

# WHEN OLD BECOMES NEW: RECONCILING THE COMMANDS OF THE WILDERNESS ACT AND THE NATIONAL HISTORIC PRESERVATION ACT

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*Abstract:* The Wilderness Act created a national framework for the protection of wilderness areas. Although the statute defines wilderness as an area “untrammelled by man, where man himself is a visitor who does not remain,” it leaves room for the “public purposes of recreational, scenic, scientific, educational, conservation, and historical use.” As such, the Wilderness Act clarifies that its purposes are “within and supplemental” to other land-use statutes, including statutes like the National Historic Preservation Act (NHPA), which created a national scheme for preserving historic places and structures. When considering the Wilderness Act relative to the NHPA, agencies and courts have interpreted agency obligations under each act differently. Though the historical context, text, and purpose of each statute indicate that historic preservation efforts should be permitted within wilderness areas, courts have read the two acts as mutually exclusive and held that the Wilderness Act takes precedence over the NHPA. The two statutes can be harmonized. To clarify the law in this area, however, Congress should amend the Wilderness Act to provide an express exception for preservation efforts in compliance with the NHPA.

## INTRODUCTION

*Thousands of tired, nerve-shaken, over-civilized people are beginning to find out that going to the mountains is going home; that wildness is a necessity; and that mountain parks and reservations are useful not only as fountains of timber and irrigating rivers, but as fountains of life.<sup>1</sup>*

—John Muir

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1. JOHN MUIR, OUR NATIONAL PARKS 1 (1901).

*[T]hese old buildings do not belong to us only; . . . they have belonged to our forefathers, and they will belong to our descendants unless we play them false. They are not in any sense our property, to do as we like with. We are only the trustees for those that come after us.*<sup>2</sup>  
—William Morris

Although the American public has long contested the uses and purposes of wilderness,<sup>3</sup> the concept of an open frontier of wild lands has never ceased to be a culturally and historically important aspect of America.<sup>4</sup> Similarly, while not universally acknowledged, the study of history—whether by museum, textbook, or designation of historic landmark—has also wielded significant influence on American society.<sup>5</sup> However, in the race to define and protect wilderness lands and historic monuments, the respective land-use schemes created by Congress did not explicitly account for each other.<sup>6</sup> The resulting inconsistencies have left agencies and courts alike in a predicament when determining whether and how to maintain protected historic structures located within designated wilderness areas.<sup>7</sup>

Congress enacted the Wilderness Act<sup>8</sup> in 1964 against a backdrop of competing ideologies regarding the value of wilderness, the rise of conservationism, and inter-agency conflict.<sup>9</sup> For its time, the Wilderness Act was “the most far-reaching land preservation statute ever enacted.”<sup>10</sup>

2. William Morris, Address at the Society for the Protection of Ancient Buildings Twelfth Annual Meeting (July 3, 1889), in *SOC'Y FOR THE PROT. OF ANCIENT BLDGS., ANNUAL REPORT* 65 (1889).

3. See generally RODERICK FRAZIER NASH, *WILDERNESS AND THE AMERICAN MIND* (4th ed. 2001) (studying the introduction of preservationist thinking amidst the status quo of pro-business interests in the context of American wilderness).

4. See, e.g., HENRY D. THOREAU, *EXCURSIONS* 202 (Joseph J. Moldenhauer ed., 2007) (“The West of which I speak is but another name for the Wild; and what I have been preparing to say is, that in Wildness is the preservation of the world.”).

5. See National Historic Preservation Act, 16 U.S.C. § 470(b) (2006) (“The Congress finds and declares that – (1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage; (2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people”). See generally SPECIAL COMM. ON HISTORIC PRESERVATION, U.S. CONFERENCE OF MAYORS, *WITH HERITAGE SO RICH* (1966).

6. The Wilderness Act does not mention the National Historic Preservation Act, and the National Historic Preservation Act does not mention the Wilderness Act.

7. See *infra* Part III.

8. Pub. L. No. 88-577, 78 Stat. 890 (codified as amended at 16 U.S.C. §§ 1131–1136 (2006)).

9. See Delbert V. Mercure, Jr. & William M. Ross, *The Wilderness Act: A Product of Congressional Compromise*, in *CONGRESS AND THE ENVIRONMENT* 47, 48–57 (Richard A. Cooley & Geoffrey Wandesforde-Smith eds., 1970).

10. Robert L. Glicksman & George Cameron Coggins, *Wilderness in Context*, 76 *DENV. U. L.*

Through the creation of the National Wilderness Preservation System,<sup>11</sup> the Wilderness Act established a national framework<sup>12</sup> for the protection of designated wilderness areas via acts of Congress.<sup>13</sup> Since designating the inaugural 9.1 million acres of wilderness,<sup>14</sup> Congress has added over 100 million acres to the National Wilderness Preservation System.<sup>15</sup> Today, approximately five percent of the United States is protected as wilderness.<sup>16</sup> With few exceptions, wilderness legislation has enjoyed wide bipartisan support.<sup>17</sup> In fact, every president following Lyndon Johnson has signed legislation protecting additional wilderness acreage.<sup>18</sup>

In a similarly conservationist spirit, two years later Congress passed the National Historic Preservation Act (NHPA).<sup>19</sup> The purpose of the NHPA was to remedy ineffective federal historic preservation statutes.<sup>20</sup> Like the Wilderness Act, the NHPA was “a watershed in preservation law, for it created a means by which the Nation’s preservation goals could be achieved.”<sup>21</sup> The NHPA promotes the protection of historic resources at federal, state, and local levels.<sup>22</sup> It authorizes the Secretary of the Interior to maintain and expand the National Register of Historic Places,<sup>23</sup> fosters the development of state, local, tribal, and individual

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REV. 383, 387 (1999); *see also infra* Part I.A.

11. 16 U.S.C. § 1131(a).

12. *See* Mercure & Ross, *supra* note 9, at 50.

13. 16 U.S.C. § 1131(a); *see also* Amy Rashkin et al., *The State of the Law: The Wilderness Act of 1964: A Practitioner’s Guide*, 21 J. LAND RESOURCES & ENVTL. L. 219, 222–23 (2001); *infra* Parts I.A., I.B.

14. *See infra* text accompanying note 63.

15. *Fast Facts*, WILDERNESS.NET, <http://www.wilderness.net/NWPS/fastfacts> (last visited Apr. 26, 2013).

16. *Id.*

17. Peter A. Appel, *Wilderness, the Courts, and the Effect of Politics on Judicial Decisionmaking*, 35 HARV. ENVTL. L. REV. 275, 290 (2011).

18. *Id.*

19. Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. §§ 470–470x(6) (2006)).

20. *See* ADINA W. KANEFIELD, ADVISORY COUNCIL ON HISTORIC PRES., FEDERAL HISTORIC PRESERVATION CASE LAW, 1966–1996: THIRTY YEARS OF THE NATIONAL HISTORIC PRESERVATION ACT 3 (1996), *available at* <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/preservation-law-101/resources/ACHP-FHPCL-1996-1996-Part-1.pdf> (“Although Federal statutes containing preservation policies have existed since the turn of the 20th century, these laws typically were limited in scope and lacked effective means of enforcement.”).

21. *Id.*

22. *See infra* notes 23–26.

23. 16 U.S.C. § 470a(a)(1)(A).

preservation programs through administrative requirements<sup>24</sup> and federal grants,<sup>25</sup> and establishes the Advisory Council on Historic Preservation, an independent federal agency.<sup>26</sup> The Act has enjoyed bipartisan support, and Congress has enacted several amendments to the NHPA,<sup>27</sup> each serving to strengthen its protection of historic sites.<sup>28</sup> Since the NHPA's enactment, Congress has also enhanced federal historic preservation policy in several other statutes.<sup>29</sup> Currently, more than eighty thousand properties are listed on the National Register of Historic Places.<sup>30</sup>

However, neither the Wilderness Act nor the NHPA specifies whether wilderness protection or historic preservation should take precedence when the two values conflict.<sup>31</sup> Although the Wilderness Act purports to be “within and supplemental” to other land-use statutes,<sup>32</sup> courts have consistently interpreted the Wilderness Act to preclude historic preservation efforts undertaken by agencies and the public.<sup>33</sup> As a result, a court decision can strip a nationally significant historic structure located within wilderness land of its federal historic protection and leave it to deteriorate or be removed entirely.<sup>34</sup>

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24. *Id.* §§ 470a(b)–470a(d).

25. *Id.* § 470e.

26. *Id.* § 470i. *See generally* KANEFIELD, *supra* note 20.

27. *See, e.g.*, NHPA Amendments of 2006, Pub. L. No. 109-453, 120 Stat. 3367 (codified as amended at 16 U.S.C. §§ 470 note, 470h, 470i, 470m, 470t, 470v-2 (2006)); NHPA Amendments of 1980, Pub. L. No. 96-515, 94 Stat. 2987 (codified as amended at 16 U.S.C. §§ 469c-2, 470-1, 470a-1, 470a-2, 470h-2, 470h-3, 470u to 470w, 470w-1 to 470w-6 (2006)); NHPA Amendments of 1976, Pub. L. No. 94-222, 90 Stat. 1230 (codified as amended at 16 U.S.C. §§ 470a(e)(1)–470a(e)(2) (2006)).

