statutes in the absence of an underlying identifiable legislative intent. The intent of a statute must be one assigned by the legislature, this camp argues, for if it is not "intended by the law makers . . . the law-makers do not legislate".

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8 DICKERSON, supra note 3, at 68.
10 Mac Callum, supra note 6, at 755.
11 CRAWFORD, supra note 5, at 255.
Since the courts have continued to find this concept valid and to search for intent through statutory interpretation, its existence should not be dismissed without further examination. One argument against the existence of a single legislative intent focuses on the point that legislatures, being groups of individuals, cannot have intentions. In short, one might argue that only individuals can have intentions, legislatures are not individuals, and therefore legislatures cannot have intentions. Examining this argument more closely, however, highlights its deficiencies. A commonly perceived precondition of having an intention is the capacity for "purposive behavior". A quick look at the language used for legislatures shows a popular belief in its ability to act as a whole. Legislatures 'debate', 'deliberate', 'enact', and 'reject', among other purposive behaviors. The average reader clearly understands that these words mean that members of the legislature are acting in the form of the majority. Yet, to say that the legislature acting is nothing more than many individual legislators acting ignores the "legal significance of the criteria for determining whether the legislature acted". Since the procedure for accepting legislative action is not random, the legislature has clear parameters under which it officially acts. Therefore, like corporations, which are treated like persons for many purposes in this society, legislatures may be presumed to be enough like people to act purposefully and as a result, also have intentions.

The concept of a broad legislative intent "underlies the very idea of a legislative process". Dismissing the existence of a discoverable intent behind legislative action dismisses any connection between the enactment of legislation by a body of legislators, and what they express through the

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15 MacCallum, *supra* note 6, at 764-765.
16 Id. at 767.
17 Id. at 78.
language of a statute. The fact that the concept of legislative intent may have been misused or misinterpreted does not "deny its importance as a fundamental presupposition of the legislative process" according to Dickerson, an avowed skeptic regarding Congressional intent.

The confusion surrounding legislative intent makes it useful to distinguish between legislative intent and legislative purpose. The concept of legislative intent is usually identified with an immediate legislative purpose, while the term legislative purpose generally relates to a broader ulterior legislative purpose. A statute is passed to achieve a foreseeable goal which is "coextensive with legislative intent" and which, when taken in context, corresponds with "legislative meaning". The legislative purpose usually appears within the text of a statute in a statement explaining what the legislature is trying to do with passage of the act. This statutory affirmation of purpose does not guarantee that the purpose will actually be achieved by the subsequent provisions of a statute however. In some cases, specific provisions may conflict with the stated purpose under certain circumstances. For the purposes of this thesis, I will use the term legislative intent to refer to both intent and purpose, outside of statutorily dictated purpose.

Even believers in legislative intent caution that this concept is best applied on a general level to statutory interpretation. It is easier to determine Congress' intent for enacting the broad purpose of a statute, and more difficult to find evidence of legislative intent in regards to specific provisions. Dickerson warns that if legislative intent is pursued "relentlessly", the

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18 de Sloovere, supra note 4, at 539.
19 DICKERSON, supra note 3, at 77.
20 DICKERSON, supra note 3, at 97.
21 Id. at 99-100.
interpreter may end up creating a specific intent where none actually exists.\textsuperscript{22} With these cautions in mind, I will address different methods for uncovering legislative intent and purpose. The following are a variety of tools traditionally used by courts of law to determine statutory meaning and legislative intent. The pros and cons of each are outlined to help understand their usefulness to this process.

**Plain Meaning Doctrine**

The plain meaning doctrine is a well-known rule that the judiciary applies to statutory interpretation. It requires that where the language of a statute is clear and unambiguous it represents the final meaning of the statute. A clear statement of this doctrine can be found in *United States v. Missouri Pacific Railroad*.\textsuperscript{23} In this decision the court wrote that:

> where the language of an enactment is clear and construction according to its terms does not lead to absurd or impractical consequences, the words employed are to be taken as the final expression of the meaning intended.\textsuperscript{24}

Under this doctrine, the best way to ascertain a statute's meaning is through the statutory language. Only when such an analysis would yield "absurd" results, or the words are unclear, can other interpretive methods be used.

The Supreme Court relied on this doctrine in *Caminetti v. United States*\textsuperscript{25} where it refused to refer to the legislative history of the Mann Act because of the perceived clarity of the statute's language. The issue at hand was whether the Mann Act, which prohibited taking a woman across state lines for "prostitution or debauchery or for any other immoral purpose", applied to non-commercial activities. Although discussion during passage of

\footnotesize{\textsuperscript{22} Id. at 82.  
\textsuperscript{23} U.S. v. Missouri Pacific RR 278 US 269 (1929).  
\textsuperscript{24} Id. at 278.  
\textsuperscript{25} 242 U.S. 470 (1917).}
the Act clearly indicated that Congress was targeting white slavery, the court upheld the convictions for non-commercial activities. The dissenting opinion disagreed that the Act's phrase "for any other immoral purpose", was clear and unambiguous, referring to the alternative meaning indicated during pre-passage debate. This case indicates a flaw in the plain meaning doctrine which is that judges often disagree over whether a particular statutory word or phrase is in fact ambiguous.

The Supreme Court decision in *United States v. American Trucking Association* retreated from the rule of plain meaning. This case revolved around whether the word "employee" in the Motor Carrier Act applied to employees whose duties were unrelated to safety issues. The Court asserted that even though the language was clear, applying the literal meaning of the words was not in keeping with the overall policy goal of the legislation. In what has become a new standard for the application of the plain meaning rule they noted that "when aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on superficial examination". Thus, if legislative materials can help, this Court argued, they should not be ignored.

**Canons of Linguistic Construction**

Another method for uncovering the meaning of statutory language is to use the canons of linguistic and grammatical construction. As indicated in the plain meaning doctrine, if the language of the statute is clear and

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27 Id. at 126.
28 310 U.S. 534 (1940).
29 Id. at 126-127.
unambiguous, it should be read literally. When its meaning is not clear, the text of the statute may be subjected to construction. These canons of construction have arisen from decades of case law and can be used to guide judicial and agency interpretation. They are only applicable, however, when the plain meaning is not clear, and they may sometimes conflict with one another. Their worth is dependent on "how true they are as generalizations about customary habits in the use of language" and by their applicability to the case at hand. Because the purpose of these rules is to illuminate legislative intent, they should not be used to frustrate it.

The following is a list of some of the most common canons of construction used by the courts:

1. Words in common usage should be assigned their ordinary meaning.

2. Where a word has both technical and popular meaning, the popular meaning shall prevail unless otherwise indicated.

3. The courts may change the meanings of disjunctive and conjunctive words only to express the obvious intent of the legislature not to contradict it.

4. General words should be considered more broadly and specific words more narrowly.

5. *Noscitur a Sociis* - associated words may be used to understand an ambiguous word or phrase.

6. *Ejusdem Generis* - when general words follow the designation of particular things they should be construed to include only those things specifically enumerated.

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30 CRAWFORD, supra note 5, at 315.
31 SUTHERLAND STAT CONST § 48.15 (5th Ed.).
32 See generally, CRAWFORD, supra note 5.
33 Id. § 186 at 316 and SUTHERLAND, supra note 28, § 47.28 at 248.
34 CRAWFORD, supra note 5, § 187 at 319.
35 Id. § 188 at 322-323.
36 Id. § 189 at 325.
37 Id. § 190 at 325-326 and SUTHERLAND, supra note 31, § 47.16 at 183.
38 Id. § 191 at 326 and SUTHERLAND, supra note 31, § 47.17 at 188.
7. Relative and qualifying terms apply to the word, phrase, or clause immediately preceding them, not to more remote terms.\(^{39}\)

8. *Reddendo Singula Singulis* - words in different parts of a statute should be taken distributively according to their place in the statute.\(^{40}\)

9. *Expressio Unius Est Exclusio Alterius* - the mention of one thing implies the exclusion of another.\(^{41}\)

10. Common rules of grammar may justify the acceptance of one particular construction over another.\(^{42}\)

11. Courts can abandon the literal meaning of words in a statute only to achieve an obvious legislative intent.\(^{43}\)

12. If intention and punctuation conflict, legislative intent should be deferred to. Courts may punctuate, repunctuate or disregard punctuation only to achieve intended legislative goal.\(^{44}\)

13. Words unintentionally omitted by the legislature can be added by the courts to complete intended meaning.\(^{45}\)

While these canons have been applied with merit in many cases, the practice of using them is falling out of favor. They are increasingly seen as rigid, overly mechanical, and restrictive.\(^{46}\) One flaw is that these linguistic rules, like the statutes they seek to interpret, are composed of words and are themselves open to alternative interpretations. Sometimes canons conflict with one another when applied to the same issue.\(^{47}\) Thus, the canons of construction are just one tool, be it an imperfect one, in the toolbox of statutory interpreters.

\(^{39}\) Id. § 193 at 331 and SUTHERLAND, *supra* note 31, § 47.33 at 270.

\(^{40}\) Id. § 194 at 332-333 and SUTHERLAND, *supra* note 31, § 47.26 at 240.

\(^{41}\) Id. § 195 at 334.

\(^{42}\) Id. § 196 at 338.

\(^{43}\) Id. § 197 at 338-339.

\(^{44}\) Id. §199 at 324-343.

\(^{45}\) Id. § 200 at 345.

\(^{46}\) Araujo, *supra* note 1, at 98.

\(^{47}\) Id.
Legislative History

Legislative history is the body of information from which legislative intent can be derived. One author defines legislative history as the "explanations of the legislators themselves, or the documents officially used by them, in the course of making a specific law." Relevant history includes "all aspects of the internal legislative history of a statute which were officially before the legislature at the time of its enactment." It includes the statute, committee reports, relevant debates in the committee of the whole, committee hearings, and conference reports. Previous drafts of the successful bill, amendments suggested but rejected during debate, and similar bills which did not pass the legislature are also given consideration. Portions of the legislative history outside of the actual statute are referred to as extrinsic aids. Legislative history is valuable in that it provides the "authoritative explanations of the purposes or meaning of the language of the resulting law".

Uses of Legislative History

Legislative history can illuminate the context in which a statute was conceived and can lend clarity in the case of confusion or statutory silence. While it cannot be used to change the plain meaning of the statute, legislative history can be used to resolve controversy over interpretations of this meaning. It can also help determine Congressional intent as to the scope or limitations of statutory provisions. When using legislative history to interpret a statute, the courts are not confined to the statutory language at

49 Dickerson, supra note 3, at 140.
50 de Sloovere, supra note 4, at 539, 545.
51 Folsom, supra note 48, at 12.
hand, but they are confined by it. Thus, legislative history may not be used to create purposes which do not exist or go beyond the realm of discussion held by the legislature. The broader and more comprehensive the contextual setting in which the interpreter operates is, the less subjective the interpretive process becomes.

A primary use of legislative history is to verify hypotheses which have been developed on other grounds. The interpreter should not go to the legislative history to determine whether ambiguity exists, but rather should be directed there by confusion or ambiguity within the statute. Historical analysis should not be pursued unless a clear need presents itself. In de Sloovere's words, "venturing into the uncharted realm of factual backgrounds of legislation . . . is still a perilous journey, especially if the reason for the journey is not clearly understood."

Extrinsic aids also help to illustrate the context in which a statute was conceived. According to de Sloovere, a careful study of such materials can provide "a broad and deep grasp of the contextual implications of statutory language for application to cases by the courts."

Examining the entire context of a statute, rather than just the final product, is a valuable aid for discovering a variety of possible linguistic meanings, the "evils" which prompted the drafting of a statute, the atmosphere in which it was enacted, and the objectives of the legislature.

Supreme Court Justice Stephen Breyer lists five circumstances under which he believes the use of legislative history as an aid to statutory

52 Id. at 17.
53 de Sloovere, supra note 4, at 540.
54 Id.
55 Id. at 533.
56 Id. at 528.
57 Id. at 529.
interpretation can be justified (Table 1). The first instance is when the use of legislative history can help the court avoid reaching an absurd result. In Green v. Bock Laundry Machine Co., the Supreme Court looked to the history of the Federal Rule of Evidence to reach its decision that Congress did not intend a rule to apply solely to criminal cases despite the specific use of the term "defendant". Were just the plain meaning of the statutory language relied upon, the result would be an 'absurd' situation where a particular rule of evidence would apply only in civil cases.

A second instance where legislative history is useful is to discover and correct errors in statutory drafting. In this case, earlier drafts of a bill can be instructive.

The third circumstance is to discover any special meaning which may exist for a word within a particular statute. Breyer presents Pierce v. Underwood as an example. In this 1988 Supreme Court case involving a federal criminal statute and the meaning of the phrase "substantially justified", Justice Scalia indirectly refers to the 1946 House and Senate Reports for the Administrative Procedure Act which defines this phrase used in this law.

In a fourth scenario, to decide whether a particular case "falls within the scope of a word or phrase" the court may need to determine the purpose of that word or phrase in the broader statutory scheme. To determine its purpose the court may ask, "[g]iven this statutory background, what would a reasonable human being intend this specific language to accomplish?"

60 Id. at 851.
62 Breyer, supra note 59, at 852.
63 Id. at 854.
When the statutory text cannot clarify this question, the broader context of legislative history can be an instructive aid.

Finally, when a statute is politically controversial, the legislative history can help the judiciary choose between alternative interpretations.\(^6^4\) This is the area of usage which causes critics the most concern. Often the more controversial statutes contain the most ambiguity because of the polarized nature of the debate involved in their passage. In such cases, critics fear that a reliance on extrinsic aids will elevate legislative testimony to the level of law. If the statute is silent or unclear but the legislative history provides clarification, the historical evidence can provide valid insight into Congressional intent.\(^6^5\)

Table 1. Five circumstances where the use of legislative history is appropriate.

| 1. To avoid reaching an absurd result. |  
| 2. To discover and correct drafting errors. |  
| 3. To determine whether a special meaning exists for a word within a statute. |  
| 4. To determine the purpose of a word in the statutory scheme. |  
| 5. To help choose between alternatives when a statute is politically controversial. |  

The use of legislative history has both a strong following and serious detractors. In its support, Chief Justice Marshall wrote that "[w]here the mind labors to discover the design of the legislature, it seizes everything from

\(^6^4\) Id. at 856.

\(^6^5\) Id. at 856-857.
which aid can be derived . . . ." Another Supreme Court Justice, Justice Frankfurter asserted that "if the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded."

Critiques of the Use of Legislative History

Like the issue of legislative intent, the question of whether courts should use legislative history has garnered some controversy over the years. An increase in the volume of discussion and criticism of legislative history in the last decade has reduced its use within the judiciary. In 1981, the Supreme Court used legislative history in deciding almost every case before it. In 1989, however, the number of cases decided with no reliance on legislative history was ten out of a total of 65. Despite this possible down trend, Justice Wallace noted in 1991 that "the Court's practice of utilizing legislative history reaches well into its past, [and we] suspect that the practice will likewise reach well into the future." In view of this ambivalence, I feel it necessary to examine some of the critiques of this interpretative tool.

The Supreme Court does not have a standard position regarding the use of legislative history in statutory interpretation. Rather, use or dismissal of extrinsic aids is a matter of personal belief on the part of the Justices. Some Justices vary in their use of extrinsic aids while others are staunch believers in either the use or disregard of legislative history. Former Justice William Brennan was a firm adherent to the use of legislative history while Justice Scalia is "an outspoken critic" of deviating from the plain meaning of statutes. This predilection on his part, coupled with resignation of

67 Id. at 130.
68 Id. at 132 and Breyer, supra note 59, at 846.
69 Breyer, supra note 59, at 846.
70 Id.
71 McDonald, supra note 26, at 121.
Brennan, his ideological counterpoint, will most certainly result in a downturn in the use of legislative history in the current Court.

The main arguments against the use of legislative history can be summarized as lack of utility, unconstitutionality, controversy over legislative intent, historical and international comparisons, and the availability of extrinsic aids. The most frequently heard argument is that legislative history is not useful for interpretation. However, supporters counter that "[i]f the history is vague, or seriously conflicting, do not use it." Legislative history does not have to be useful at all times for it to have value in some cases.

The Constitutional argument is two-fold; the "statute-is-the-only-law" argument and the delegation argument. The former, focuses on the Constitutional fact that a statute is the only legally acceptable way to enact a law. This argument ignores the fact that legislative history is not meant to supplant the statute but merely to assist in its interpretation. The latter argument is concerned with the fact that much legislative preparation has been delegated to staff people and that it may be the work and words of these individuals that appears in legislative history documents. However, the Constitution does not prohibit Congress from relying on outside groups or staff members for assistance, what it does do is limit the power to legislate to members of Congress. Therefore, members of Congress are the only people who can and do officially legislate.

The Congressional intent argument was discussed sufficiently above and will not be reiterated here. The historical and international argument holds that the United States today is unique in its reliance on legislative

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72 Id. at 861-868.
73 Id. at 861-862.
74 Id. at 863-864.
histories. Legislative history was not used in the nineteenth and early twentieth century in this country, nor is it used with the same zeal in other countries. However, the current legislative and judicial experience in America is uniquely characterized by heavy caseloads in the courts and the availability to the courts and the public of extensive legislative materials.75

The final argument is that when the courts rely on legislative history to interpret a law, it makes it harder for citizen's to plan their behavior under that law. Yet courts will only turn to the legislative history where the statute is unclear in the first place. Nor is legislative history difficult to find, as is often argued. Most libraries have, at a minimum, summary governmental documentation, and many large libraries are depositories for copies of all federal government documents.76 In addition, with the proliferation of internet information and access, more and more such documentation can be found electronically from any computer.

It is important to remember, as critics are quick to point out, that legislative history is "not the Rosetta Stone of statutory interpretation".77 On the other hand, neither is it without value. It can be a very useful tool to interpreters if they understand its shortcomings. I will now examine the varying importance of different extrinsic aids to interpretation.

**Significance of Different Aspects of Legislative History**

The weight given to various aspects of legislative history during interpretation varies. While the courts cannot always agree on which legislative materials are acceptable, most agree that extrinsic aids should be

75 Id. at 868.
76 Id. at 869.
77 Araujo, supra note 1, at 61.
both relevant and reliable to be valid. I created the following table (Table 2.) which provides a hierarchy of extrinsic aids, from information culled from many different sources. The legislative documents included and the general order of preference they are given, reflects common use by the courts. It is by no means strictly limiting, however.

Committee reports and other related documents addressing a statute are generally given the most weight. Folsom considers them the "preeminent sources" and the court in Zuber v. Allen stated that, "[a] committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." In fact, between 1938 and 1974, 65% of the total citations to extrinsic aids were from House and Senate Reports and the Congressional Record.

Statements made by legislative sponsors of a bill to the whole chamber are next in importance. According to Dickerson, these pronouncements "reveal a legislative intent more significant than that revealed by those of a more casual legislative adherent". Where statements are pertinent to the matter on hand, they are almost always used by the courts. Sutherlands Statutory Construction uses as an example the weight that was given to the opinions of the principal supporter of the Sunshine Act in court. Sutherlands cautions, however, that a sponsor may be acting on behalf of a

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78 McDonald, supra note 26, at 128.
79 Id. at 128.
81 Id. at 186. FOLSOM, supra note 48, at 33.
82 Id. at 135.
83 DICKERSON, supra note 3, at 73.
private party and not know any more about the particulars of a bill than other members.\textsuperscript{86}

In contrast, the views of opponents of a bill are rarely assigned much importance. Their statements, "may tend to overstate the reach of the provision opposed, [and] are given little probative effect as against the stated views, or even silence, of proponents."\textsuperscript{87} Sutherlands takes exception with this general rule when proponents of a bill have not specifically questioned or challenged specific statements by the opposition.\textsuperscript{88}

Table 2. Significance of legislative documents to interpreting legislative history in descending order of importance.

<table>
<thead>
<tr>
<th>I. Committee Reports</th>
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</thead>
<tbody>
<tr>
<td>II  a. Statements of sponsors to the whole chamber</td>
</tr>
<tr>
<td>b. Explanations of the Committee Chair</td>
</tr>
<tr>
<td>III a. Committee hearings</td>
</tr>
<tr>
<td>b. Statements in general debate</td>
</tr>
<tr>
<td>IV a. Statements of members of the opposition</td>
</tr>
<tr>
<td>b. Amendments or language rejected in committee or on the floor</td>
</tr>
</tbody>
</table>

On a level coequal with the previous category are the explanations of the committee chairperson when a bill is reported out of the standing committee to the committee of the whole. In the process of explaining a bill to the full legislature, a committee chair must answer specific questions about it and defend it against opposition. Thus, they must have familiarized

\textsuperscript{86} SUTHERLAND, \textit{supra} note 31, \textsection 48.15.


\textsuperscript{88} SUTHERLAND, \textit{supra} note 31, \textsection 48.15.
themselves with both the bill and the situation in need of remedy. Their statements may be taken as the opinion of the majority of the committee.  

Committee hearings are given less weight by interpreters of legislative histories. They are generally "concerned with the more diffuse matters of ulterior legislative purpose", and therefore less reliable for resolving specific questions of statutory intent. Some aspects of lengthy or involved statutory schemes are only discussed in committee hearings. Statements of individual members during general debate have historically been discounted by courts during construction. However, such statements are now considered acceptable if they are consistent with statutory language and other aspects of legislative history, and if they show "common agreement in the legislature about the meaning of an ambiguous provision."  

Amendments or previous bill language that was discarded also plays a role in legislative history. When certain words or phrases were either eliminated or rejected by the legislature, it indicates that the meaning in question was not intended or was no longer acceptable to the majority.  

Statutory Interpretation and Agency Regulation  
Once the legislature completes its Constitutionally delegated task of creating a law, the administrative agencies are responsible for writing the regulations that will allow them to carry out and enforce it. These agency regulations must be based upon the language and meaning of the relevant statute(s). In this capacity, the executive branch "often is called upon to

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89 Id. § 48.14.  
90 DICKERSON, supra note 3, at 157.  
92 SUTHERLAND, supra note 31, § 48.04.
interpret statutes long before they appear in court for judicial construction.\textsuperscript{93} Although their interpretation is not binding upon the judiciary, it is "entitled to great weight" and is usually accepted by the courts.\textsuperscript{94} Agencies must consider Congressional intent in its broadest implication when crafting these regulations.\textsuperscript{95}

Agencies often find themselves in the same position as the courts, needing to interpret an ambiguous statutory statement or provision or resolving a controversy arising from such an interpretation. In the face of such controversy, the agency must consider what Congressional intent was with regards to the particular aspect of the statute at issue. Thus, this interpretative process is equally applicable to the work of agencies as to courts. Like the lower courts however, an agency's interpretation of statutory meaning can be appealed.

**Conclusion**

While the arguments against the use of legislative history in statutory interpretation have merit, they are outweighed by its potential value. Although relying solely on the plain language of a statute for interpretation is ideal, the nature of the legislative process often creates statutes that are ambiguous, vague, or silent on the issue at hand. In such cases, interpreters, be they the courts, lawyers, agencies, or citizens, need to uncover Congressional intent. The legislative history of a statute describes the context out of which the statute arose. This documentation often holds explanatory statements which can elucidate Congressional intent for both broader

\textsuperscript{93} CRAWFORD, \textit{supra} note 5, at 300.
\textsuperscript{94} Id.
\textsuperscript{95} WILLIAM P. STATSKY, \textsc{Legislative Analysis: How to Use Statutes and Regulations} 4 (1975).
statutory purpose and specific provisions. A clear understanding of Congress' purpose can inform both judicial and agency decisions. If legislative history is used with a full understanding of its limitations and drawbacks, it can be an extremely useful interpretative tool.

In the following chapters I will apply this conceptual framework of analysis to the specific issue of nonconforming uses of wilderness, focusing on aircraft landing strips and their management today. I will spend the next two chapters examining the legislative history of relevant wilderness acts in the context of this analytical framework. Then I will examine the Forest Service's wilderness policies, controversies arising from the statutory ambiguity surrounding incompatible uses, and how this process can be used to resolve such issues in a manner compatible with Congressional intent.
CHAPTER 3
THE WILDERNESS ACT OF 1964

Introduction
Before delving into the legislative history of the Wilderness Act, it is important to understand the historical, administrative, and Congressional context in which the legislation was conceived. After briefly examining the evolution of wilderness thought in society in general, and the land management agencies specifically, I will outline the history of the Wilderness Act itself. Having thus presented the backdrop for wilderness legislation, I will examine the legislative intent found within this history for wilderness protection and nonconforming uses. This intent will be revisited in subsequent chapters that apply the previously outlined interpretive framework to specific management issues.

Early Wilderness Thought
By the turn of the last century most of the vast wilderness which had made up the American frontier had given way to farmlands and cities. Wilderness was no longer seen as a threat, but had come to represent both the power of the young nation that had conquered it and its cultural heritage. Having spent three centuries taming it, wilderness had become "a symbol imbedded in our national consciousness - a nostalgia for a lost opportunity".¹ Early wilderness philosophers such as Emerson, Thoreau, and Muir played an influential role in the increased valuation of wilderness for spiritual,

aesthetic, and educational purposes. A rise in national prosperity and an increased scarcity of wilderness heightened the public's interest in wilderness preservation.

The idea that wilderness was an appropriate use of public land had its origins in the early 1900s. Two Forest Service employees, Aldo Leopold and Arthur Carhart, were instrumental in the institutionalization of wilderness protection within their agency. It was due to the work of both these men that the agency's first wilderness, the Gila, was established in New Mexico. Another early wilderness proponent was Bob Marshall, a highly influential conservationist who championed wilderness from the Office of Indian Affairs, the Forest Service, and finally the Wilderness Society, which he helped to found. He was responsible for institutionalizing wilderness in the Office of Indian Affairs before accepting a position as head of the Division of Recreation and Lands for the Forest Service.

During the same period, a Yale University forestry professor, H.H. Chapman voiced concern over the insufficiency of existing administrative protection for wilderness. He argued for congressional protection of a national wilderness system managed by the current caretakers of these areas. In 1939, Franklin Delano Roosevelt's Secretary of the Interior, Harold Ickes, joined in the call for congressional designation and protection of wilderness.