28. *See* KANEFIELD, *supra* note 20, at 7 (“The [NHPA] has been amended several times since its inception in 1966, each time strengthening and clarifying various aspects of the law.”).

29. *See id.* at 3.

30. *National Register of Historic Places Program: About Us*, NAT'L PARK SERVICE, <http://www.nps.gov/nr/about.htm> (last visited Apr. 12, 2013).

31. *See infra* Part III.

32. 16 U.S.C. § 1133(a) (2006); *see also* Rashkin et al., *supra* note 13, at 233–34; *infra* note 87 and accompanying text.

33. *See, e.g.*, *Wilderness Watch v. Mainella*, 375 F.3d 1085 (11th Cir. 2004) (invalidating Park Service's use of motor-vehicle transport across wilderness to provide tourist access to historic sites); *Wilderness Watch v. Iwamoto*, 853 F. Supp. 2d 1063 (W.D. Wash. 2012) (invalidating Forest Service and public's rebuilding of historic structure within wilderness); *High Sierra Hikers Ass'n v. U.S. Forest Serv.*, 436 F. Supp. 2d 1117 (E.D. Cal. 2006) (invalidating Forest Service's decision to maintain and repair historic structures within wilderness); *Olympic Park Assocs. v. Mainella*, No. C04-5732FDB, 2005 WL 1871114 (W.D. Wash. Aug. 1, 2005) (invalidating Park Service's reconstruction of historic structures within wilderness); *see also* Peter A. Appel, *Wilderness and the Courts*, 29 STAN. ENVTL. L.J. 62 (2010) (using statistical analysis to evaluate limited amount of successful challenges to the Wilderness Act); *infra* Part III.

34. *See, e.g.*, *Iwamoto*, 853 F. Supp. 2d at 1077–79 (ordering Forest Service to remove Green

As opposed to the trend of lower and appellate court interpretations that preference the Wilderness Act's commands over those of the NHPA,<sup>35</sup> this Comment argues that the Wilderness Act should be reconciled with the NHPA so as to ensure that historic structures within wilderness areas be preserved. Part I explores the historical context of the Wilderness Act's enactment, as well as its purposes and text. Part II discusses the same aspects of the NHPA. Part III reviews three lower court decisions that have grappled with the conflicts between the Wilderness Act and the NHPA. Part IV makes two arguments. First, long-standing canons of statutory interpretation compel the harmonization of the Wilderness Act with the NHPA. Second, because courts are not harmonizing the two statutes, Congress should clarify this area of the law by amending the Wilderness Act to explicitly provide for historic preservation activities within wilderness areas.

#### I. THE WILDERNESS ACT'S HISTORICAL CONTEXT, PURPOSE, AND TEXT REFLECT COMPROMISE

Prior to the passage of the Wilderness Act, protection of wild lands was haphazard and depended on agency willpower.<sup>36</sup> However, once the conservation movement gained a foothold in American political ideology,<sup>37</sup> the first comprehensive approach to wilderness protection was undertaken, which culminated eight years later in the passage of the Wilderness Act.<sup>38</sup> The political history and language of the bill demonstrate that its ultimate success was the result of compromise and bipartisanship.<sup>39</sup> For example, the final version of the bill only permanently designated as wilderness about sixty percent of land that was previously classified as wilderness and primitive areas<sup>40</sup> and removed agency authority to designate wilderness areas.<sup>41</sup> Moreover, the

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Mountain lookout, which is listed on National Register of Historic Places, from Glacier Peak Wilderness). *But see* Wilderness Watch v. Iwamoto, No. C10-1797-JCC, 2012 WL 6766551 (W.D. Wash. Sept. 20, 2012) (granting Forest Service's motion to alter or amend judgment).

35. *See* cases cited *supra* note 33.

36. *See generally* Glicksman & Coggins, *supra* note 10, at 384-86.

37. *See id.* at 385; *see also* Michael McCloskey, *What the Wilderness Act Accomplished in Protection of Roadless Areas Within the National Park System*, 10 J. ENVTL. L. & LITIG. 455, 461 (1995). *See generally* NASH, *supra* note 3.

38. *See* Michael McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288, 288 (1966); Mercure & Ross, *supra* note 9, at 52-53.

39. *See* Mercure & Ross, *supra* note 9, at 58-59.

40. *See id.* at 57-60.

41. *See* NASH, *supra* note 3, at 225-26; Rashkin et al., *supra* note 13, at 223.

Wilderness Act clarified that its aims are “within and supplemental” to other land-use legislation (including historic preservation statutes)<sup>42</sup> and specified that, in addition to conservation, the purposes of wilderness areas also include “recreational,” “scenic,” “scientific,” and “historic use.”<sup>43</sup> The Wilderness Act also contains numerous exceptions for private rights and established and special uses, even for activities such as mining and aircraft use.<sup>44</sup>

A. *The History of the Wilderness Act’s Enactment Demonstrates Concession and Cooperation from Both Wilderness Advocates and Opponents*

Before the Wilderness Act’s enactment, federal land-use policy varied according to the administering agency, lacking any uniform purpose.<sup>45</sup> The earliest federal effort to protect wilderness occurred with the creation of the national park system.<sup>46</sup> However, wilderness protection was not the first priority of those managing the national parks.<sup>47</sup> The

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42. 16 U.S.C. § 1133(a) (2006).

43. *Id.* § 1133(b).

44. *Id.* §§ 1133(c)–(d).

45. *See generally* Glicksman & Coggins, *supra* note 10, at 384–86. At the time of the country’s founding, the federal government owned over two billion acres of land. *Id.* at 384. Until the 1930s, federal land-use policy was that of “disposition,” in which Congress gave veterans, homesteaders, ranchers, miners, states, and railroads land at little to no cost to promote economic development. *Id.* However, as the federal government’s remaining land holdings became increasingly unattractive to prospective purchasers, *see id.*, and the conservation movement gained momentum, *see* NASH, *supra* note 3, *passim*, federal agencies acquired jurisdiction over federal lands and managed them according to various statutory mandates, *see* Jan G. Laitos & Rachael B. Gamble, *The Problem with Wilderness*, 32 HARV. ENVTL. L. REV. 503, 554 n.305 (2008) (“The Forest Service has regulated wild lands within national forests pursuant to the Organic Act of 1897, 15 U.S.C. § 473 (2000); the Multiple Use Sustained Yield Act of 1960, 16 U.S.C. §§ 528–531; and the [National Forest Management Act], [*i*]d. §§ 1600–1614.”).

46. *See* Mercure & Ross, *supra* note 9, at 52. The first national parks were Yosemite National Park (established in 1864) and Yellowstone National Park (established in 1872). McCloskey, *supra* note 38, at 295 n.29.

47. *See* McCloskey, *supra* note 38, at 296 (“Eventually master plans were prepared for national parks showing the ultimate limit of planned developments, but in the framework of this planning, wilderness seemed to be viewed mainly as the land left over in planning. Rather than being positively identified as a value in its own right, wilderness became the residuum in master planning.”). The purposes of national parks and national forests are very different: whereas the Park Service is to manage national parks so as “to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations,” 16 U.S.C. § 1 (2006), the Forest Service is to manage national forests for multiple uses, *see, e.g.*, 16 U.S.C. § 475 (2006) (“No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . .”). For a

Park Service did not systematically designate wilderness areas and often gave precedence to the demands of recreation.<sup>48</sup> The Forest Service was the first agency to designate wilderness areas in national forests for the purpose of wilderness protection.<sup>49</sup> While its conservation efforts were laudable, the Forest Service's designation of wilderness areas was in fact part of a larger turf battle between the two agencies.<sup>50</sup> The Forest Service also often caved in to business interests by declassifying formerly designated wilderness areas.<sup>51</sup>

By the end of World War II, the conservation movement had established its legitimacy and was beginning to gain political acceptance.<sup>52</sup> In response to proposed developments in wilderness areas,<sup>53</sup> Howard Zahniser of the Wilderness Society and other conservationists began their campaign to establish a national system of wilderness protection.<sup>54</sup> Together, Zahniser, the Sierra Club, the National Parks Association, the National Wildlife Federation, and the Wildlife Management Institute wrote a draft bill.<sup>55</sup> In 1956, Senator Hubert Humphrey and eight other senators introduced the first wilderness legislation.<sup>56</sup>

As a conservation statute, the Wilderness Act (both in its drafted and

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more detailed discussion of the differences between national parks and national forests and the resulting impact on wilderness lands, see *River of No Return: National Parks, National Forests, and U.S. Wildernesses*, P.B.S., <http://www.pbs.org/wnet/nature/episodes/river-of-no-return/national-parks-national-forests-and-u-s-wildernesses/7667/> (last visited Mar. 7, 2013).

48. See Mercure & Ross, *supra* note 9, at 49–50, 52.

49. See McCloskey, *supra* note 38, at 296.

50. Mercure & Ross, *supra* note 9, at 52 (“[T]he move in this direction by the Forest Service was . . . a defensive and bureaucratic one aimed at preventing the continued take-over of choice scenic and recreation lands by the Park Service for the establishment of new national parks.”); Rashkin et al., *supra* note 13, at 224.