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2 See generally, RODERICK NASH, WILDERNESS AND THE AMERICAN MIND. (3rd ed. 1982).
3 McCloskey supra note 1, at 288.
4 JOHN C. HENDEE ET AL., WILDERNESS MANAGEMENT, at 100 (1990).
6 Id. at 82.
7 HENDEE, supra note 4, at 102.
Wilderness Regulations in the Forest Service

In response to this public trend, recognition and protection of wild
areas was increasing institutionally within the agencies. In 1927, the Chief of
the Forest Service announced plans for a ban on road building and
development in areas with wilderness character. Also in the mid 1920's, the
Forest Service began to take inventory of the wilderness remaining within
the national forests. As a direct result of this survey, administrative
regulation L-20 was promulgated in 1929, providing the first systematic
protection for wilderness ever. The L-20 regulation listed permitted and
prohibited uses for the agency's primitive areas. However, many uses which
did not conform with wilderness preservation were permitted - logging,
grazing, and some road building. These regulations were not considered a
long-term commitment but rather a form of temporary protection and were
only nominally enforced.

A general dissatisfaction with the efficacy of the L-20 regulations
resulted in the development of the "U Regulations", U-1, U-2 and U-3(a), in
1939. Bob Marshall was instrumental in the promulgation of these new
regulations which were aimed at long-term protection for roadless portions of
the national forests. These regulations embodied a philosophical and
administrative leap forward in wilderness protection and a broader
recognition of wilderness values. The USFS Manual for that period noted
that "[w]ilderness areas provide the last frontier where the world of
mechanization and of easy transportation has not yet penetrated. They have
an important place historically, educationally, and for recreation."

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8 Id.
9 Id. at 100.
10 ALLIN, supra note 5, at 82-83.
11 HENDEE, supra note 4, at 101.
The U Regulations instituted three land use designations which could be applied to existing primitive areas; "wilderness", "wild", and "roadless". Wilderness and wild areas differed in size requirements and were established by different levels of the administration but were managed identically. These regulations prohibited logging, road construction, and permanent structures in these areas and banned motorized access except where previously established. Permitted uses included grazing, water resource development, and mining. Before existing primitive areas could be reclassified as wilderness or wild they underwent a review process. During the review period these areas were managed according to the new regulations and were protected from many extractive uses.

The review process proceeded slowly, halting altogether during World War II. By the end of the forties, only two million of the potential 55 million acres had been classified as wilderness. Conservationists were unhappy with the pace of reclassification and expressed fears that lower elevation timbered areas were being lost through this process. This administrative protection of wilderness left much of the decision making to the discretion of agency personnel whose commitment to wilderness preservation varied. Changes in administration could radically affect the course of preservation and created an atmosphere of uncertainty. Thus, a push began for a Congressionally mandated and secure program of wilderness protection.

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12 Wilderness areas were defined as areas over 100,000 acres in size; wild areas had 5-1000,000 acres, and roadless areas were over 100,000 and were managed primarily for recreation, however, logging was permitted if provided for in the area's management plans. The only areas that were classified as roadless areas were 3 sections of the Superior NF which were combined to form the Boundary Waters Canoe Area in 1958.

13 HENDEE, supra note 4, at 101.

14 Id.

15 Id. at 102.

16 Id.
The Birth of the Wilderness Act

In 1949, the Legislative Reference Service of the Library of Congress released a research document entitled *The Preservation of Wilderness Areas: An Analysis of Opinion on the Problem*. This report, written by C. Frank Keyser, was a survey of existing information and thoughts on the wilderness idea. Members of Congress had requested this study to provide background for potential legislative action on wilderness designation. Their interest was spurred by the lobbying of Howard Zahniser, the Executive Secretary of the Wilderness Society and an influential proponent of wilderness protection until the day he died, four months before the passage of the Wilderness Act. Keyser's report supported the need for legislative protection of wilderness and expressed concern over the preservation of wilderness under the current management structure. It also noted widespread public support for wilderness protection.

In May 1955, Howard Zahniser gave a speech entitled "The Need For Wilderness Areas", which outlined a specific program for preserving wilderness within the public domain. Zahniser believed that a cohesive program of wilderness protection was crucial to the preservation of the remaining wild areas. A national system would eliminate the fragmentation and uncertainty of the prevailing management regime. Senator Hubert H. Humphrey (D-MN) was captivated by the idea and inserted the speech into the Congressional Record, effectively bringing the argument into the legislative arena.

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17 CONGRESSIONAL QUARTERLY ALMANAC Vol. XX, 88th Cong. 2nd Sess., at 487 (1964).
18 HENDEE, supra note 4, 102-103.
19 Id. at 102.
20 ALLIN, supra note 5, at 104.

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Zahniser and his fellow wilderness supporters had three goals for wilderness legislation; 1) that it be as unambiguous as possible, 2) that it be supported by a united coalition of groups, and 3) that opposition be minimized as much as possible. The first wilderness bills were drafted on these premises. The idea of a congressionally mandated system of wilderness was opposed by both the Forest Service and the Park Service at the outset. These agencies felt that such legislation was unnecessary and feared that it might set a precedent for other special interest groups to secure statutory protection for their uses, like grazing or mining. The Park Service was concerned that wilderness protection of their lands would decrease if placed into a national system with Forest Service wilderness.

Despite agency opposition, Senator Humphrey urged conservationists to draft a wilderness bill which Zahniser did with the help of the Sierra Club, the National Parks Association, the National Wildlife Federation, and the Wildlife Management Institute. The wilderness proposal produced by this coalition became the first wilderness bill introduced in the United States Congress in 1956. Passage of wilderness legislation, however, would be a long time in coming.

Legislative History of the Wilderness Act

Summary

During the nine years it took for a wilderness bill to successfully emerge from Congress, 65 different wilderness bills were introduced. A total of eighteen hearings were held across the country, hundreds of witnesses

22 HENDEE, supra note 4, at 103.
23 Id.
24 ALLIN, supra note 5, at 110.
25 HENDEE, supra note 4, at 104.
spoke, and thousands of pages of testimony were produced. Over the course of those years, many changes were wrought to the bill so that the final law differed substantially from Zahniser's original draft. Through each successive attempt, more compromises were made and more opposition to the bill was removed until passage was finally possible in 1964.

The original wilderness bill included for study 65 million acres of lands of the Park Service, the Forest Service, the National Wildlife Refuges and Game Reserves, and the Bureau of Indian Affairs. All designated Forest Service wilderness, wild, and canoe areas would immediately become part of the new wilderness system and primitive areas would be temporarily included. In its final form, the NWPS of 1964 would include only 9.1 million acres of these Forest Service wilderness-type areas, with the remaining Primitive areas slated for wilderness study.

The first bills prohibited development, logging, new mining, dams, roads, aircraft, motorboat use, and commercial enterprise. They set up a National Wilderness Preservation Council which was eventually removed. This was to be a group of agency heads and conservationists charged with reviewing wilderness recommendations and advising Congress and the administration on designation decisions. In these early versions of the legislation, the executive branch was given the power to make allocation decisions subject to Congressional veto. The allocation issue became a sticking point throughout the later years of debate. This balance of power

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26 McCloskey, supra note 1, at 298.
28 Id. at 18.
30 HESSION, supra note 27, at 98-103.
was reversed by the final bill which gave Congress the power of affirmative action on wilderness designation.\(^{31}\)

**The Early Years of Debate**

In July of 1956, Humphrey and nine other Senators introduced the first piece of wilderness preservation legislation in the Senate. Four days later, Representative John Saylor (R-PA) introduced identical companion legislation in the House.\(^{32}\) While no action was taken on any of these bills due to the late date in the session, it was an important first step on the long road to eventual passage.\(^{33}\) The first hearings were held on wilderness preservation proposals during 1957. The Senate Interior and Insular Affairs Committee, chaired by James Murray (D-MT), held hearings on two bills, S. 1176 and S. 4028; the former was opposed by the Departments of Agriculture and the Interior, and the latter was endorsed with reservations.\(^{34}\) The House Interior Committee also held hearings on wilderness legislation but no record of these hearings was published.\(^{35}\) Support for the creation of a wilderness system continued to grow, with letters regarding the legislation running 20 to 1 in favor of wilderness preservation.\(^{36}\) In 1959, hearings were held by the House Interior Committee, under the leadership of Wayne Aspinall (D-CO) who would be a formidable opponent of wilderness legislation over the next six years. The Senate Interior and Insular Affairs Committee also held hearings but no bills were reported to the floor of either house that year.\(^{37}\)

\(^{31}\) The Wilderness Act, supra note 29, at § 3(b).

\(^{32}\) ALLIN, supra note 5, at 107. [S. 4013 and H.R. 11703.]

\(^{33}\) Id. at 108.

\(^{34}\) CONGRESSIONAL QUARTERLY ALMANAC, supra note 17, at 489.

\(^{35}\) HESSON, supra note 27, at 14, 93.


\(^{37}\) CONGRESSIONAL QUARTERLY ALMANAC, supra note 17, at 489.
Legislative Success

1961 dawned a positive year for wilderness legislation. Clinton Anderson (D-NM) took over as chair of the Senate Interior Committee, introducing wilderness bill S. 174 almost immediately. The newly elected President John F. Kennedy urged passage of wilderness legislation in his natural resources message to Congress. Both the Secretaries of Interior and Agriculture, Stewart Udall and Orville Freeman, endorsed S. 174 completely after years of reservations. The Department of Agriculture wrote that "enactment of S. 174 would be desirable resource legislation and in the national interest". Udall stated that the administration was "deeply committed to the enactment of a bill similar [to this]]. With Frank Church (D-ID), acting as the floor manager, the bill was passed by a vote of 83-13 on September sixth.

No parallel steps were taken in the House, however, and the bill once again failed to become law. The following year, the House Interior and Insular Affairs Committee held hearings on their own version of the wilderness bill, H. 776; a measure which was widely criticized by the conservation community. On August 9, the House Public Lands Subcommittee reported their altered version of this bill, which permitted mining, to the full committee. It was reported out of committee to the House under a suspension of rules on August 30, a maneuver which blocked the addition of any new amendments. The bill's supporters were unable to

38 HESSION, supra note 27, at 72.
40 Id. at 18.
41 Congressional Quarterly Weekly Report, August 8, 1961, at 1565.

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gather the necessary two-thirds majority for passage under suspended rules and the measure failed.42

The Senate once again took the lead on this legislation in 1963, passing S. 4 with the full backing of the Kennedy administration. This bill was virtually identical to the successful Senate bill of 1961. Strong opposition to wilderness legislation in the House, however, precluded passage once again. In his budget message in January of 1964, President Lyndon Johnson specifically requested the passage of wilderness legislation during the upcoming year.43 The House Interior and Insular Affairs Committee once again held hearings and finally reported a bill to the floor in July of 1964. The Senate passed S. 4 by a voice vote once the House took action, and in August a conference report on the bill successfully passed both houses. On September 3, 1964, after nine years of debate, revisions, and countless hours of hearings, Public Law 88-577, the Wilderness Act, was signed into law by President Johnson.44

The Wilderness Act of 1964

Throughout the nine years of its maturation, the Wilderness Act went through many alterations, both minor and major, while maintaining its fundamental outline. Its long title reads "An Act: To establish a National Wilderness Preservation System for the permanent good of the whole people, and for other purposes." The second section of the bill is a statement of policy, followed by a definition of "wilderness" in the context of this legislation. The Act refers to wilderness as an area which is "untrammeled by

42 Id.
43 CONGRESSIONAL QUARTERLY ALMANAC, supra note 17, at 490.
44 Id. at 485.
man, where man himself is a visitor who does not remain". Then the
definition is narrowed down to four characteristics of a potential wilderness
area. To qualify for wilderness designation an area must be; (1) primarily
unaffected by the work of man, (2) have "outstanding opportunities for
solitude or a primitive and unconfined type of recreation", (3) be more than
5,000 acres or large enough "to make practicable its preservation and use in an
unimpaired condition, and (4) it may also have "ecological, geological, or
other features of scientific, educational, scenic, or historical value".

Section 3 of the Act deals with the extent of the system; which lands
would immediately become wilderness and which would be studied for later
inclusion, how wilderness would be classified, who was responsible for
designation, and the methods for modifying the wilderness system. Section 4,
"Use of wilderness areas", first indicates that the purposes of the Act are
"within and supplemental to" the present uses of the land and that the Act
does not interfere with certain existing statutes. Section 4(b) informs land
managers that they are responsible for "preserving the wilderness character of
the area" and that the wilderness under their care "shall be devoted to the
public purposes of recreational, scenic, scientific, educational, conservation,
and historical use."

The following two subsections address acceptable uses of wilderness.
Section 4(c), "Prohibition of certain uses", states that within designated
wilderness there would be no "use of motor vehicles, motorized equipment,
or motorboats, or landing of aircraft". This is followed by an exception in
4(d)(1) that allows that;

45 The Wilderness Act, supra note 29, § 2(c).
46 Id.
47 Id. § 4(b).
Within wilderness areas designated by this Act the use of aircraft or motorboats where these practices have already become established may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable.\textsuperscript{48}

This is the section of most interest to this paper, as it deals with the guidelines for aircraft use within wilderness areas, and is the one I will return to. The final section explains the provisions affecting private or state landholders within wilderness areas, and finally, the last section governs protocol for the acceptance of gifts, bequests, and contributions to the NWPS.

\textbf{The Wilderness Concept According to the Original Sponsors}

As outlined in Chapter Two, the statements of a statute's primary proponents, particularly members of the committee which considered the bill, are one of the most convincing indicators of Congressional intent. These are the members of Congress who had the strongest working knowledge of a statute and who have taken part in the machinations of the committee's work and have the most exposure to the statute. Statements made before the committee of the whole hold the most weight, followed by statements within the considering committee. Statements from hearings on a bill can be useful when they touch upon an aspect of the proposed legislation which is not debated by the whole.

Thus Congressional intent behind wilderness legislation can be elucidated by the words of its sponsors and major proponents. The statements of these individuals present a clear view of what they hoped to preserve with the creation of a wilderness preservation system and why they felt such a system was needed. They spoke of the values of wilderness and the qualities which make a wilderness experience unique and important.

\textsuperscript{48} Id. § 4(d)(1).
They also provide some explanation and justification for their emphasis on maintaining the status quo on lands entering the wilderness system.

A main goal of wilderness legislation was to protect areas with wilderness character from the pressures of an expanding population. In the words of Senator Humphrey, a principal sponsor of wilderness legislation in the Senate;

Our civilization moves fast. Our population pressures are growing. The time when we have the opportunity to provide for the preservation of wilderness without having to interfere with other programs will not be with us for long.49

He and the other proponents felt that many existing wilderness areas were "in a precarious position because [they] lack adequate legal protection against pressures for commercial and exploitative encroachments." A major assumption behind the legislation was that, in the words of sponsor Representative John Saylor (R-PA), "our civilization is such that no areas will persist unexploited or underdeveloped except those that are deliberately set aside and faithfully protected".50

Senator Morse, a co-sponsor of the original wilderness bill sang the praises of the wilderness experience on the floor of the Senate, emphasizing the proximity to "God Almighty" that can be found in primitive areas. In his words;

We cannot justify, in our generation, the destruction of these great areas of wilderness ... . There is no timber interest, there is no mining interest, there is no grazing interest, there is no economic interest that, in my judgment, has any right to be placed above the great need of preserving one of the great spiritual strengths of America which is to be found in these untouched and untapped wilderness areas.51

50 Id. at 276.
51 107 CONG. REC. S18353 (daily ed. September 6, 1961).
Several proponents addressed themselves to the opposition and what one member termed "gross misconceptions" of what the legislation would actually do. Morse emphasized that units of the proposed system were areas 1) already in federal ownership, 2) within agencies with purposes consistent with wilderness preservation, and 3) that have maintained their wilderness condition while serving the public purposes of their park, forest, or refuge. He assured skeptics that "no new Federal lands will be created, and no new wilderness areas will be created by this bill".

As mentioned above, the proposed system was carefully crafted to minimize opposition by not reaching too far. Supporters wished to protect the qualities and characteristics of existing wilderness areas within the public domain but could not do so if their bill was politically untenable. The NWPS would maintain the status quo of the time of designation in these areas, protecting them from further degradation and development. Frank Church, a long time wilderness supporter and member of the Senate Interior and Insular Affairs Committee, asserted that "[n]o one will be adversely affected by passage of the bill. It has been carefully drawn to give all possible protection to the economic interests of the West."

As to the quality of the resource they sought to protect, Senator Humphrey clarified his definition of wilderness as "the native condition of the area, undeveloped, so to speak, untouched by the hand of man or his

52 Id. Senator Frank Church.
53 Id. at S18352.
54 Id. at S18354.
mechanical products". His definition incorporates an absence of mechanization as a core ingredient. He saw wilderness as a place "for people to make their way into . . . without all of the so-called advances of modernization and technology". He feared that "pressures for roads and non-wilderness recreational and tourist developments threaten in many places to destroy the primeval back-country wilderness".

Church spoke directly to the issue of nonconforming wilderness uses in his statement to the Senate;

Since uses inconsistent with wilderness eliminate wilderness, it is logical to conclude that if we want wilderness we shall have to exclude such incompatible uses in areas to be preserved as wilderness. Such a procedure is completely consistent with a multiple-use philosophy.

The preceding comments demonstrate some of the ideals that were behind the long battle for a unified system of wilderness protection. Common themes found in the rhetoric of the sponsors include the need to preserve a certain quality of wilderness for future generations. This quality is more than just a physical characteristic of the land, but also encompasses the challenge to the human spirit to travel primitively and be free from reminders of mechanized society. These statements bolster the firm preservationist language of the final Wilderness Act and must be taken into account when balancing the various ambiguities found within the statute as.

The Evolution of "Special Provisions"

By the time the first draft of the Wilderness Act appeared in the Senate in 1956, the bill had been shaped by years of thought and planning by

55 Hearings on S. 1176, supra note 49, at 19.
56 Id. at 20.
57 Id. at 26.
58 107 CONG. REC., supra note 51, at S18355.
conservationists. It is important to look to that first draft for the original intent of the legislation. As mentioned above, the drafters tried to write a bill which would eliminate opposition to the proposal and avoid ambiguity. Subsequent substantive changes to the bill reflect the multitude of compromises necessary for passage. I will now focus on how the specific sections governing aircraft and other motorized uses in wilderness areas changed over time.

Section 3 of the draft version presented to the Senate Interior and Insular Affairs Committee, entitled "Special Provisions", (b) read;

Within such areas, except as otherwise provided in this section and in section 2 of this act, there shall be no road, nor any use of motor vehicles, or motorboats or landing of aircraft, nor any other mechanical transport or delivery of persons or supplies . . . in excess of the minimum required for the administration of the area for the purposes of this act.59

This section provides guidance for limiting these uses. Section 3(c) addresses exceptions to these guidelines,

the use of aircraft or motorboats where these practices have already become well established may be permitted to continue, subject to such restrictions as the Chief of the Forest Service deems desirable. *Such practices shall be recognized as non-conforming uses of the area of wilderness involved and shall be terminated whenever this can be effected with equity to, or in agreement with, those making this use.* (emphasis added)60

The bill's drafters clearly felt that motorized uses were not compatible with the wilderness character they sought to preserve. While maintaining the status quo where such uses were "well established", the bill would phase out non-conforming uses in time. This would adjust the current status quo to be more in line with wilderness values. The initial wording of this subsection is particularly telling when compared to the final version.

59 *Hearings on S. 1176, supra note 49, at 6.*
60 Id. at 19.
Opponents of the bill were not pleased with the fate the bill outlined for motorized uses. Gordon Rule, legal counsel for the National Association of Engine and Boat Manufacturers Inc. told the Senate Interior Committee that his organization saw section 3(c) as an "absolute prohibition" of new motorboat use in wilderness, and the next statement as a mandate to eliminate existing uses. He argued that regulations for aircraft and motorboat use were already in place for Forest Service wilderness areas, and thus new regulations were not needed. Wilderness proponents appear to have responded to these complaints according to their original goal of minimizing opposition. Rather than risk alienating potential supporters, the drafters partially acquiesced on this point.

The 1958 version, Senate bill 4028, retained most of the same language regarding aircraft and motorboat use except for one crucial change. Section 3(c), no longer contained the language terming motorboat and aircraft uses "non-conforming" uses that had to be eliminated. Additional change came with the following version, S. 1123, in 1959. Concerns of the timber industry and land management agencies prompted the inclusion of language permitting the use of aircraft and other motorized transport for the control of fire, insects and the spread of disease in the forests. Under section 3(c)(1) after "deems desirable", the following was inserted:

Within national forest areas included in the Wilderness System such measures may be taken as may be necessary in the control of insects and diseases, subject to such conditions as the Secretary deems desirable.63

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62 Id. at 276.
While the main substance of these sections remained essentially the same, the prohibitions had been reined in and the exceptions broadened to minimize conflicts.

Conclusion

Senator Anderson, Committee chairman summarized his overview of the legislation's history saying that;

proponents were pretty well satisfied with the bill as drafted. They feel they have come a long way from their original position, but that they have given up some things in the bill that they consider important to their purposes.64

He stated that the opposition to the bill; the Farm Bureau, lumbermen, oil people, mining interests and others, now realized that "wilderness is inevitable".65 He continued to state that throughout the years of debate there had been "almost unanimous support for the basic purpose of a wilderness bill". The debate had been focused on disagreement regarding how much wilderness, how it should be designated and how stringent preservation would be. Anderson noted that considerable opposition had been withdrawn as a result of compromises by the proponents of the bill.66 Interior Secretary Udall saw S. 174 as a "reasonable compromise" on the part of all parties which "resolves many of the past objections".67

A review of the legislative history behind the use of aircraft in wilderness indicates the attitude of wilderness proponents towards this use. While the original bill indicated the sponsors' awareness that airfields and aircraft did not conform with wilderness, some level of use was permitted to

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64 HESSION, supra note 27, at 1.
65 Id.
66 Id. at 2.
67 Id. at 18.
minimize opposition. Both the statutory language and statements of the bill's authors, indicate that aircraft use could be tolerated at existing levels, but would not be expanded. The original sponsors of the bill wanted this nonconforming use to be eliminated, however, compromise removed this explicit stipulation. The strongest statements by proponents of the bill focus on the values and character of the wilderness resource they were seeking to protect. This was clearly, in their minds, a wilderness devoid of most of the impacts of man and his mechanical products. While the strategy of maintaining the status quo necessitated compromising that character, the discretionary management power given to the agencies would allow them to minimize the conflicts between such uses and wilderness character.
CHAPTER FOUR
WILDERNESS AIRSTRIPS

Introduction

There are currently fifteen aircraft landing strips on national forest wildernes ses in the coterminous states. These strips are found on the Frank Church-River of No Return Wilderness in Idaho, the Selway-Bitterroot Wilderness which straddles the Idaho-Montana border, and the Great Bear Wilderness in northern Montana. This number does not include landing strips on either private or state wilderness inholdings. This discussion excludes fixed-wing aircraft access to Alaskan wildernes ses which is permitted under the Alaska National Interest Lands Conservation Act (ANILCA).\(^1\)

The Wilderness Act of 1964 immediately designated 9.1 million acres of Forest Service wild, wilderness, and canoe areas as units of the National Wilderness Preservation System. It set out provisions for determining the suitability of Forest Service Primitive areas for inclusion in the system within ten years, and for reviewing the wilderness potential of all large roadless areas within the Department of Interior. The management provisions of the Act, however, only directly applied to the 54 units classified as wilderness in 1964. Those Primitive areas that were later included in the NWPS would also be managed under the 1964 Act. The Act left the door open for special management provisions for future wildernes ses.

As referred to in Chapter Three, one of the main reasons given for establishing a national wilderness system was consistency of management. Widespread use of special provisions for post-1964 wildernes ses would

undermine the consistency of wilderness in the NWPS.\(^2\) Perhaps seeing the error of this omission, Congress has applied the provisions of the original Act to subsequently designated wildernesses, affirming that they would be managed in the same manner as the existing units. Wilderness enabling legislation usually includes a statement similar to the following excerpt from the Great Bear Wilderness Act,

The [designated wilderness] shall be administered by the Secretary [of Interior or Agriculture] in accordance with the provisions of the Wilderness Act governing areas designated by that Act as wilderness areas, except that any reference in such provisions to the effective date of the Wilderness Act shall be deemed to be a reference to the effective date of this Act.\(^3\)

This practice did not preclude the use of special provisions, but restricted such exceptions to specific areas.\(^4\)

Special management provisions occur in response to unique attributes or circumstances in an area, powerful special interests, or concern regarding ambiguities in the original Wilderness Act. The Eastern Wilderness Act responded to the concern that many potential wildernesses in the east failed to meet the size and purity requirements of both the Wilderness Act and Forest Service policy. It was also a reaction to the fact that a high percentage of the remaining undeveloped lands in the East were privately owned and that opportunities for preserving public land were dwindling fast.\(^5\) This act contains two unique clauses; (1) it gives the Secretary of Agriculture the power to condemn private land within wilderness boundaries when landowners are not managing their property in a manner compatible with

\(^4\) HENDEE, *supra* note 2, at 119.
\(^5\) Id. at 134.
wilderness values and (2) wilderness and wilderness study areas designated by this act were withdrawn from mineral entry.\(^6\)

The Colorado Wilderness Act provides an example of the influence of special interest groups on wilderness legislation. Grazing is another nonconforming use which the Wilderness Act allowed to continue if previously established. As with aircraft landing strips and motorboat use, grazing was "subject to such reasonable regulations as are deemed by the Secretary of Agriculture".\(^7\) During the Forest Service's Roadless Area Review and Evaluation (RARE II) process in the late 1970's, grazing permittees became increasingly concerned by the Forest Service's use of its statutory discretion to limit wilderness grazing. Livestock operators feared that this administrative trend would eventually result in the phase out of grazing in designated wilderness.\(^8\)

During deliberations over the Colorado Wilderness Act, Congress included language in the committee report, House Report 96-617, further protecting wilderness grazing. The provision, which became known as the 'Colorado Grazing Guidelines', stated that;

\[
\text{there shall be no curtailments of grazing in wilderness areas because an area is, or has been designated as wilderness, nor should wilderness designations be used as an excuse by administrators to slowly "phase out" grazing.}^{9}
\]

The report stipulated that these guidelines would be "promptly, fully, and diligently implemented" by the Forest Service and applied to all the agency's wilderness lands.\(^10\) While the provision explicitly explained that it did not

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\(^10\) Id.
amend the Wilderness Act, it was to guide Forest Service interpretation of the Act on all wilderness lands.\textsuperscript{11}

The Wilderness Act's language governing aircraft landings is also open to agency interpretation. The Act clearly gives the Secretary of Agriculture discretion to regulate this use in areas where it was previously established and prohibits it where absent prior to designation. The Selway-Bitterroot, the Frank Church, and the Great Bear Wildernesses had established aircraft usage before they were designated as wilderness. The Selway-Bitterroot was established by the 1964 Act and subject only to the provisions therein. However, the Great Bear and Frank Church Wildernesses were not designated until 1978 and 1980 respectively. Proponents of air access in both these areas had a strong interest in limiting the Forest Service's discretion to eliminate aircraft use. This problem was dealt with differently for both areas, but with similar results. The Central Idaho Wilderness Act included statutory language further protecting air access to this area. The Great Bear Wilderness Act contained no such language in the law, but addressed the issue in the committee report. This report's language has become the basis for management of the single airstrip on the Great Bear.