51. Mercure & Ross, *supra* note 9, at 50. Additionally, each agency managed its lands internally with little oversight, which prevented public review of decisions about wilderness protection and allowed politics to play a large role in the process. See *id.* at 49–50; John D. Leshy, *Contemporary Politics of Wilderness Preservation*, 25 J. LAND RESOURCES & ENVTL. L. 1, 1–2 (2005).

52. See Glicksman & Coggins, *supra* note 10, at 385. See generally NASH, *supra* note 3.

53. See Mercure & Ross, *supra* note 9, at 52 (proposed activities included logging, mining, and establishment of dams, reservoirs, and tramways).

54. See *id.* at 52–53; see also Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 YALE L.J. 1122, 1170–73 (2010) (discussing Zahniser and other environmentalists' impact on congressional debates regarding the Wilderness Act).

55. See Mercure & Ross, *supra* note 9, at 53. For an exhaustive discussion of the legislative history of the Wilderness Act, see Jack M. Hession, *The Legislative History of the Wilderness Act (July 1967)* (unpublished M.A. thesis, San Diego State College) (on file with San Diego State University Library).

56. S. 4013, 84th Cong. (1956); 102 CONG. REC. 9,772–83 (1956); see also McCloskey, *supra* note 38, at 298.

final form) was unprecedented in its scope and content.<sup>57</sup> Congress held nine separate hearings on the legislation, totaling over six thousand pages of testimony and sixty-six modifications or resubmissions.<sup>58</sup> Opposed by the Forest Service, the National Park Service, and business interests, the original bill removed the Forest Service's authority to adjust wilderness areas, protected national forests against mining and hydropower projects, and required the designation of additional wilderness areas.<sup>59</sup> The Forest Service supported the bill once the agency successfully amended it to both eliminate the proposed National Wilderness Preservation Council<sup>60</sup> and permit mining, reservoirs, power plants, and roads in wilderness, if the President deemed such developments in the national interest.<sup>61</sup> Once the bill removed any reference to Indian reservations, it won the executive branch's endorsement.<sup>62</sup> In addition to the Forest Service and the President's amendments, the final weakened version of the bill, enacted eight years after its introduction, required additions to the National Wilderness Preservation System to be completed via congressional acts (rather than by presidential initiative or agency discretion) and permitted certain mining exploration and development, power projects, and livestock grazing.<sup>63</sup> Ultimately, Congress attempted to "preserve pristine areas

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57. See NASH, *supra* note 3, at 222 ("Congress lavished more time and effort on the wilderness bill than on any other measure in American conservation history."); see also *supra* text accompanying note 10.

58. NASH, *supra* note 3, at 222. One environmental law scholar identifies the most important congressional bills as: S. 4, 88th Cong. (1963); H.R. 930, 9070, 9162, 88th Cong. (1963); H.R. 293, 87th Cong. (1962); S. 174, 87th Cong. (1961); H.R. 776, 1925, 87th Cong. (1961); S. 3809, 86th Cong. (1960); H.R. 12951, 86th Cong. (1960); S. 1123, 86th Cong. (1959); H.R. 713, 86th Cong. (1959); S. 4028, 85th Cong. (1958); H.R. 13013, 85th Cong. (1958); S. 1176, 85th Cong. (1957); H.R. 3611, 85th Cong. (1957); S. 4013, 84th Cong. (1956); H.R. 11703, 84th Cong. (1956). McCloskey, *supra* note 38, at 298 n.40.

59. S. 4013, 84th Cong. (1956); CRAIG W. ALLIN, *THE POLITICS OF WILDERNESS PRESERVATION* 106-07 (1st ed. 1982).

60. Federal administrators and citizen conservationists would have comprised this advisory council, which was to study wilderness and recommend maintenance activities and system expansion. See NASH, *supra* note 3, at 221.

61. See *The Wilderness Act: Hearings on S. 174 Before the Comm. on Interior and Insular Affairs*, 87th Cong. 42-57 (1961) (statements of Richard E. McArdle, Chief, Edward C. Crafts, Assistant Chief, & Reynolds G. Florance, Director, Division of Legislative Reporting and Liaison, Forest Service); ALLIN, *supra* note 59, at 116-18; McCloskey, *supra* note 38, at 298-99.

62. See McCloskey, *supra* note 38, at 298-99; see also Mercure & Ross, *supra* note 9, at 54. One of the early draft bills would have established wilderness areas on Indian reservations subject to the consent of the tribal council. S. 4013, 84th Cong. (1956); see also ALLIN, *supra* note 59, at 107. The Department of the Interior opposed this provision because it was at odds with tribal self-government. See Hession, *supra* note 55, at 46-51.

63. S. 4, 88th Cong. (1963); Pub. L. No. 88-577, 78 Stat. 890 (codified as amended at 16 U.S.C.



from development and yet avoid economic harm to local communities and development interests.”<sup>64</sup>

*B. The Wilderness Act’s Implementation Reveals Congressional Trade-Offs*

The overarching purpose of the Wilderness Act and the goal of its supporters was to create a national policy for wilderness protection.<sup>65</sup> The Wilderness Act’s preamble provides, “[I]t is hereby declared to be *the policy of the Congress* to secure for the American people of present and future generations the benefits of an enduring resource of wilderness.”<sup>66</sup> To that end, the Wilderness Act established a uniform National Wilderness Preservation System.<sup>67</sup> However, members of Congress and the Forest Service eliminated an early proposal to create a national management body,<sup>68</sup> the National Wilderness Preservation Council.<sup>69</sup> Instead, the Wilderness Act leaves the management of wilderness areas to the agency originally responsible for that land<sup>70</sup> and

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§§ 1131–1136 (2006)); *see also* NASH, *supra* note 3, at 225–26; Mercure & Ross, *supra* note 9, at 59–60 (“The final legislation establishing the National Wilderness [Preservation] System must be considered a compromise; but it may also be said that the economic interests gained rather more than they were forced to give up.”). Of the 14.6 million acres of land previously classified as wilderness and primitive areas, the bill included only 9.1 million acres of wilderness in the National Wilderness Preservation System. Mercure & Ross, *supra* note 9, at 57, 60. The Wilderness Act left the remaining 5.5 million acres of primitive areas, as well as about sixty million acres of wild and roadless portions of the national park system and national wildlife refuges and game ranges, to a ten-year review period by the Secretary of Agriculture and Secretary of the Interior respectively. *Id.*

64. Daniel Rohlf & Douglas L. Honnold, *Managing the Balances of Nature: The Legal Framework of Wilderness Management*, 15 *ECOLOGY L.Q.* 249, 257 (1988). Both the House and Senate reports accompanying the final bill acknowledged that the Wilderness Act carved out a place for business interests. *See* S. REP. NO. 88-109, at 246 (1963) (“Serious consideration has been given to the various competitive uses. Provisions have been included in the bill for future modifications in the wilderness system, or in regulations governing specific areas . . . Congress itself can at any time enact legislation making changes.”); H.R. REP. NO. 88-1538, at 93 (1964) (“In those areas designated as ‘wilderness’ grazing would be permitted where previously established . . . Specific provision is made for performance of commercial services ‘to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes’ of the areas concerned.”).

65. *See* NASH, *supra* note 3, at 220–22; Rashkin et al., *supra* note 13, at 222.

66. 16 U.S.C. § 1131(a) (emphasis added).

67. *Id.*

68. *See* S. 4, 88th Cong. (1963); H.R. 930, 88th Cong. (1963); H.R. 9070, 88th Cong. (1963); H.R. 9162, 88th Cong. (1963); H.R. 293, 87th Cong. (1962); Rashkin et al., *supra* note 13, at 224.

69. *See supra* note 60.

70. 16 U.S.C. § 1131(b) (“The inclusion of an area in the National Wilderness Preservation System notwithstanding, the area shall continue to be managed by the Department and agency having jurisdiction thereover immediately before its inclusion in the National Wilderness

directs that agency “to provide for the protection of these areas [and] the preservation of their wilderness character.”<sup>71</sup>

In addition to its lack of a national oversight body for the newly created national wilderness protection scheme, the Wilderness Act also restricts the designation of new wilderness areas to congressional action.<sup>72</sup> The Wilderness Act’s opponents removed the authority of federal agencies to designate wilderness areas and vested that authority exclusively with Congress.<sup>73</sup> According to the preamble, “[N]o Federal lands shall be designated as ‘wilderness areas’ except as provided for in this chapter or by a subsequent Act.”<sup>74</sup> Through requiring congressional action to designate additional wilderness areas, the Act prevents individual agencies from classifying or declassifying wilderness areas at the behest of the executive or Congress with little public scrutiny<sup>75</sup> and appears to embrace a national approach to wilderness protection. In practice, this requirement “deliberately created a cumbersome system of government bureau reviews, local public hearings, [c]ongressional committee reviews, and finally a separate act of Congress for each addition.”<sup>76</sup> While statutorily designated wilderness areas are no longer threatened by election cycles,<sup>77</sup> “[h]ardly a more tedious, time-consuming, and obstructive method could have been devised.”<sup>78</sup>

Thus, although wilderness protection has enjoyed longstanding bipartisan support<sup>79</sup> (evidenced by the National Wilderness Preservation System’s over twelve-fold acreage expansion since 1964),<sup>80</sup> this

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Preservation System unless otherwise provided by Act of Congress.”).

71. *Id.* § 1131(a).

72. See NASH, *supra* note 3, at 222 (“Previously, preservation policy in the National Forests had been only an administrative decision subject to change at any time by Forest Service personnel. Even the laws creating National Parks and Monuments deliberately left the way open for the construction of roads and tourist accommodations. The intention of the wilderness bill, however, was to make any alteration of wilderness conditions within the system illegal.”).

73. See, e.g., *id.* at 225–26; Rashkin et al., *supra* note 13, at 223.

74. 16 U.S.C. § 1131(a).

75. NASH, *supra* note 3, at 226; Mercure & Ross, *supra* note 9, at 52–53, 55, 60–61; Rashkin et al., *supra* note 13, at 222–23.

76. NASH, *supra* note 3, at 226.

77. *Id.* at 222; Rashkin et al., *supra* note 13, at 223.

78. Mercure & Ross, *supra* note 9, at 60.

79. Appel, *supra* note 33, at 65. On March 30, 2009, President Obama joined every administration since Lyndon Johnson to sign legislation adding wilderness areas to the National Wilderness Preservation System with the Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 125 Stat. 991 (2009) (codified as amended in scattered sections of 16 U.S.C. and 43 U.S.C.). Appel, *supra* note 33, at 65 n.10.

80. *Fast Facts*, *supra* note 15.

expansion is by way of multi-million-acre wilderness bills because of the political process involved.<sup>81</sup> Most wilderness-designation acts package wilderness areas by land management agency or by state.<sup>82</sup> Though Congress's wilderness protection efforts are impressive, much wild land remains outside of the Wilderness Act's protections:<sup>83</sup> "[e]stimates vary, but it is fair to say that as much federal land as is already in the system . . . is, although not now in the system, currently wild enough to qualify for it."<sup>84</sup> Today, some observers blame the cumbersome process of wilderness designation and economic, political, and internal congressional pressures for the fact that Congress no longer designates vast land tracts as wilderness areas, even asserting that "wilderness designation by Congress has largely come to an end."<sup>85</sup>

*C. The Wilderness Act's Text Expressly Balances Interests Other than Conservation*

Rather than create an inexorable command to protect wilderness above all else, Congress openly declared its intent that the Wilderness Act "preserve[] the integrity of several statutes governing national forests and national parks . . . ."<sup>86</sup> Accordingly, the Wilderness Act states that its purposes are "within and supplemental to the purposes for which national forests and units of the national park and national wildlife refuge systems are established and administered."<sup>87</sup> To achieve this objective, the Wilderness Act enumerates specific statutes with which it does not interfere.<sup>88</sup> These statutes include certain organic acts of the

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81. Leshy, *supra* note 51, at 3.

82. *Id.*

83. *Id.* at 4.

84. *Id.*

85. Laitos & Gamble, *supra* note 45, at 534–37 (noting that recreation and business lobbies, as well as limited experience with wilderness designation among current members of Congress, have deterred Congress from keeping pace with its previous wilderness designations). The 112th Congress was the first Congress since 1966 not to designate any wilderness areas. *Congress Adjourns, Leaving Unfinished Business*, THE PEW CHARITABLE TRUSTS (Jan. 15, 2013), <http://www.pewenvironment.org/news-room/other-resources/congress-adjourns-leaving-unfinished-business-8589443035#>.

86. H.R. REP. NO. 88-1538, at 13 (1964).

87. 16 U.S.C. § 1133(a) (2006); *see also* McCloskey, *supra* note 38, at 302–03; Rashkin et al., *supra* note 13, at 233–34 ("Congress'[s] clear objective in passing the [Wilderness] Act was to create a law that was 'within' and 'supplemental' to other acts, but also established national forests and wilderness areas for the preservation and enjoyment of the public. . . . Ultimately, the [Wilderness] Act expands Congress'[s] commitment to the preservation of public lands with wilderness qualities without modifying the authority of previous acts of Congress.").

88. 16 U.S.C. § 1133(a).

Forest Service and National Park Service, legislation managing the Superior National Forest in Minnesota, the authority of the Federal Power Commission to license power development, and the major federal historic preservation statutes existing in 1964.<sup>89</sup>

However, scholars have observed that the purposes of the statutes exempted from the Wilderness Act seem to conflict with the Act's defining conservation mandates.<sup>90</sup> For instance, the exempted Organic Administration Act<sup>91</sup> provides that national forests will be established to support irrigation, as well as provide a reliable timber supply for the American public.<sup>92</sup> Similarly, the exempted Multiple-Use Sustained-Yield Act of June 12, 1960<sup>93</sup> states that national forests will also provide "outdoor recreation, range, timber, watershed, and wildlife and fish . . . ."<sup>94</sup> By contrast, under the Wilderness Act, wilderness areas (which include national forests) "shall be administered for the use and enjoyment of the American people in such manner as will leave them *unimpaired* for future use and enjoyment as wilderness . . . ."<sup>95</sup>

Importantly, the statutes exempted from the Wilderness Act also include early historic preservation statutes<sup>96</sup> that were forerunners to the NHPA. Section 1133(a) of the Wilderness Act in particular "reveals Congress'[s] efforts to supplement and be within previous land preservation acts."<sup>97</sup> For example, this section exempts the Antiquities Act of 1906,<sup>98</sup> which regulates the excavation and examination of

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89. *Id.*; see also McCloskey, *supra* note 38, at 302–03; Rashkin et al., *supra* note 13, at 232–37.

90. See generally ROSS W. GORTE, CONG. RESEARCH SERV., R41649, WILDERNESS LAWS: STATUTORY PROVISIONS AND PROHIBITED AND PERMITTED USES (2011), available at <http://www.wilderness.net/NWPS/documents/Wilderness%20LawsStatutory%20Provisions%20and%20Prohibited%20and%20Permitted%20Uses.pdf>; Elinor Colbourn, *The Morality of Wilderness: Federal Reserved Water Rights in Western Wilderness Areas*, 6 YALE L. & POL'Y REV. 157, 164–69 (1988); McCloskey, *supra* note 38, at 305–14; Rashkin et al., *supra* note 13, at 232–36.

91. Sundry Civil Appropriations Act of 1897, ch. 2, 30 Stat. 11, 34–35 (1897) (codified as amended at 16 U.S.C. § 475 (2006)). Section 1133(a)(1) of the Wilderness Act exempts the Organic Administration Act from the Wilderness Act.

92. 16 U.S.C. § 475.

93. Pub. L. No. 86-517, 74 Stat. 215 (1960) (codified as amended at 16 U.S.C. §§ 528–31 (2006)). Section 1133(a)(1) of the Wilderness Act exempts the Multiple-Use Sustained-Yield Act from the Wilderness Act.

94. 16 U.S.C. § 528.

95. *Id.* § 1131(a) (emphasis added).

96. See *id.* § 1133(a)(3).

97. Rashkin et al., *supra* note 13, at 236.

98. Act of June 8, 1906, ch. 3060, 34 Stat. 225 (codified as amended at 16 U.S.C. §§ 431–33 (2006)).

archeological digs and ruins and the collection of historic objects.<sup>99</sup> It also exempts from the Wilderness Act the Historic Sites, Buildings and Antiquities Act,<sup>100</sup> which declares as national policy the preservation of historic sites, buildings, and nationally significant objects.<sup>101</sup> Although the Wilderness Act does not mention the NHPA specifically,<sup>102</sup> the Act recognizes the NHPA's statutory authority by reference insofar as the Act "in no manner lower[s] the standards . . . [of] *any* other [a]ct of Congress which might pertain to or affect such [wilderness] area, *including, but not limited to,*" the historic preservation statutes mentioned above.<sup>103</sup>

Additionally, the Wilderness Act's definition of wilderness and its express purposes leave room for uses of wilderness areas beyond conservation, so that the Act's definitions and directives appear to conflict.<sup>104</sup> Although wilderness is defined as "an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation"<sup>105</sup> and "where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain,"<sup>106</sup> the Act declares that wilderness areas "may also contain ecological, geological, or other features of scientific, educational, scenic, or *historical* value."<sup>107</sup> Somewhat redundantly, the Wilderness Act further declares that "wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and *historical* use."<sup>108</sup> In a decision interpreting the Wilderness Act, the Ninth Circuit recognized the difficulty of reconciling the competing demands of the Act's broad purposes with its very restrictive definition of wilderness:

Read as a whole, the [Wilderness] Act gives conflicting policy directives to the [United States Fish and Wildlife] Service in administering the area. The Service is "charged with

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99. 16 U.S.C. § 432.

100. Act of August 21, 1935, ch. 593, 49 Stat. 666 (codified as amended at 16 U.S.C. §§ 461–67 (2006)).

101. 16 U.S.C. § 461.