**The Central Idaho Wilderness Act**

On July 23, 1980, President Carter signed into law the Central Idaho Wilderness Act (CIWA), creating what was then the largest wilderness area in the lower 48 states.\textsuperscript{12} This bill designated 2.2 million acres of wilderness in central Idaho and added 105,600 acres to the Selway-Bitterroot Wilderness in...
Idaho. It also gave Wild and Scenic status to 125 miles of the Salmon River. Many users believed that an area of this size was too vast to permit reasonable access by foot. There was a substantial tradition of access by stock and airplane, both private and commercial. These users wished to ensure their continued access by these means.\textsuperscript{13}

Idaho’s senior Senator Frank Church, for whom the wilderness would later be renamed, was the individual most responsible for the passage of this act.\textsuperscript{14} In 1979 Senator Church introduced three bills into the Senate on behalf of the River of No Return Wilderness Council, a coalition of conservationist groups, the Idaho Forest Industry Council, and the Carter administration.\textsuperscript{15} All three of these bills contained language dealing with aircraft and motorboat use that mirrored section 4(d)(1) of the Wilderness Act. Before the bills went to committee, Church facilitated four days of hearings around Idaho, and a fifth day in Washington D.C. All told, testimony was heard from over 600 people.\textsuperscript{16} By the time the bill was reported out of committee, the provision governing aircraft had been rewritten to remove much of the Secretary’s discretionary authority to close wilderness airstrips.

The alternate language included in the CIWA ensured the continuation of this preexisting use. The final language regarding aircraft use is found in section 7(a)(1);

\begin{quote}
the landing of aircraft, where this use has become established prior to the date of enactment of this Act shall be permitted to continue subject to such restrictions as the Secretary deems desirable: Provided,
\end{quote}

\begin{footnotes}
\item[14] CONGRESSIONAL QUARTERLY ALMANAC, Vol. 35, at 688 (1979). Originally designated the River of No Return Wilderness, it was renamed the Frank Church-River of No Return Wilderness in 1984 by Public Law 98-231.
\item[15] Id.
\item[16] See generally, River of No Return Wilderness Proposals, supra note 13.
\end{footnotes}
however, that the Secretary shall not permanently close or render unserviceable any aircraft landing strip in regular use on national forest lands on the date of enactment of the Act for reasons other than extreme danger to aircraft, and in any case not without the express written concurrence of the agency of the State of Idaho charged with evaluating the safety of backcountry airstrips.\footnote{17}

The Forest Service has responded to this provision by retaining and maintaining all of the twelve airstrips managed by the agency.

During the hearings in Idaho, there were some comments supporting the exception allowing for established uses of aircraft and motorboats, yet only four statements favored an additional statutory mandate to protect all wilderness airstrips. People who spoke in favor of the continuation of established uses, whether by air or by water, primarily kept their comments within the framework of the existing language. The River of No Return Council, which spoke for 39 organizations and submitted a petition signed by 20,178 individuals favoring S. 95, supported the continuation of established aircraft and motorboat uses according to section 4(d)(1) of the Wilderness Act.\footnote{18}

Idaho Governor John Evans was one of a few witnesses who spoke in favor of stronger protection of air access. Evans asserted that he would insist "that all existing airstrips on public lands within the primitive area remain accessible to the public".\footnote{19} The editor of the Idaho Statesman also argued that the existing provision for aircraft use was not good enough. He felt the wording was not definitive enough and gave "too much discretionary power to the Secretary of Agriculture to capriciously and arbitrarily close landing strips".\footnote{20}

\footnote{17} The Central Idaho Wilderness Act, supra note 12, § 7(a)(1).
\footnote{18} River of No Return Wilderness Proposals, supra note 13, at 599.
\footnote{19} Id. at 557.
\footnote{20} Id. at 688.
It was not until the hearing in Washington D.C. that most of the discussion regarding increased protection of existing airstrips took place, primarily as a debate between Senator Church and representatives of the Department of Agriculture. Senator Church expounded that,

[the proposed Central Idaho wilderness] is not the kind of area that can be easily entered on foot from its exterior boundaries by people who have neither the time or the capability... many people who want the wilderness experience fly in and land on one or another of these airstrips and then move to the interior of the area from the landing strip.21

Rupert Cutler, the Assistant Secretary for Conservation, Research, and Education at the Department of Agriculture, countered with the assurance that closure of back-country airstrips would only happen "after a fair amount of due process."22 He stated that the Department of Agriculture favored the discretionary authority provided by the Wilderness Act which would allow airstrips on national forest land that "are not needed for the protection and appropriate use of the wilderness or for emergency purposes... [to] be phased out."23

According to the Department, only a few of the twelve airstrips in question received active maintenance and some had been closed due to their dangerous conditions. Church admonished the Department and the Forest Service for these closures, stating that "through the process of intentional neglect over the passage of years, they have become virtually unusable."24 He argued for "something in this bill that lays down an affirmative duty on the Forest Service [to maintain these strips] because access to this area is just too important."25 Senator McClure also found the language of the Wilderness

21 Id. at 871.
22 Id.
23 Id. at 872.
24 Id. at 881.
25 Id. at 872.
Act too permissive and believed that it could result in management that did not meet "with the approval of the people who are accustomed to that use."26

This discussion reappeared once again on the House and Senate floors. Senator Church justified the need for air access to his colleagues by saying that "[b]ecause of the vastness of the new wilderness, without continued access by air, few people could see and enjoy the more remote and less accessible parts of this region." He emphasized that "the Forest Service is expressly prohibited from closing airstrips on national forests within the wilderness, which are in regular use at present, except for the reason of aircraft safety."27 In the House, Representative Santini emphasized the need to provide explicit direction to the Forest Service because "there has been a very strong administration trend to either totally preclude such use or to make them essentially unattainable."28

Section 7(a)(1) clearly limits administrative discretion to close wilderness airstrips on this Wilderness. However, nowhere in the statutory language or the legislative history is there any indication that Congress intended to limit the agency’s ability to regulate levels of air access to these strips. Nor is there any discussion of increasing levels of use. So, while the Act and its history does not prohibit any increase in use beyond the level existing in 1980, neither does it prevent the Forest Service from restricting use to 1980 levels where necessary to meet the Wilderness Act's requirements for wilderness character, values and experience. The CIWA's addition to the Wilderness Act's aircraft exception merely prohibits the closure of these airstrips for anything but safety reasons and mandates state involvement.

26 Id. at 881.
27 126 CONG. REC. at S17780 (Daily ed. June 26, 1980).
28 Id. at S17781.
Wilderness managers on the Frank Church have interpreted it more restrictively than is necessary.

The Great Bear Wilderness Act

While the language of the three paragraph Great Bear Wilderness Act does not address the issue of aircraft landing strips, this issue is discussed in the report which accompanied the bill. The legislation, sponsored by Representative Mo Udall (D-AZ), added 60,000 acres to the Bob Marshall Wilderness and designated approximately 290,571 acres of the Flathead National Forest as the Great Bear Wilderness. The newly designated Great Bear Wilderness contained one airstrip, Schafer Meadows, which was primarily used for recreational access by commercial outfitters and private users, as well as for administrative purposes.29

House Report 1616 states that "[t]his area was included in the wilderness with the specific understanding that the Forest Service will not act to phase out public use of the airstrip." It goes on to note that section 4(d)(1) of the Wilderness Act allows for such use to continue and instructs the Forest Service to manage the area so as to provide for continued access to the airstrip."30 While the airstrip must remain open, the committee agreed that it should not be significantly upgraded in any way. It also recognized that the level of use should remain about the same and added that "greatly expanded use may be reasonably regulated by the Forest Service to protect wilderness values."31 This regulation might be anticipated to include limitations on daily landings or types of usage.

29 The Great Bear Wilderness Act, supra note 3.
31 Id. at 4.
As discussed in Chapter Two, a statute is the only legally permissible way for a legislature to express its will. Statements within the legislative history of an act may, however, be used to guide interpretation of a statute where it is vague, ambiguous, or over general. The Forest Service has taken the report's language as a guide for management in this area. The agency states in the Bob Marshall Great Bear Scapegoat Wilderness Recreation Management Direction of 1987 that "the Forest Service recognizes the Congressional Direction established in the House Committee Report accompanying the act establishing the Great Bear Wilderness".32

Conclusion

The direction found in both the Central Idaho Wilderness Act and House Report 1616 indicate an unwillingness to allow the Forest Service full discretion for the management of airfields in wilderness. The main concern of the activists behind both of these provisions appears to be preventing unwarranted closure of landing strips. The language of the CIWA clearly restricts the Forest Service's ability to close airfields, however it places no restrictions on the agency's power to regulate or limit air access. Nor does the CIWA explicitly require the Forest Service to repair an airstrip that has been rendered unserviceable by natural causes. House Report 1616 emphasizes Congress' intention to keep the Shafer Meadows airstrip open. It does, however, clearly recognize the potential need to regulate air access in order to protect the wilderness resource.

Thus, although proponents of both provisions were wary of the regulatory discretion provided by the Wilderness Act, neither goes much

further than that statute in actuality. The emphasis of section 4(d)(1) of the Wilderness Act is on maintaining the status quo. For the Selway-Bitterroot, the status quo in 1964 included three airstrips with a moderate level of use. Therefore, Congressional intent was to retain this level of access - not to allow it to increase. While the statutory discretion would permit the Forest Service to decrease or eliminate these airstrips, that has not been done. What all three provisions do still allow, most importantly, is agency regulation of these airstrips, per its own regulations, for the protection of wilderness values and the wilderness experience.
The Development of Forest Service Wilderness Policy

As explained in Chapter Two, it is the responsibility of the relevant federal agencies to translate Congressional statutes into working regulations that accurately interpret the legislature's intent. After the passage of the Wilderness Act, the Forest Service needed to write wilderness regulations that translated the goals and provisions of the Act into on-the-ground preservation.

In "Two faces of wilderness - a time for choice", Bill Worf details the birth of wilderness policy in the Forest Service. Worf played an important role in this development as a member of the four person task force assigned to draft the agency's wilderness regulations and policy guidelines. The task force recognized that Congress had clearly instructed the agency to pursue a new direction in wilderness policy. To better understand that mandate, they first studied the legislative history and debate surrounding wilderness legislation. Throughout this history, wilderness supporters consistently made three points: "1) the wilderness resource is special, 2) the Wilderness System must be for all time, and 3) wilderness once lost could never be regained." The job of the task force would have been simple if Congress had not included a list of exceptions to the generally prohibited uses of wilderness. In doing this Congress "opened the door for controversy" and inconsistencies in agency interpretation.

1 William A. Worf, Two faces of wilderness - a time for choice, 16 ID L REV 424, 425 (1980).
2 Id. at 426.
3 Id. at 427.
4 Id.
In 1965, the wilderness task force sent out 18,000 copies of their draft wilderness regulations for public comment. Meanwhile, land managers were being barraged with requests for permission to use motorized equipment in wilderness; from miners asking for helicopter access to wilderness mines, to phone companies wanting to build electronic repeaters in newly designated wilderness. On a case-by-case basis, managers tested these decisions "against the Act, the maturing policy, and other preceding decisions."^5

To meet such challenges, the agency needed a clear management philosophy. This philosophy had to be based on a full understanding of the value and meaning of wilderness, and an interpretation of the statutory language regarding management activities "necessary to meet the minimum requirements of the administration of the area for the purposes of this Act."^6 While an overarching philosophy would provide consistency, it was clear that there would need to be flexibility in on-the-ground decision making. Worf summarized this philosophy as follows:

Wilderness is recognized as . . . a fragile and essentially nonrenewable resource. Man's use of the area must always be in context with the idea that maintaining an enduring resource of wilderness for the future is our overriding mandate.^7

This doctrine came to be known as the Forest Service's purity philosophy.