102. This omission (and subsequent lack of amendment) may be an artifact of history as the NHPA was not enacted until two years after the passage of the Wilderness Act. *See supra* text accompanying notes 8, 19.

103. 16 U.S.C. § 1133(a)(3) (2006) (emphasis added).

104. *See id.* §§ 1131(c), 1133(b).

105. *Id.* § 1131(c).

106. *Id.*

107. *Id.* § 1131(c)(4) (emphasis added).

108. *Id.* § 1133(b) (emphasis added).

maintaining the wilderness character of the land, providing opportunities for wilderness recreation, managing fire and insect risk, and even facilitating mineral extraction activities.” It is charged with simultaneously devoting the land to “conservation” and protecting and preserving the wilderness in its natural condition. We cannot discern an unambiguous instruction to the Service. Rather, those competing instructions call for the application of judgment and discretion.<sup>109</sup>

Finally, even though wilderness areas are supposed to be largely without human improvement or influence, the Wilderness Act includes some fairly broad exceptions.<sup>110</sup> For example, the Wilderness Act’s prohibition on commercial enterprises and permanent roads is subject to existing private rights.<sup>111</sup> Similarly, if “necessary to meet minimum requirements for the administration of the [wilderness] area,” temporary roads, motorized vehicles and equipment (including automobiles, motorboats, aircraft, and mechanical transport), and structures or installations are permitted within wilderness areas.<sup>112</sup> Moreover, special provisions exist for aircraft, motorboats, fire, insect and disease control, mining and mineral activities, water infrastructure, livestock grazing, commercial services, state fish and wildlife management, and access to private- and state-owned land surrounded by wilderness.<sup>113</sup>

## II. WITH THE NHPA, CONGRESS ESTABLISHED STRONG PROTECTIONS FOR HISTORIC PROPERTIES

Although solitary efforts on federal, state, and local levels to protect historic sites existed well before the enactment of the NHPA,<sup>114</sup> the

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109. *Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1033 (9th Cir. 2010) (internal citations omitted) (finding that conservation of bighorn sheep was a historical purpose consistent with the Wilderness Act); *see also* *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 647–48 (9th Cir. 2004) (“Although we believe that Congress intended to enshrine the long-term preservation of wilderness areas as the ultimate goal of the [Wilderness] Act, the diverse, and sometimes conflicting list of responsibilities imposed on administering agencies renders Congress’s intent arguably ambiguous.”).

110. *See, e.g.*, 16 U.S.C. §§ 1133(c), 1133(d), 1134. For a detailed discussion of the Wilderness Act’s permitted non-conforming uses, *see* GORTE, *supra* note 90, at 10–15.

111. 16 U.S.C. § 1133(c).

112. *Id.* Neither Congress nor any federal agency has defined the minimum requirements to allow motorized access and infrastructure. GORTE, *supra* note 90, at 10.

113. 16 U.S.C. §§ 1133(d), 1134.

114. *See generally* CHRISTOPHER J. DUERKSEN, *A HANDBOOK ON HISTORIC PRESERVATION LAW* 6 (1983); CHARLES B. HOSMER, JR., *PRESENCE OF THE PAST: A HISTORY OF THE PRESERVATION MOVEMENT IN THE UNITED STATES BEFORE WILLIAMSBURG* (1965).

NHPA marked the first comprehensive national attempt to protect historic properties.<sup>115</sup> Central to its framework, the NHPA establishes collaborative partnerships at all levels of government that foster historic protection through the development and promotion of the National Register of Historic Places.<sup>116</sup> Since the NHPA's enactment, Congress has strengthened its protections numerous times<sup>117</sup> without exceptions for other types of land-use protections. Though the purpose of each amendment does not appear to be settled,<sup>118</sup> much of the legislative history evinces a congressional intent to elucidate and strengthen federal agencies' historic preservation responsibilities.<sup>119</sup>

A. *The Context of the NHPA's Enactment and Its Subsequent Amendments Illustrate Congress's Increasing Protection of Historic Properties*

Though there have been isolated efforts to protect historic sites associated with important people or events since the turn of the twentieth century,<sup>120</sup> the 1960s marked the launch of a nationwide preservation movement that culminated in the enactment of the NHPA.<sup>121</sup> For example, in 1964, the U.S. Conference of Mayors began a study of domestic historic preservation policies and identified public demand for a national approach to the preservation of historic sites, which it ultimately recommended that Congress adopt.<sup>122</sup> Moreover, by 1964,

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115. See KANEFIELD, *supra* note 20, at 3.

116. See 16 U.S.C. §§ 470(b), 470(a) (2006).

117. See *infra* notes 129–37 and accompanying text.

118. See *infra* note 148.

119. See *infra* Part II.C.

120. See generally HOSMER, *supra* note 114. The first federal statute was the Antiquities Act of 1906, 16 U.S.C. §§ 431–433 (2006), which authorized the President to designate historic sites as national monuments and required permits for archeological activities on federal lands. *Id.* Given the Act's limited scope, Congress enacted the Historic Sites Act of 1935, *id.* §§ 461–467 (2006), which declared a national policy of historic preservation and vested responsibility of such preservation with the Secretary of the Interior. *Id.* However, even with this limited federal effort for preservation, state and local preservation laws were sparse. See DUERKSEN, *supra* note 114, at 6 (describing 1956 survey of local preservation laws that found that only a “handful of cities had enacted laws: Alexandria, Virginia (1946); Williamsburg, Virginia (1947); Winston-Salem, North Carolina (1948); Georgetown in Washington, D.C. (1950); Natchez, Mississippi (1951); Annapolis, Maryland (1951); Beacon Hill in Boston and Nantucket, Massachusetts (1955); and Salem, Massachusetts (1956)”; see also 3 PATRICIA E. SALKIN, AM. L. ZONING § 27:1 (5th ed. 2012) (“Local preservation laws were not adopted as quickly as general zoning ordinances, however, and by the mid 1950s only a few cities had enacted historic preservation ordinances.”).

121. See 3 SALKIN, *supra* note 120.

122. See SPECIAL COMM. ON HISTORIC PRESERVATION, U.S. CONFERENCE OF MAYORS, *supra*

more than forty states had established historic preservation policies.<sup>123</sup> These efforts resulted in the passage of the NHPA in 1966, which created a partnership between federal agencies and states to coordinate historic preservation via the National Register of Historic Places.<sup>124</sup> To effectively create a national framework for historic preservation, the NHPA established the Advisory Council on Historic Preservation.<sup>125</sup> The Council advises the President and Congress on historic preservation issues, recommends measures to coordinate public and private local, state, and federal preservation efforts, and participates in the review of agency action that impacts historic properties.<sup>126</sup> The NHPA also authorized grants to state and local governments and Indian tribes for historic preservation surveys and projects.<sup>127</sup> The grants were administered by state liaison officers (later known as state historic preservation officers) for the National Park Service.<sup>128</sup>

While the Wilderness Act has remained largely unchanged since its enactment, Congress has amended the NHPA several times to strengthen its mandates<sup>129</sup> and has supplemented it with environmental and transportation laws that contain preservation obligations.<sup>130</sup> In 1976, the

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note 5, at 220–21.

123. See DUEKSEN, *supra* note 114, at 8.

124. See *supra* text accompanying note 122; see also 16 U.S.C. §§ 470(b), 470a (2006).

125. 16 U.S.C. § 470i.

126. *Id.* §§ 470j, 470f. The NHPA's review process is described in *infra* Part II.B.

127. 16 U.S.C. § 470a.

128. THOMAS F. KING, CULTURAL RESOURCE LAWS & PRACTICE 19, 24, 373 (3d ed. 2008); see also 16 U.S.C. § 470a.

129. See KANEFIELD, *supra* note 20, at 5–7; *supra* notes 27–28 and accompanying text; *infra* notes 131–37 and accompanying text.

130. See, e.g., Federal-Aid Highway Act of 1966, Pub. L. No. 89-574, 80 Stat. 766 (codified as amended at 23 U.S.C. §§ 137–138 (2006)); National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321–4347 (2006)); Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (codified as amended at 15 U.S.C. §§ 3711(b), 3711(c); 16 U.S.C. § 1262; 23 U.S.C. §§ 133, 153, 160, 303, 325, 326; 26 U.S.C. § 9511; 33 U.S.C. §§ 59cc, 59dd; 49 U.S.C. §§ 111, 309 (2006)). Unlike the Wilderness Act, the executive branch has also supplemented the NHPA through various executive orders. For example, in 1971, President Nixon signed Executive Order No. 11,593, 36 Fed. Reg. 8921 (May 13, 1971), that established many preservation procedures to which federal agencies must adhere. In 1996, President Clinton signed Executive Order Nos. 13,006, 61 Fed. Reg. 26071 (May 21, 1996), and 13,007, 61 Fed. Reg. 26771 (May 24, 1991), which respectively directed federal agencies to locate their offices and facilities in historic districts and properties and articulated the Administration's support for the preservation of Native American sacred sites. In 2003, President Bush signed Executive Order No. 13,287, 68 Fed. Reg. 10635 (Mar. 3, 2003), which directed federal agencies to advance historic preservation to the degree consistent with the executive branch and agencies' missions and encouraged federal agencies to partner with state, local, and tribal governments and private entities to promote economic development through the sustainable use of



first of many amendments established the Historic Preservation Fund for the NHPA's preservation grants, expanded the NHPA's procedural protections to include historic sites *eligible* for listing on the National Register of Historic Places, and rendered the Advisory Council on Historic Preservation an independent agency.<sup>131</sup> The next major amendments occurred in 1980 when Congress added Section 110.<sup>132</sup> This new section clarified and expanded the preservation responsibilities of federal agencies,<sup>133</sup> and other amendments explained the duties of State Historic Preservation Officers and directed the Advisory Council on Historic Preservation to evaluate federal agencies' preservation policies.<sup>134</sup> In 1992, the NHPA was amended again to expand the preservation duties of Native Americans and Native Hawaiians.<sup>135</sup> The 1992 amendments also obligated federal agencies to develop internal preservation procedures and withhold funding in the event of any demolition of historic properties.<sup>136</sup> Finally, Congress most recently amended the NHPA in 2000 and 2006 to re-authorize both the Historic Preservation Fund and the Advisory Council on Historic Preservation.<sup>137</sup>

*B. The NHPA's Text Does Not Indicate that Other Land-Use Legislation Controls Historic Preservation Obligations*

In addition to establishing the National Register of Historic Places, which receives support from state and local preservation programs as well as federal funding and oversight,<sup>138</sup> the NHPA governs federal agency action with respect to historic properties in two key provisions: Section 106<sup>139</sup> and Section 110.<sup>140</sup> Section 106, included in the original

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historic properties. *See also* KANEFIELD, *supra* note 20, at 3–4.

131. NHPA Amendments of 1976, Pub. L. No. 94-422, 90 Stat. 1313 (codified as amended at 16 U.S.C. §§ 470b, 470c, 470f, 470h, 470i, 470l–470t (2006)).

132. NHPA Amendments of 1980, Pub. L. No. 96-515, 94 Stat. 2987 (codified as amended at 16 U.S.C. §§ 469c–2, 470–1, 470a–1, 470a–2, 470h–2, 470h–3, 470u to 470w, 470w–1 to 470w–6 (2006)).

133. 16 U.S.C. § 470h–2; *see also infra* Parts II.B, II.C.

134. 16 U.S.C. §§ 470u–470w; *see also infra* Part II.B.

135. NHPA Amendments of 1992, Pub. L. No. 102-575, 106 Stat. 4753 (codified as amended at 16 U.S.C. §§ 470h–4 to 470h–5, 470x to 470x–6 (2006)).

136. 16 U.S.C. §§ 470h–2, 470h–4; *see also infra* Part II.B.

137. NHPA Amendments of 2000, Pub. L. No. 106-208, 114 Stat. 318 (codified as amended at 16 U.S.C. §§ 470 note, 470a to 470c, 470h, 470h–2, 470n, 470t, 470w, 470w–6, 470x–3 (2006)); NHPA Amendments of 2006, Pub. L. No. 109-453, 120 Stat. 3367 (codified as amended at 16 U.S.C. §§ 470 note, 470h, 470i, 470m, 470t, 470v–2 (2006)).

138. *See supra* text accompanying notes 22–26, 124–28.

139. 16 U.S.C. § 470f (2006).

text of the NHPA, is a procedural mandate that requires agencies to consider the impact of their activities on historic properties and provide the Advisory Council on Historic Preservation the opportunity to comment on the agency's activities.<sup>141</sup> As Section 106 only establishes a consultative process rather than a substantive outcome,<sup>142</sup> courts have interpreted Section 106 as merely a "stop, look, and listen" statute.<sup>143</sup> Consequently, agencies can engage in activities that will harm historic sites so long as they have complied with Section 106's procedures.<sup>144</sup>

However, in 1980, Congress added Section 110 to the NHPA,<sup>145</sup> which arguably heightens the protections agencies must afford to historic properties.<sup>146</sup> Originally intended to codify an executive order that directed federal agencies to preserve and maintain their historic properties,<sup>147</sup> Section 110's requirements expand beyond the executive order to supplement the NHPA.<sup>148</sup> This section requires federal agencies

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140. *Id.* § 470h-2 (2006).

141. *Id.* § 470f ("The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under part B of this subchapter a reasonable opportunity to comment with regard to such undertaking.").

142. *See* 3 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 28:10 (2d ed. 2013) (Section 106's "requirements do not contain an enforceable substantive mandate, however. The federal agency need only take into account the effect of an action on a listed site to comply.").

143. *See, e.g.*, *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999); *Neighborhood Ass'n of The Back Bay, Inc. v. Fed. Transit Admin.*, 407 F. Supp. 2d 323, 332 (D. Mass. 2005), *aff'd*, 463 F.3d 50 (1st Cir. 2006).

144. *See* 3 SALKIN, *supra* note 120, § 27:3 ("Section 106 does not require agencies to refrain from undertakings that will harm historic sites, but merely prescribes a consultative process . . .").

145. *See supra* note 132.

146. *See* KANEFIELD, *supra* note 20, at 9 ("The review required by Section 110(f) is similar to that required under Section 106 but involves a higher standard of care.").

147. Exec. Order No. 11,593, 35 Fed. Reg. 8921 (May 13, 1971).

148. *See* KANEFIELD, *supra* note 20, at 9. The relationship between Sections 106 and 110 is not settled. At least one district court has held that "Section 110 represents an elucidation and extension of the Section 106 process but not its replacement by new and independent substantive obligations of a different kind." *Nat'l Trust for Historic Pres. v. Blanck*, 938 F. Supp. 908, 920 (D.D.C. 1996). This holding was in the context of declaratory and injunctive relief sought to compel the Army to assume emergency repairs and stabilization measures of historic sites that were allegedly deteriorating due to the Army's neglect. *Id.*; *see also* *Lee v. Thornburgh*, 877 F.2d 1053, 1056, 1057 (D.C. Cir. 1989) (concluding that "Congress intended [Section 110] to have a limited reach" not beyond Section 106 by relying in part on language from a House Report that stated that the 1980

to “assume responsibility for the preservation of historic properties which are owned or controlled by such agency.”<sup>149</sup> “Each agency [also] *shall* undertake, consistent with the preservation of such properties and the mission of the agency and the professional standards established . . . , any preservation, as may be necessary to carry out this section.”<sup>150</sup> In 1992, Congress amended Section 110,<sup>151</sup> again arguably increasing federal agencies’ preservation obligations.<sup>152</sup> The amendment clarifies that each agency “*shall* establish . . . a preservation program . . . [that] *shall* ensure” that properties listed on or eligible for listing on the National Register of Historic Places “are managed and maintained in a way that considers the preservation of their historic, archaeological, architectural, and cultural values . . . .”<sup>153</sup> Notably, unlike the Wilderness Act,<sup>154</sup> neither the original text of the NHPA nor any of its subsequent amendments include provisions exempting other federal land-use statutes from its requirements.

*C. The Purpose of the NHPA and Its Subsequent Amendments Is to Require Agencies to Protect Historic Properties*

In enacting the NHPA in 1966, Congress identified its purpose as: “(1) to strengthen and expand the [Historic Sites, Buildings and Antiquities Act of 1935] and to establish a national register [of historic places] . . . ; (2) to encourage local, regional, State, and National interest in the protection of [historic] properties; and (3) to establish an Advisory Council on Historic Preservation . . . .”<sup>155</sup> When adding Section 110 to the NHPA in 1980 on top of Section 106’s consultative process,<sup>156</sup> Congress stated that Section 110 is necessary to:

clarif[y] and codif[y] the minimum responsibilities expected of Federal agencies in carrying out the purposes of this Act . . . Section 110(a)(1) requires a Federal agency to assume

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Amendments are “not intended to change the preservation responsibilities of Federal agencies as required by any other laws, executive orders or regulations”).

149. 16 U.S.C. § 470h–2(a)(1) (2006).

150. *Id.* (emphasis added).

151. *See supra* notes 135–36 and accompanying text.

152. *See* KANEFIELD, *supra* note 20, at 9 (“The 1992 amendments to NHPA added greater Federal agency responsibility for consideration of historic properties during agency decisionmaking.”).

153. *Id.* § 470h–2(a)(2)(B) (emphasis added).

154. *See* 16 U.S.C. § 1133(a) (2006); *see also supra* text accompanying notes 86–103.

155. H.R. REP. NO. 89-1916, at 79 (1966).

156. *See supra* Part II.B.

preservation responsibilities for properties owned or under the control of the agency. It is intended that the degree of preservation responsibility be commensurate with the extent of the agency's interest in or control of a particular property. . . . Agencies are further directed to undertake such preservation as may be necessary . . . .<sup>157</sup>

Finally, in its most recent amendments to Section 110,<sup>158</sup> Congress explained that the modifications were "to clarify and strengthen the preservation responsibilities of Federal agencies."<sup>159</sup>

### III. COURTS HAVE INTERPRETED THE WILDERNESS ACT TO EXCLUDE HISTORIC PRESERVATION OBLIGATIONS

The vast majority of the few courts that have interpreted the relationship between the Wilderness Act and the NHPA have held that the Wilderness Act prohibits historic preservation activities undertaken by federal agencies in compliance with the NHPA within wilderness areas.<sup>160</sup> One court has even stated, "When there is a conflict between maintaining the primitive character of the [wilderness] area and between any other use . . . the general policy of maintaining the primitive character of the area must be supreme."<sup>161</sup> To reach this conclusion, courts generally have relied on precedent<sup>162</sup> and/or conducted a *Chevron* analysis<sup>163</sup> to hold that Congress unambiguously barred an agency's preservation efforts under the Wilderness Act. Courts have thus not reviewed the reasonableness of the agency's action or examined the text, purpose, and context of the two acts together.<sup>164</sup>

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157. H.R. REP. NO. 96-1457, at 129 (1980).