Under the purity philosophy, the appropriateness of nonconforming activities would be judged by their feasibility. The feasibility of undertaking a project through primitive rather than motorized or mechanized means would not be biased by economic considerations, convenience, comfort, or efficiency.^8 This applied to administrative, public, and commercial activities

5 Id.
7 Id. at 427.
8 Id. at 428.
alike. This philosophy interprets the prohibitions of the Wilderness Act's section 4(c) as being aimed as much

at preventing the ease and efficiency with which man can affect the character of the land as to prevent temporary noise or unnatural appearance . . . . The cumulative effect of nonconforming occupancies and mechanization is sometimes subtle, but nonetheless real . . . . the fact that they can sometimes be hidden from visitors . . . does not make them more compatible with wilderness.9

The purity doctrine has been criticized both by Congress and by some classes of wilderness users. Senator Church, during debate over the Endangered American Wilderness Act in 1977, accused the agency of "applying provisions of the Wilderness Act too strictly".10 Yet the task force had considered both a more liberal interpretation of the Act's meaning of wilderness and the "necessary . . . minimum requirements" provision and had rejected both in light of the Act's intent.11 While a more practical approach to wilderness management might reduce opposition to new wilderness designation12 and facilitate higher use of the NWPS, the wilderness resource as envisioned by the Wilderness Act's sponsors would be irreversibly damaged. In conclusion, Worf challenged the growing debate over the appropriateness of the purity doctrine to consider "whether we want a carefully selected and cherished collection of U.S. originals in our wilderness heritage gallery or whether we want to fill it to overflow with cheap copies."13

Forest Service Wilderness Regulations and Policy

Current Forest Service wilderness regulations and policy are found in the Code of Federal Regulations and the Forest Service Manual. For the

9 Id. at 430.
10 Id. at 432.
11 Id. at 433.
12 Id. at 436.
13 Id. at 437.
purpose of this thesis, I will focus only on regulations that broadly and specifically speak to nonconforming wilderness uses. The Forest Service Wilderness Regulations in the Code of Federal Regulations state that National Forest Wilderness shall be managed "to promote, perpetuate, and, where necessary, restore the wilderness character of the land and its specific values of solitude, physical and mental challenge, scientific study, and primitive recreation."\textsuperscript{14}

C.F.R. section 293.6 reiterates the Wilderness Act's stipulation that nonconforming motorized uses are prohibited "[e]xcept as provided in the Wilderness Act, subsequent legislation establishing a particular Wilderness unit or . . . [other regulations], and subject to existing rights".\textsuperscript{15} These regulations further outline the discretion of Chief of Forest Service to regulate certain of these uses;

The Chief, Forest Service, may permit, subject to such restrictions as he deems desirable, the landing of aircraft and the use of motorboats at places within any wilderness where these uses were established prior to the date the Wilderness was designated by Congress. . . . The Chief may also permit the maintenance of aircraft landing strips, heliports, or helispots which existed when the Wilderness was designated.\textsuperscript{16}

In recognition of the potential ambiguity within the Act, these regulations tell the agency that when it is "resolving conflicts in resource use, wilderness values will be dominant". This is qualified by the clause, "... to the extent not limited by the Wilderness Act, subsequent establishing legislation, or the regulations in this part."\textsuperscript{17}

The Forest Service Manual provides guidance to the agency in both broad and detailed directives. Unlike the codified regulations in the C.F.R.s,

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{14} 36 C.F.R. § 293.2.
    \item \textsuperscript{15} 36 C.F.R. § 293.6.
    \item \textsuperscript{16} 36 C.F.R. § 293.6(c).
    \item \textsuperscript{17} 36 C.F.R. § 293.2(c).
\end{itemize}
\end{footnotesize}
the Forest Service Manual is a policy document rather than a set of strict regulations. Several recent court cases have asserted that the policy direction found in the Forest Service Manual is not legally binding on the agency.\textsuperscript{18} The Forest Service Manual is not substantive but "merely establishes guidelines for the exercise of the Service's prosecutorial discretion".\textsuperscript{19} Because the Manual is not promulgated according to specific Congressional direction as the CFR regulations are, it does not "have the independent force and effect of law" according to the court in Western Radio Services Co., Inc. \textit{v. Espy}.\textsuperscript{20} Despite this ruling, the agency can still be found to have been arbitrary and capricious under the Administrative Procedures Act if it does not follow the policies it sets forth for itself in the Manual. It is also the source for consistent management direction across the agency and is where managers turn when faced with difficult discretionary duties. Therefore, it is still quite important to this discussion.

The Forest Service Manual instructs wilderness managers to;

Manage the wilderness resource to ensure its character and values are dominant and enduring. Its management must be consistent over time and between areas to ensure its present and future availability and enjoyment as wilderness. . . . ensure that each wilderness offers outstanding opportunities for solitude or a primitive and unconfined type of recreation.\textsuperscript{21}

It sets forth a general "policy" for the management of nonconforming uses of wilderness areas that states;

In wildernesses where the establishing legislation permits resource uses and activities that are nonconforming exceptions to the definition

\textsuperscript{18} \textit{United States v. Doremus}, 888 F. 2d 630, 633 (9th Cir. 1989); \textit{Western Radio Services Co., Inc. v. Espy}, 79 F. 3d 896, 901 (9th Cir. 1996); \textit{Swanson v. U.S. Forest Service}, 87 F. 3d 339 (9th Cir. 1996).


\textsuperscript{20} \textit{Western Radio Services Co., Inc. v. Espy}, 79 F 3d 896, 901 (9th Cir. 1996).

\textsuperscript{21} \textit{FOREST SERVICE MANUAL}, WO Amdt § 2320 at 6 (1990).
of wilderness as described in the Wilderness Act, manage these nonconforming uses and activities in such a manner as to minimize their effect on the wilderness resource.\textsuperscript{22}

In addition to following these general policy guidelines, managers should;

- Cease uses and activities and remove existing structures not essential to the administration, protection, or management of wilderness for wilderness purposes or not provided for in the establishing legislation.\textsuperscript{23}

The guidelines set forth in the Forest Service Manual become more important for occurrences like airfields, where Congress has given the agency discretion rather than strict direction. However, even with the clarification of the Manual and Regulations, on-the-ground decisions are still subject to a large amount of discretion and, as a result, controversy. I will now look more closely at existing airstrips in Idaho and Montana and then examine some current issues in Forest Service wilderness airfield management and how the interpretive framework I have presented can assist managers in their decision-making processes.

\section*{Wilderness Airstrips in Idaho and Montana}

\textbf{Frank Church-River of No Return Wilderness}

The 2.3 million acre Frank Church-River of No Return Wilderness (FC-RONRW) has 31 operational airstrips within its boundaries.\textsuperscript{24} Twelve of these are on federal land (Table 1.), four are on state inholdings, and fifteen are on private inholdings.\textsuperscript{25} Additional airstrips occur on national forest lands just outside the Wilderness.\textsuperscript{26} According to the Wilderness

\begin{itemize}
  \item \textsuperscript{22} Id. § 2320.3(3) at 8.
  \item \textsuperscript{23} Id. § 2320.3(4) at 8.
  \item \textsuperscript{24} Frank Church-River of No Return Wilderness Draft Env. Impact Statement (FC-RONRW DEIS), Vol. I, at 3-6 (1998).
  \item \textsuperscript{25} Id. at 1-9, 3-6.
  \item \textsuperscript{26} FC-RONRW Draft Programmatic Management Plan, at 13 (1998).
\end{itemize}
Management Plan, these airstrips "provide improved access to the Wilderness for hunters, anglers, backpackers, river floaters, researchers, private inholding groups, and other wilderness users." As described in Chapter Four, the Central Idaho Wilderness Act (CIWA) contains a special provision governing the closure of airstrips on federal land in the Wilderness. Both the provisions of the CIWA and the Wilderness Act must be considered in wilderness management decisions in this area.

Table 1. Operational Landing Strips in the FC-RONRW.

<table>
<thead>
<tr>
<th>National Forest Land</th>
<th>State Inholdings</th>
<th>Private Inholdings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bernard*</td>
<td>Lower Loon Creek</td>
<td>Allison Ranch</td>
</tr>
<tr>
<td>Cabin Creek•Δ</td>
<td>Stonebraker*</td>
<td>Bradley Ranch</td>
</tr>
<tr>
<td>Chamberlain•Δ</td>
<td>Taylor Ranch*</td>
<td>Campbells Ferry</td>
</tr>
<tr>
<td>Cold Meadows•Δ</td>
<td>Thomas Creek</td>
<td>Copenhagen</td>
</tr>
<tr>
<td>Dewey Moore □</td>
<td></td>
<td>Dovel</td>
</tr>
<tr>
<td>Indian Creek*</td>
<td></td>
<td>Flying B</td>
</tr>
<tr>
<td>Mahoney•Δ</td>
<td></td>
<td>James Ranch</td>
</tr>
<tr>
<td>Mile-Hi □</td>
<td></td>
<td>Pistol Creek</td>
</tr>
<tr>
<td>Simonds □</td>
<td></td>
<td>Root Ranch</td>
</tr>
<tr>
<td>Soldier Bar*</td>
<td></td>
<td>Shepp Ranch</td>
</tr>
<tr>
<td>Vines □</td>
<td></td>
<td>Sulphur Creek Ranch</td>
</tr>
<tr>
<td>Wilson Bar</td>
<td></td>
<td>Whitewater Ranch</td>
</tr>
</tbody>
</table>

* Closed to public use but operational.
• National forest landing strip with pit toilets.
Δ National forest landing strip with stock racks.
□ National forest landing strip under consideration for use limitations by the DEIS; commercial use currently prohibited.

The recently released 1998 Draft Environmental Impact Statement (DEIS) for the FC-RONRW notes that "[t]he sites and sounds of aircraft operating at or near landing strips and the noise of low level overflights

27 FC-RONRW, supra note 24, at 1-36.
28 FC-RONRW, supra note 26, at 11.
29 Id. 13.
30 Id.
probably disturb the quiet of the wilderness." The presence of aircraft and landing strips affect wilderness visitors' potential for "viewing undeveloped landscapes and areas where natural forces predominate." They provide a "reminder of human presence in the wilderness." In addition to affecting non-motorized users, "[a]ircraft activities have the potential to affect wildlife species, particularly those at landing sites located on or near key wildlife habitat." Some landing strips have been identified as being proximal to important habitat areas such as elk calving grounds.

The landing strips vary in condition from small, non-maintained, undeveloped areas to graded and maintained runways with tie-downs, wind socks, and user facilities. Most have only been given a "fair" condition rating by the state of Idaho's last inspection. According to the FC-RONRW management plan, approximately 5,500 aircraft landings occur within the wilderness annually. Chamberlain and Indian Creek are the least demanding to land on. Much of the use of Indian Creek is by boaters accessing the Middle Fork of the Salmon River. Data on the use of federal airstrips in the Wilderness is limited and inconsistent. Information that was collected between 1991 and 1995, however, provides an idea of general trends and minimum levels of use. During this period use has fluctuated but has not increased measurably.

31 Id.
32 FC-RONRW, supra note 24, at 1-32.
33 Id. at 1-37.
34 Id.
35 Id. at 1-9.
36 Id. at 1-37.
37 Id. at 1-10.
38 FC-RONRW, supra note 26, at 13.
39 Id. at 14.
40 Id. at 15.
Selway-Bitterroot Wilderness

The Selway-Bitterroot Wilderness covers 1,340,460 acres straddling the Montana-Idaho border. The area was one of the original Forest Service wilderness units designated by the 1964 Act. At that time there were three established airstrips in this area that are still in use today; Moose Creek, Shearer, and Fish Lake. Both Moose Creek and Shearer are situated along the Selway River in the heart of the wilderness on the Nez Perce National Forest and Fish Lake is near the Wilderness' northern border on the Clearwater National Forest.

Moose Creek is the only airfield on the Selway Bitterroot for which there is reliable use data. This data indicates that total landings at this strip have remained stable since 1975, decreasing slightly in recent years. Use of all three airstrips fits into three categories, administrative (either district use, fire, emergency of other agency activities), private, and outfitted. Between 1975 and 1990, use of the Moose Creek airstrip was 11% administrative, 35% outfitted, and 54% private. Over this period, administrative use has declined substantially as the agency has eliminated its dependence on air access for supplying the Moose Creek Ranger Station. Commercial flights were reduced by a third when the number of outfitters operating there dropped from three to two. In 1996, there were a total of 565 landings recorded at Moose Creek, with 86% of these private, 10% commercial, and the remainder administrative flights of different types.

41 Aldo Leopold Wilderness Research Institute, Unpublished data (1998).
43 Id.
44 Id. at O-2.
The management plan states that "low level overflights by aircraft create a disturbance which is not compatible with a wilderness experience."\textsuperscript{46} Despite this fact, these airstrips are intended to serve as "internal portals for users pursuing wilderness-dependent activities".\textsuperscript{47} In 1988, research at the Shearer airstrip found that most aircraft remained at the strip for less than 15 minutes which, according to the Forest Service, is not a wilderness-dependent use unless the pilots were dropping off wilderness users.\textsuperscript{48} Instead, many pilots are engaged in what are called "touch and goes", where an aircraft touches down on a strip in order to add another backcountry landing to their accomplishments.\textsuperscript{49}

The 1992 Management Plan Update addresses how the use of these three airfields will be evaluated and possibly regulated. The number of landings per day per airfield, and the number of landings per year per airfield will serve as indicators of use levels. Standards that will be based upon four years of "reasonable data" from each landing strip and a study of user perceptions regarding aircraft use and impacts will allow managers to judge inappropriate use of the airstrips.\textsuperscript{50} Six years after the plan was written, four years of data is still needed for Fish Lake and three years for Shearer.\textsuperscript{51} A yearly standard of 800 landings was set for Moose Creek based on the average number of landings from 1975 to 1990. There is still no daily standard for Moose Creek and no standards at all for Fish Lake and Shearer.\textsuperscript{52}

\textsuperscript{46} U.S.D.A. Forest Service, supra note 42, at O-1.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at O-2.
\textsuperscript{49} For definition of "touch and go" landings see U.S.D.A. Forest Service, Payette NF, \textit{Environmental Assessment for the Cabin Creek Airstrip Repair Project}, March 31, 1997 at 34.
\textsuperscript{50} U.S.D.A. Forest Service, supra note 42, at O-1.
\textsuperscript{51} Jerome Bird, District Ranger, U.S.D.A. Forest Service Moose Creek Ranger District, personal communication, 3/18/97.
\textsuperscript{52} U.S.D.A. Forest Service, supra note 42, at O-2.
The purpose of these standards is to allow managers to prevent "further erosion of wilderness values, such as that of an area isolated from the sights and sounds of human use."\(^53\) While no standards will be set for length of stay at the airfields, management restrictions may be imposed when total use numbers exceed standards in order to reduce use that is not wilderness dependent.\(^54\) The management plan prioritizes management methods that might be instituted in the face of overuse. The two "most preferable" methods are education (through airport guides, newsletters, and on-site contacts and interpretative materials) and encouraging use of airstrips outside of the wilderness boundary. Three other techniques are listed as "least preferable but still acceptable". These are requiring user landing fees, instituting a permit system, and emphasizing shuttle services rather than many smaller aircraft.\(^55\)

The 1992 plan's attempt to reevaluate levels of air access to the Selway-Bitterroot is admirable but unfortunately it has not been implemented. While outfitter use of Moose Creek has decreased, private use has increased. If the inactive outfitter permit is reissued, Moose Creek could be in danger of violating its standards. Use data is not yet available for the Shearer and Fish Lake airfields because of insufficient funds to support a study. The forests are trying to find volunteers to collect this data since automatic counters are consistently disabled by moose. To be reliable however, data would need to be collected throughout the full operating season which is July through October for the high altitude Fish Lake, and June through October for Shearer and Moose Creek.\(^56\)

\(^{53}\) Id.
\(^{54}\) Id.
\(^{55}\) Id. at 0-6.
\(^{56}\) Bird, supra note 51.
Great Bear Wilderness

The Great Bear Wilderness is part of the area commonly called the Bob Marshall Wilderness Complex (BMWC) along the Continental Divide in northern Montana. As discussed in Chapter Four, when the Great Bear Wilderness was designated, the House Committee Report included a statement of their intent to allow use of the Shafer Meadows Airstrip to continue. The report stipulated that the airfield should remain open, but that access could be regulated if use expanded greatly. The 1987 Recreation Management Direction for the BMWC officially recognized the Congressional direction given by this report.