158. *See supra* Part II.B.

159. S. REP. NO. 102-336, at 16 (1992).

160. *See infra* Parts III.A, III.B.

161. *Minn. Pub. Interest Research Grp. v. Butz*, 401 F. Supp. 1276, 1331 (D. Minn. 1975), *rev'd in part on other grounds*, 541 F.2d 1292 (8th Cir. 1976).

162. *See infra* Part III.A for a discussion of *Wilderness Watch and Public Employees for Environmental Responsibility v. Mainella*, 375 F.3d 1085 (11th Cir. 2004).

163. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (establishing analysis for appropriate level of deference courts should give administrative decisions).

164. *See infra* Parts III.A, III.B.

A. *Wilderness Watch Sets Precedent for the Interaction of the Wilderness Act and the NHPA*

The first and oft-cited case<sup>165</sup> for the proposition that the Wilderness Act excludes historic preservation activities is *Wilderness Watch and Public Employees for Environmental Responsibility v. Mainella*.<sup>166</sup> In this case, the Park Service organized motorized transportation across designated wilderness areas in Cumberland Island, Georgia, to provide public tourist access to a Georgian Revival-style mansion and an area occupied by freed slaves.<sup>167</sup> Both historic sites are listed on the National Register of Historic Places<sup>168</sup> and are located outside of the wilderness area.<sup>169</sup> Prior to introducing tourist access to the historic sites, the Park Service maintained motorized access to the historic sites to comply with its preservation obligations under the NHPA.<sup>170</sup> The Eleventh Circuit held that the Park Service's tourist transportation to the historic properties unambiguously violated the Wilderness Act.<sup>171</sup> To reach this conclusion, the court relied on the Wilderness Act's definition of wilderness<sup>172</sup> and its prohibition on motorized transport (unless for administrative need).<sup>173</sup> The court also found that the statute's purpose

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165. See *High Sierra Hikers Ass'n v. U.S. Forest Serv.*, 436 F. Supp. 2d 1117, 1135–36 (E.D. Cal. 2006) (noting the only cases that discuss the relationship between structures on National Register of Historic Places and wilderness areas as *Wilderness Watch* and *Olympic Park Associates v. Mainella*, No. C04-5732FDB, 2005 WL 1871114 (W.D. Wash. Aug. 1, 2005)).

166. 375 F.3d 1085 (11th Cir. 2004).

167. *Id.* at 1088–90.

168. Plum Orchard is a nineteenth century mansion complex commissioned by Thomas Carnegie. *Id.* at 1088 n.3. The Settlement is an area occupied by freed slaves after the Civil War. *Id.*

169. Plum Orchard is located just outside of the Cumberland Island wilderness area, and the Settlement is located in a potential wilderness area. *Id.* at 1088.

170. *Id.* at 1089.

171. See *id.* at 1091–94. After this decision, Congressman Jack Kingston, the congressional representative from the district where Cumberland Island is located, successfully removed the road used by the Park Service, two smaller roads, and a historic district from the wilderness area via a rider to the omnibus federal appropriations bill. See Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 145, 118 Stat. 2809, 3072–73 (2004). The resulting Cumberland Island Wilderness Boundary Adjustment Act of 2004, 16 U.S.C. §§ 459i note, 459i-5, 1132 note (2006), also authorized tours of the historic sites on the island. *Id.*; see also JAMES CHARLES SMITH, EDWARD J. LARSON, JOHN COPELAND NAGLE & JOHN A. KIDWELL, PROPERTY: CASES & MATERIALS 784 (2d ed. 2008).

172. See *Wilderness Watch*, 375 F.3d at 1091–92 (“The Wilderness Act defines wilderness as ‘undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation’ . . . [that] should ‘generally appear[] to have been affected primarily by the forces of nature, with the imprint of man’s work substantially unnoticeable.’”) (quoting 16 U.S.C. § 1131(c) (2006)).

173. See *id.* at 1092 (“The Wilderness Act bars the use of motor vehicles in these areas ‘except as

prohibits the Park Service's tourist transportation to the historic sites because that transportation interferes with a "primitive wilderness experience."<sup>174</sup> Though the court did acknowledge that the Wilderness Act provides for historical use,<sup>175</sup> it concluded that "[g]iven the consistent evocation of 'untrammelled' and 'natural' areas, the previous pairing of 'historical' with 'ecological' and 'geological' features, and the explicit prohibition on structures, the only reasonable reading of 'historical use' in the Wilderness Act refers to natural, rather than man-made, features."<sup>176</sup>

Although the *Wilderness Watch* court does hold that the Wilderness Act precludes motorized tourist access to historic sites, the decision carefully leaves room for historic preservation within wilderness areas under the NHPA.<sup>177</sup> For example, after determining that "historical use" as provided for in the Wilderness Act refers to natural features, the court acknowledged, "Of course, Congress may separately provide for the preservation of an existing historical structure within a wilderness area, as it has done through the NHPA."<sup>178</sup> The court then clarified that "[t]his appeal turns *not* on the preservation of historical structures but on the decision to provide motorized public access to them across designated wilderness areas."<sup>179</sup> Moreover, while holding that "the Wilderness Act . . . unambiguously prohibit[s] the Park Service from offering motorized transportation to park visitors through the wilderness area,"<sup>180</sup> the court made no mention of the Park Service's motorized transport across the wilderness area for the purpose of maintaining the historic sites.

*B. Later Federal District Court Cases Follow Wilderness Watch's Reasoning to Conclude that the Wilderness Act Precludes Historic Preservation Activities*

*Olympic Park Associates v. Mainella*<sup>181</sup> was the first case to cite the

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necessary to meet minimum requirements for the administration of the area for the purpose of this chapter [the Wilderness Act].") (alteration in original) (quoting 16 U.S.C. § 1133(c)).

174. *Id.* at 1093.

175. *See id.* at 1092 ("Section 1133(b) mentions 'historical use' along with 'recreational, scenic, scientific, educational, [and] conservation' uses.") (alteration in original).

176. *Id.*

177. *See id.*

178. *Id.*

179. *Id.* (emphasis added).

180. *Id.* at 1094.

181. No. C04-5732FDB, 2005 WL 1871114 (W.D. Wash. Aug. 1, 2005).

*Wilderness Watch* court's holding regarding the Wilderness Act squarely with regard to the NHPA. This case involved a challenge under the Wilderness Act to the Park Service's decision to rebuild two collapsed snow shelters in the Olympic Wilderness of Washington State with new and original materials.<sup>182</sup> Both snow shelters, though not listed, were eligible for listing on the National Register of Historic Places.<sup>183</sup> The district court held that the Park Service's decision violated the Wilderness Act because of the Act's purpose,<sup>184</sup> definition of wilderness,<sup>185</sup> and proscription against structures (except for emergencies).<sup>186</sup> To support its holding, the court also cited the pivotal language from *Wilderness Watch* regarding the goals of the Wilderness Act and the meaning of the Act's reference to "historical use":

As an initial matter, we cannot agree with the Park Service that the preservation of historical structures furthers the goals of the Wilderness Act. The Park Service's responsibilities for the historic preservation of Plum Orchard and the settlement derive, not from the Wilderness Act, but rather from the National Historic Preservation Act. The NHPA requires agencies to "assume responsibility for the preservation of historic properties" they control.

The agency's obligations under the Wilderness Act are quite different. . . . As the Park Service notes, Section 1133(b) [of the Wilderness Act] mentions "historical use" along with "recreational, scenic, scientific, educational, [and] conservation" uses. However, this list tracks the definition of wilderness areas in § 1131(c), which describes "a primitive and unconfined type of recreation" and "ecological, geological, or other features of scientific, educational, scenic, or historical value." Given the consistent evocation of "untrammled" and "natural" areas, the previous pairing of "historical" with "ecological" and "geological" features, and the explicit prohibition on structures, the only reasonable reading of "historical use" in the Wilderness Act refers to natural, rather than man-made features.<sup>187</sup>

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182. *See id.* at \*1–2.

183. *See id.* The court nowhere mentions that the shelters' eligibility for listing on the National Register of Historic Places, rather than being listed, affected its analysis.

184. *See id.* at \*3 (quoting 16 U.S.C. § 1131(a) (2006)).

185. *See id.* at \*4 (quoting 16 U.S.C. § 1131(c)).

186. *See id.* at \*4 (quoting 16 U.S.C. § 1133(c)), \*5.