The task force responsible for writing the management plan, which was made up of managers, researchers, and citizens and included pilots, chose not to define "greatly expanded use". Instead, the acceptable level of aircraft use would be based on impacts to the wilderness resource and experience. Management actions would be imposed only if use levels exceeded standards set by the Task Force. As on the Selway Bitterroot, airfield use indicators are the number of landings per day and per year. The standards for appropriate use levels are 1) "[a] 90% probability of having no more than a total of five aircraft landings per day" and 2) "[n]o more than a total of 550 landings per year of which no more than 6% will be administrative landings."

The task force emphasized the need for education of both pilots and non-motorized users before use gets to the point where it is unacceptably

57 H. REP. No. 96-1616 (1978).
59 Id. at 36.
60 Id.
61 Id. at 39.
impacting other wilderness users. Educational programs include a cooperative effort between the Forest Service, the Montana Aeronautics Division, Montana Pilots Association, and others to instruct pilots to avoid flights into Schafer for non-wilderness purposes, to maintain a minimum flight level of 2,000 feet over the wilderness, and to avoid unnecessary low approaches and departures. Training flights into the wilderness strip have been discouraged by both the pilot associations and the Forest Service. For its part, the Forest Service will let other wilderness users know about these efforts and tell them that air access is a Congressionally recognized use of the Great Bear Wilderness.

If the standards are exceeded and increased educational efforts cannot bring them back into compliance, more restrictive management steps will be taken. These might entail limiting the types and timing of landings, or as a last resort, requiring a permit for landings. Of the various options, the least restrictive management tool will always be chosen. The Forest has between twelve and fifteen year of use data for the Shafer Meadows strip. This information is broken down by type of user, but it is not statistically accurate at this level. Use levels are currently within the parameters of the standards. There is an administrative site at the airfield which gives managers the opportunity to make contact with users and further educational efforts towards both aircraft and non-motorized users.

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62 Id.
63 Steve McCool, personal communication, 4/24/98.
64 Id. at 39-40.
65 Id. at 40.
Issues in Airstrip Management and Congressional Intent

Applying the Process

I will now examine three recent issues in wilderness airfield management and demonstrate how the interpretive framework outlined in Chapter Two can be applied to them. In one of these case studies, wilderness values prevailed; one gave preference to aircraft access; and one is undecided. In each of these cases I will show how the steps of statutory construction and legislative interpretation outlined in Chapter Two and demonstrated in Chapters Three and Four could have been applied. The primary steps that must be followed are as follows; 1) determine through statutory construction whether ambiguity exists, 2) apply the canons of linguistic construction to the statute to attempt to resolve the ambiguity or contradiction, 3) after statutory construction fails, determine whether the use of legislative history is appropriate, 4) examine the legislative history for Congressional intent.

FC-RONRW Management Plan

The first case study I will look at is the Draft Management Plan for the FC-RONRW. This is an example of a decision which was not properly informed by the intentions of the Wilderness Act and the CIWA. One of the primary focuses of the 1998 Draft Environmental Impact Statement (DEIS) accompanying the new management plan is the acceptability of aircraft use and maintenance of landing strips in the Wilderness. The DEIS will decide how much commercial aircraft access is acceptable, what degree of maintenance should be undertaken, and how to reduce conflicts between aircraft and other users. The need for this analysis was brought up by conflicts with other user groups identified by managers and the public.

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67FC-RONRW, supra note 24, at 1-6.
68 Id. at 1-7.
69 Id. at 1-9.
an important case study because the chosen alternative will govern
management of all twelve airstrips for the next planning period.

Common factors for all four action alternatives in the DEIS include
requiring special use permits for all commercial flights, minimum tool
evaluations for any maintenance projects, seasonal closures to prevent soil
erosion and wildlife disturbances, and case-by-case analysis of the treatment
of acquired lands with air access.\footnote{Id. at 2-105.} Alternative 5, the Forest Service's
preferred alternative, prohibits commercial use of Dewey-Moore, Mile-Hi,
Simonds, and Vines airstrips (see Table 1.), limits non-commercial use on
these strips to emergency situations only, and would maintain them at only a
serviceable rating or better.\footnote{Id. at 2-106.} The remaining eight strips would be
maintained at a fair rating.

The planning document anticipates an increase in overall airstrip use
based on projections of growth for the state of Idaho. Under Alternative 5,
this increase would be concentrated primarily at Indian Creek and
Chamberlain.\footnote{Id. at 4-4.} Use at Cabin Creek is expected to see the next highest level of
increase. Overall, the Wilderness would see a slow increase in overflights
that might be offset by educational efforts geared at backcountry pilots.\footnote{Id. at 4-4, 4-8.}

According to the DEIS, Alternative 2, would "have the greatest positive
effect on the wilderness resource and would minimize the negative effects of
aviation on other groups".\footnote{Id. at 4-5.} It would also have the most negative effect on
aviation activities, while still providing for "current use levels at most
landing strips".\footnote{Id. at 4-5.} This alternative would limit use of the four airstrips along
Big Creek to one party a week selected by permit and would reduce commercial use of Indian Creek to 44% of current peak levels.\textsuperscript{76} Use of non-wilderness airstrips would probably see the greatest increase under this alternative. Since more than half of the airstrips within the wilderness are privately owned, there is no way of assuring the reduction of overflights across the Wilderness solely through agency action. Now I will show how to apply the analytical framework to this case study.

_Determine Ambiguity_

The first step is to determine whether the statutory issue is ambiguous and in need of interpretation. The FC-RONRW is governed by both the Wilderness Act and the Central Idaho Wilderness Act (CIWA), thus both statutes must be examined. Construction and interpretation is only valid where the plain language of a statute is insufficient to resolve the issue or question. The interpreter must first apply the plain meaning doctrine to the statutory language of the relevant laws. The initial ambiguity in this case stems from provisions of the Wilderness Act that are intended to govern the entire NWPS. The analysis in Chapter Three has shown how aircraft use conflicts with the Act's definition of wilderness. The conflict within the statute, and therefore the ambiguity, arises from the exception found in section 4(d)(1), which permits the continuation of a use that is incompatible with the wilderness values and character defined in section 2 of the Act. The CIWA adds an additional level of ambiguity by increasing statutory protection for these airstrips without resolving the underlying conflict between the use and wilderness protection.

\textsuperscript{76} Id. at 2-105.
Canons of Linguistic Construction

The canons of linguistic construction do not help clarify the basic contradiction between the definition of wilderness and the exception for aircraft. However, they do shed light on the parameters of the management restrictions of section 7(a)(1) of the CIWA.\textsuperscript{77} The Forest Service has interpreted this section of the CIWA as severely limiting their ability to restrict use of wilderness airstrips on the FC-RONRW. However, applying both the canons and examining the legislative history show that this section does not restrict their discretion to limit use levels. The canon of \textit{Expressio Unius Est Exclusio Alterius} states that "the mention of one thing implies the exclusion of another". By adding an additional clause to the Wilderness Act's language in section 7(a)(1), Congress was clearly limiting the agency's ability to close airstrips on the Frank Church. With this provision, Congress showed that it could specifically limit the agency's management discretion. At the same time, Congress specifically does not limit the agency's ability to restrict use levels as it "deems desirable". By expressly restricting closures and not restricting regulation of use, Congress implies that only the ability to close airstrips is limited.

Legislative Interpretation

While the canons support this interpretation of the CIWA, they are not as widely accepted as legislative interpretation. Legislative interpretation is also still necessary to address the ambiguity in the Wilderness Act. Especially

\textsuperscript{77} § 7(a)(1) of the CIWA states that, "the landing of aircraft, where this use has become established prior to the date of enactment of this Act shall be permitted to continue subject to such restrictions as the Secretary deems desirable: Provided, however, that the Secretary shall not permanently close or render unserviceable any aircraft landing strip in regular use on national forest lands on the date of enactment of the Act for reasons other than extreme danger to aircraft, and in any case not without the express written concurrence of the agency of the State of Idaho charged with evaluating the safety of backcountry airstrips." The Central Idaho Wilderness Act of 1980, Pub. L. No. 96-312; 16 U.S.C. § 1132.
in a case with strong special interest lobbying, it is important to research every relevant perspective. Therefore, the interpreter should then turn to the legislative history of the statute. As outlined in Chapter Two (Table 1), Justice Breyer lists five circumstances under which the use of legislative history is justified. In this case (1), avoiding an absurd result. Interpreting the Wilderness Act as allowing greatly expanded use of existing airstrips would create the absurd result of allowing high levels of a use that Congress perceives as incompatible with wilderness values.

Turning to the legislative history, the first place to look for statutory explanations are the committee reports. The language of the committee report is given the most weight during interpretation. Statements made by the committee chair when he/she reports the bill out of committee and statements of the measure's sponsors are considered next. There are four committee reports relevant to the Wilderness Act. The full debate over wilderness preservation, however, spanned nine years, 65 bills, and 18 hearings. Therefore, there are important issues not mentioned in the committee reports which are addressed elsewhere. All of these documents - the committee reports, debate published in the Congressional Record, statements by the sponsors in hearings, statements by the opposition, and all the drafts of previous wilderness bills - must then be examined to determine Congressional intent for the management of wilderness airstrips.

Chapter Three gives a thorough description of relevant statements on these subjects. In summary, I found many clear definitions of wilderness by the bills' sponsors. These definitions focused on solitude, natural processes,

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and an absence of technology and human interference. To explain the continuation of preexisting airstrips, I looked at the treatment of airstrips in previous drafts of wilderness bills and the discussion of the status quo strategy. In the original wilderness bills, nonconforming uses like airfields were to be phased out when feasible (see page 45). This termination clause was eliminated in later drafts, but according to Sutherlands and others, both its earlier presence and eventual elimination are relevant to this discussion. By eliminating the phase out provision, Congress indicated its unwillingness to disrupt the status quo if it meant jeopardizing passage of a wilderness bill.

According to the legislative history of the Wilderness Act, the primary reason airstrips were allowed to persist in wilderness despite their incompatibility, was to maintain the status quo and reduce opposition from displaced users. While existing uses would be allowed to continue, nonconforming uses were prohibited where they were absent prior to designation. Although Congress abdicated its right to statutorily terminate the use of wilderness airstrips in this Act, it in no way indicated an acceptance of increasing this use. Nor did the Wilderness Act statutorily preclude the eventual elimination of wilderness airstrips. Instead, Congress explicitly gave the managing agency, the Forest Service, the discretion to regulate use of these airfields as the agency "deems desirable".

On the other hand, while the CIWA does restrict the Forest Service's ability to close airstrips, but does not reduce the Forest Service's management discretion. The Forest Service is still bound by the Wilderness Act to minimize the impacts of air access on the wilderness character of an area. The CIWA in no way impinges on the Service's power to regulate levels of

80 SUTHERLAND STAT. CONST. § 48.04 (5th Ed.).
81 The Wilderness Act, supra note 6, § 4(d)(1).
air access. The later act could have resolved the issue of management discretion, yet it did not. In the Great Bear House Report in 1978, the committee referred to agency regulation of "greatly expanded" aircraft use. With that report, Congress demonstrated that it could be more specific and that it could, if it so desired, control the degree of agency management discretion of nonconforming uses.

The legislative history of the CIWA supports the conclusion that closure, not management discretion, was the evil being remedied. This history shows that the bills' sponsors wanted to prevent the agency from arbitrarily closing airstrips. Nowhere in any of the statutes' extrinsic documents is there an indication that Congress intended to reduce the Forest Service's discretionary ability to manage use levels pursuant to agency regulations and policies. Senator Church did refer to the administrative trend of making air access "essentially unattainable." This could be considered the outer limit to agency management discretion before the threshold of outright closure is reached.

Both the Wilderness Act and the CIWA should have directed the agency to choose Alternative 2. Section 4(b) of the Act states that the administering agencies are responsible for "preserving the wilderness character of the area". This character is defined in section 2 as "retaining its primeval character and influence, without permanent improvements or human habitation". Yet, even though the DEIS admits that Alternative 2 would have the most positive effect on wilderness and other user groups, it was not selected. Simply overriding the broader mandates of the Wilderness Act regarding the protection of wilderness because of the protective clause of

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83 The Wilderness Act, supra note 6, § 4(b) 16 U.S.C. § 1131.
84 Id. § 2(c) 16 U.S.C. § 1131.
the CIWA would be an absurd interpretation of the two acts. While alternative 2 would admittedly have the "most negative effect" on aircraft users, it does not close any existing airstrips and therefore does not violate the CIWA. With a better understanding of the intent of the Wilderness Act and the CIWA the agency may have been prompted to select the alternative more in line with Congressional intent.

Expansion of Helicopter Access in Alaska

I followed the same steps when examining the next two management issues. Much of the process is the same and I will not repeat it in detail. Specifically, the analyses rely upon the same statements of overall Congressional intent from the Wilderness Act. For these two examples I will emphasize the differences and not reiterate the similarities. The first of these is important because it would have set a precedent for permitting a supposedly established use to continue after a lapse of eighteen years since wilderness designation. This is a case where the final decision followed the intent of the Wilderness Act.

In April of 1996, the U.S. Forest Service released a Draft EIS (DEIS), *Helicopter Landings in Wilderness*, which outlined seven alternatives providing for helicopter access to wilderness within the Tongass National Forest. The range of alternatives would affect up to 12 out of the 19 wildernesses within the Tongass, and analyzes 135 access areas ranging in size from several acres to 12,000 acres. According to the DEIS, the need for this action "responds to the request to reinstate helicopter landings at over 400 areas identified as used for general public access prior to designation". It focused on providing the general public with easier access to remote Alaskan

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85 FC-RONRW, *supra* note 24, at 4-5.
wilderness sites. The Proposed Action would have designated 41 helicopter access areas within seven wilderness areas, with one to twenty-five access areas in each affected wilderness. The number of landings at each area would be limited to five or twenty-five per year based on historical data. All of the action alternatives address only areas which have had previous usage by helicopters, as attested by pilots affidavits.

The DEIS relied on the Wilderness Act's "established" use clause as the legal basis for this action. The Alaska National Interest Lands Conservation Act (ANILCA) of 1980 includes specific provisions allowing for motorized access to Alaskan wilderness to protect traditional subsistence uses of these areas. Section 1110 of ANILCA permits the use of fixed-wing aircraft, snowmobiles, and motorboats for subsistence hunting and gathering. Because ANILCA specifies fixed-wing aircraft, the agency did not believe that this law provided sufficient legal basis for helicopter access. Therefore the DEIS focused on the special provisions of the Wilderness Act.

The Forest Service relied on affidavits signed by helicopter pilots stating that they had previously flown into specific areas as the basis for establishing previous use. One issue raised by the public during the NEPA scoping process was that this evidence is not independently verifiable and is based on the statements of those who stand to gain the most from the proposed action. No other forms of documentation, such as flight logs, dated photographs etc., were available. In its analysis, the Forest Service considered three visits within five years an "established" use. The fact that ANILCA does not refer to helicopter use while it does specify many other
uses, is to some critics "... demonstrable evidence that helicopter use for recreation had not become established at the time of designation."\(^90\)

This proposal caused an outcry of protest from wilderness users, the conservation community, the national office of the Forest Service, and the Department of the Interior. Arguments focused on the negative impacts to the wilderness resource, the experience of solitude, and opportunities for primitive recreation. Commenters also criticized the agency's dependence on minimal levels of questionably proven past access to establish previous use history. There was a fear that this action would set a precedent for retroactively instating air access to other wilderness areas, including Department of Interior wildernesses. In November of 1997, the Alaskan Regional Forester Phil Janik issued the Record of Decision on this project, selecting the no action alternative that prohibited helicopter access to these wildernesses. Janik explained that the Selected Alternative;

> provides for the best management of the Wilderness resource to ensure its character and values are dominant and enduring within the framework of the existing laws, regulations, policies, public needs and desires, and capabilities of the land.\(^91\)

He found that there is currently adequate access to wilderness without permitting helicopter use. The impacts associated with helicopter access outweighed the benefits this access might confer.

This decision shows how the agency can use both the intent and statutory language of the Wilderness Act to reject a nonconforming use that would negatively affect the character of the wilderness resource and experience. While the agency did not explicitly follow the process I have outlined and does not mention legislative history in any of the decision

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\(^90\) George Nickas, Wilderness Watch, Scoping comments. July 16, 1996.

documents, their decision is well supported by both statutory construction and legislative interpretation.

The EIS explicitly rejects ANILCA as a basis for the proposal, and relies on the Wilderness Act as the only relevant statute. I agree with their interpretation and have also only considered the Wilderness Act in analyzing this decision. Determining the ambiguity under the Act is the same as in the preceding example. The plain meaning doctrine fails because of the ambiguity inherent between sections 2 and 4 of the Wilderness Act. The canons of construction are particularly useful in determining whether this lapsed use should be reinstated. While the Act does not define "established", construction can help the interpreter understand the proper meaning of this word. One canon states that "words in common usage should be assigned their ordinary meaning" (See page 16). Merriam-Webster's dictionary defines "established" as "to provide strong evidence for", "to provide with a secure reputation", or "to make a norm, a custom, a convention". Three visits within five years does not appear to be a level of access that is 'on a firm basis'. Because of the uncertainty and limited level of the preexisting use in these areas, the agency had the discretion to prohibit access.

Finally, the interpreter must determine whether they may look to the legislative history to determine how to further resolve the ambiguity in the statutory language. Breyer's fifth circumstance - choosing between politically controversial alternatives - applies here. As evidenced by the outcry of protest from both the general public and the other management agencies, the proposal was politically controversial. Therefore, the Forest Service could

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92 SUTHERLAND, supra note 80, § 47.28 at 248.
justifiably turn to extrinsic aids for assistance. In the quote from Janik's decision notice, the agency clearly realized that permitting this access was not justified by the intent of the Wilderness Act. This intent, as outlined in Chapter Three and in the preceding example, focused on protection of the wilderness resource and its character from human development and modernization. The exception for nonconforming uses like aircraft landings was aimed at protecting the status quo and therefore only applied to established uses. The regional forester clearly saw helicopter access as incompatible with the Act's mandates to protect the wilderness resource. The resulting decision sets a strong precedent for protecting wilderness from nonconforming uses.

**Red's Horse Ranch on the Eagle Cap Wilderness**

The final case study examines a situation in which a final decision has not yet been made. In 1994, as part of the Forest Service's policy of acquiring any non-federal wilderness inholdings that become available,\(^{95}\) the agency purchased a former guest ranch, Red's Horse Ranch, in Oregon's Eagle Cap Wilderness.\(^{96}\) The ranch has about 30 buildings, farm equipment, and an airstrip. Eight miles from the nearest road, the airstrip was the main form of access to this backcountry resort.\(^{97}\) The Forest Service now must decide how to manage its newly acquired property. While the agency intends to undertake an EA to ascertain the proper use of the ranch and airstrip, it currently lacks the funds to do so. In the meantime, the airstrip is closed to the public but is being used for administrative flights. The airfield also sees occasional private landings from uninformed pilots. A full-time wilderness

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\(^{95}\) FS MANUAL, supra note 21, 2320.3(9).


\(^{97}\) Richard Cockle, "Forest Service Still Has No Plan for Red's Horse Ranch", The Oregonian. 9/2/97, at B8.
ranger is in residence at the ranch. His/her duties include maintaining its facilities and protecting against vandals.98

The Red's Horse Ranch management decision is an interesting case study for applying Congressional intent to a discretionary management situation. The ambiguity in this case involves whether or not the private inholding airstrip within the wilderness boundary can be considered an established use under the terms of the Wilderness Act. While the airstrip at Red's Horse Ranch had been in operation since 1931, it was on private land. There were no airstrips in operation on federal land within the wilderness when the Eagle Cap Wilderness was designated in 1964.

To determine whether this use deserves statutory protection, the interpreter must look to the intent and purpose of the Act. From the statutory language it is clear that the Wilderness Act sets forth rules for designating and managing federal lands as wilderness. Wilderness is defined in section 2(c) as an area of "undeveloped Federal land".99 The Act's provisions do not affect actions on private inholdings within wilderness boundaries. The only control the Act has over private inholdings is in regards to ingress and egress to lands wholly surrounded by wilderness lands.100 Thus, since the airstrip on this property was not governed by the Wilderness Act prior to acquisition, it may not be considered a previously established use under section 4(d)(1).

Although this explanation seems self-explanatory, since this is a politically charged issue, the interpreter may also turn to the legislative history of the Act for further justification. As shown in Chapter Two, the Wilderness Act clearly intended the protection of wilderness airstrips to apply

98 Gardner, supra note 96.
99 The Wilderness Act, supra note 6, § 2(c), 16 U.S.C. § 1131.
100 Id. §5(b), 16 U.S.C. § 1135.
to the 1964 status quo on federal lands. Therefore, it would be contrary to Congressional intent to expand this protection to airstrips on private inholdings. As this land was not federal in 1964, there is no established use. Arguing that the airstrip is protected as an established use would be similar to asserting that the mechanized farm equipment should be allowed to operate on the now NWPS property because it was established there before designation. In addition, the Act and agency policy provide for the acquisition of private and state inholdings when feasible. The purpose of adding to the NWPS is to expand the protection of wilderness quality lands nationwide. Therefore, the acquisition of land with existing nonconforming uses would not make sense unless those uses were terminated upon acquisition.

The Forest Service is facing strong pressure from previous users of Red's Horse Ranch to reopen both the airstrip and guest ranch to public use. However, doing so would compromise both the wilderness character of the Eagle Cap and the integrity of wilderness protection system-wide. The agency needs to make a decision that is consistent with the intent of the Wilderness Act. This framework for legislative interpretation provides a strong foundation which the agency can use in support of a decision that both restores and protects the wilderness character of this area.
The Wilderness Act of 1964 and subsequent wilderness legislation created a system that would ensure the preservation of some of the remaining wilderness in this country for future generations. Wilderness proponents saw the need to protect these remnants from the pressures of an expanding and demanding society. The preservation battle did not end with wilderness designation however. While wilderness legislation sought to foster a nationwide system of increased protection and consistent management; political compromises wrought along the way left loopholes in the laws which allow continued threats to the wilderness character of lands in the NWPS.

Today, wilderness managers are faced with the challenge of performing a host of discretionary duties in a very polarized atmosphere. They are constantly faced with pressures from interest groups demanding opposing interpretations of wilderness regulations. Where the Wilderness Act is clear and directive, these requests are easily dealt with; where the Act stipulates discretion, however, the result has usually been controversy and confusion. Wilderness airfields provide just one example of such a discretionary quandary.

Chapter Five outlined some current issues in airfield management that stem from the conflicting mandates of the Wilderness Act. I have described a process by which wilderness managers, users, and other interested parties can reevaluate such requests in light of the underlying purpose and intent of the wilderness legislation. This process uses legislative histories to interpret ambiguous aspects of the statute(s) in question. I have shown how this
practice, which has been used by the courts for over a century, can be adapted to serve the needs of agencies charged with administering ambiguous statutes. Congress instructed the land management agencies to preserve and protect wild lands for future generations but did so through a statute flawed with ambiguity. The analytical framework I have proposed gives the agencies a legal and historically accurate basis on which to make its difficult managerial decisions.

Going back to the legislative history of the Wilderness Act, it is clear that wilderness proponents wanted a system that would protect "untrammeled" areas, provide a place where natural processes would dominate, and where humans could go to experience solitude and primitive forms of recreation. They reduced opposition by preserving the status quo. In three wilderness areas in Idaho and Montana, this meant retaining airfields within wilderness. Additional protection of this particular nonconforming use was added in later years by the Central Idaho Wilderness Act (CIWA) and the committee report accompanying the Great Bear Wilderness Act.

Applying the process of statutory interpretation and construction to these three legislative documents provides a clearer idea of Congressional intent regarding wilderness airstrips. The legislative history of the Wilderness Act demonstrates the strong preservationist intent of the Act's sponsors and the political realities that led them to include such incompatible preexisting uses. Two other things are also clear from these documents; 1) while Congress would permit existing airstrips to remain, their use was to continue at existing levels and 2) the Secretary was to have discretionary duty to regulate these airfields to reduce conflicts with wilderness values, the character of the area, and other users.
The CIWA reduced much of the agency's discretion to close airstrips but nothing in the statute or its legislative history suggest any intention to limit its ability to regulate use levels at existing airstrips. The committee report on the Great Bear Wilderness, which contains Congressional direction regarding the Schafer Airstrip, reiterated the Wilderness Act's intention to maintain existing airfields but explicitly recognized the agency's responsibility to regulate this use to be more compatible with wilderness values.

This type of statutory and legislative analysis provides managers with a firmer grasp of both their Congressionally mandated responsibilities and the ideals underlying them. The preservationist ideals of the sponsors of the Wilderness Act apparent from this analysis provide the agency with the rationale it needs to protect wilderness values.
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