187. *See id.* at \*6 (internal citations omitted) (quoting *Wilderness Watch & Pub. Emps. for Envtl. Responsibility v. Mainella*, 375 F.3d 1085, 1091–92 (11th Cir. 2004)).

The *Olympic Park* court concluded that the designation of the Olympic Wilderness changed the analysis regarding permissible historic preservation activities—and these activities no longer included the reconstruction of historic snow shelters.<sup>188</sup> While the court quoted some of the language from *Wilderness Watch*, it did not include the exceptions the Eleventh Circuit cited in which Congress provided for the protection of historic structures under the NHPA.<sup>189</sup> Moreover, the *Olympic Park* court did not cite the Eleventh Circuit’s clarification that its holding precluded only motorized tourist transportation across wilderness areas and not the preservation of historic structures per se.<sup>190</sup> According to the *Olympic Park* court, the snow shelters’ eligibility for listing on the National Register of Historic Places was a conclusion based on “the history of their original construction and use . . . .”<sup>191</sup> With the Olympic National Park’s designation as wilderness, “a different perspective on the land is required . . . [which] means ‘land retaining its primitive character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions.’”<sup>192</sup>

However, the court did not acknowledge the fact that the Washington State Office of Archaeology and Historic Preservation deemed the shelters eligible for listing on the National Register of Historic Places *notwithstanding* their collapse<sup>193</sup> and made this determination over ten years after Congress formally designated the Olympic Wilderness as wilderness.<sup>194</sup> Similarly, other than referencing the Wilderness Act’s definition of wilderness and the duties of agencies under the Act,<sup>195</sup> the court did not discuss the compromises involved in the Wilderness Act’s

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188. *Id.* at \*6–7.

189. *See supra* text accompanying notes 177–78.

190. *See supra* text accompanying note 179.

191. *Olympic Park*, 2005 WL 1871114, at \*6.

192. *Id.* (quoting 16 U.S.C. § 1131(c) (2006)).

193. *See id.* at \*2.

194. *See id.* at \*1–2. Congress formally designated the Olympic Wilderness as wilderness in 1988, and the shelters were found eligible for placement on the National Register of Historic Places on January 11, 2001. *Id.*

195. Later, the *Olympic Park* court cited the provision of the Wilderness Act that specifies agencies’ responsibilities under the Act. *Id.* at \*7 (“[E]ach agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character.”) (quoting 16 U.S.C. § 1133(b)). However, the court did not include the next sentence in this provision of the Wilderness Act that provides, “[W]ilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.” 16 U.S.C. § 1133(b).



enactment<sup>196</sup> or the Act's exemption of historic preservation statutes.<sup>197</sup> Instead, the court asserted that neither the NHPA<sup>198</sup> nor other historic preservation statutes<sup>199</sup> that the Park Service administers require reconstruction.<sup>200</sup> Finally, the court applied the canon of statutory construction in which a specific provision governs a general provision, concluding without analysis that "the Wilderness Act[,] under which the Olympic Wilderness was designated, is the specific provision, while the National Historic Preservation Act . . . is the general."<sup>201</sup>

*High Sierra Hikers Ass'n v. U.S. Forest Service*<sup>202</sup> similarly cited *Wilderness Watch* to conclude that the Wilderness Act prohibited historic preservation activities within wilderness areas.<sup>203</sup> In *High Sierra Hikers*, a district court found that the Forest Service's decision to repair, maintain, and operate small, visually integrated dams located within the Emigrant Wilderness in the Sierra Nevada mountains in California was "clearly and unambiguously contrary to the provisions of the Wilderness Act."<sup>204</sup> Some of the dams the Forest Service's proposal covered were eligible for listing on the National Register of Historic Places.<sup>205</sup> Although the court gave deference to the Forest Service's determination that some of the dams qualified as historic sites and that maintenance of those dams would "preserve their historic value,"<sup>206</sup> the court nonetheless concluded that the Wilderness Act did not permit the

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196. *See supra* Part I.A.

197. *See supra* Part I.C.

198. *See Olympic Park*, 2005 WL 1871114, at \*7 (noting that Section 110 of the NHPA does not create substantive obligations beyond the NHPA's procedural requirements) (citing *Nat'l Trust for Historic Pres. v. Blanck*, 938 F. Supp. 908, 922 (D.D.C. 1996), *aff'd per curiam*, 203 F.3d 53 (D.C. Cir. 1999)). The *Olympic Park* court also cited *United States v. 162.20 Acres of Land, More or Less, Situated in Clay Cnty., State of Miss.*, 639 F.2d 299 (5th Cir. 1981), for this proposition. *Id.* However, the *162.20 Acres of Land* court does not discuss Section 110 of the NHPA; rather, it contemplates the meaning of Section 106 review. 639 F.2d at 302–04.

199. *See Olympic Park*, 2005 WL 1871114, at \*7.

200. As discussed in *supra* note 148, the obligations of administering agencies under Section 110 of the NHPA are arguably unclear. Although at least two courts have concluded that Section 110 does not include any additional mandates beyond Section 106's procedural requirements, the context, plain meaning, and purpose of the NHPA do not compel this result. *See infra* Part IV.A.

201. *See Olympic Park*, 2005 WL 1871114, at \*8. The court does not discuss why the Wilderness Act is more specific than the shelters' eligibility for placement on the National Register of Historic Places under the NHPA. *Id.*

202. 436 F. Supp. 2d 1117 (E.D. Cal. 2006).

203. *Id.* at 1135.

204. *Id.* at 1132.

205. *See id.* at 1127–28.

206. *Id.* at 1133.

dams.<sup>207</sup>

For support, in addition to referencing *Olympic Park*, the *High Sierra Hikers* court cited the same passage of *Wilderness Watch* that the *Olympic Park* court highlighted, which defined the Wilderness Act's provision for historical use to refer to natural, not human-made, features.<sup>208</sup> As in the *Olympic Park* decision, the *High Sierra Hikers* court also did not cite the parts of the *Wilderness Watch* decision that recognize Congress's intent to provide for the protection of historic structures within wilderness areas through the NHPA or that cabin the court's decision to motorized tourist transportation, not historic preservation.<sup>209</sup> Moreover, the *High Sierra Hikers* court did not refer to the Wilderness Act's provision for historic preservation statutes,<sup>210</sup> the compromises that led to the Wilderness Act's passage,<sup>211</sup> or the Forest Service's obligations under the NHPA.<sup>212</sup> Rather, the court determined that "[a]bsent a declaration by Congress of the need to restore and preserve the dam structures in recognition of their historical significance, there is nothing the court can point to that would authorize such an action where the maintenance of the dams would otherwise . . . conflict with the Wilderness Act."<sup>213</sup>

#### IV. BECAUSE COURTS HAVE REACHED CONFLICTING RESULTS, CONGRESS SHOULD AMEND THE WILDERNESS ACT TO EXPLICITLY PROVIDE FOR HISTORIC PRESERVATION ACTIVITIES

Although appellate and lower courts have consistently interpreted the Wilderness Act to exclude preservation activities under the NHPA within wilderness areas,<sup>214</sup> this outcome is not ideal, and it is not

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207. *Id.* at 1134. The court reasoned that fisheries enhancement (the purpose of the dams) is not an activity "necessary to meet minimum requirements for the administration of the area for the purpose of [the Wilderness Act]" to overcome the Wilderness Act's general prohibition on structures and installations. *Id.* (quoting 16 U.S.C. § 1133(c) (2006)).

208. *See id.* at 1135 (quoting *Wilderness Watch & Pub. Emps. for Envtl. Responsibility v. Mainella*, 375 F.3d 1085, 1092 (11th Cir. 2004)); *supra* text accompanying note 187.

209. *See supra* text accompanying notes 177–79.

210. *See supra* Part I.C.

211. *See supra* Part I.A.

212. *See supra* Part II.B.

213. *High Sierra Hikers Ass'n*, 436 F. Supp. 2d at 1136. The court does not explain why the dam's eligibility for listing on the National Register of Historic Places is not sufficient to accomplish such a declaration.

214. *See supra* Part III; *see also* Appel, *supra* note 17, at 277 (using statistical analysis to "find[] that the judicial decisions show a pattern of having a pro-wilderness bent").

required by the statutes<sup>215</sup> or *Wilderness Watch*. Rather, longstanding canons of statutory interpretation support reconciling the apparent conflicts between two statutes,<sup>216</sup> which prevents courts from defaulting to general interpretive aids to render a decision.<sup>217</sup> When applied to the Wilderness Act and the NHPA, these canons lead to the conclusion that historic preservation activities should be permitted within wilderness areas. However, because lower courts have not reached this result, Congress should amend the Wilderness Act to explicitly provide for preservation efforts under the NHPA.

A. *Wilderness Watch Does Not Prohibit Historic Preservation Efforts Within Wilderness Areas*

Lower courts' incomplete citation to *Wilderness Watch* to support their unanimous conclusion that the Wilderness Act prohibits historic preservation activities in compliance with the NHPA within wilderness areas<sup>218</sup> is inaccurate and misleading. A careful reading of the decision reveals the *Wilderness Watch* court's nuanced understanding that the NHPA is the mechanism through which Congress has permitted the preservation of historic structures located within wilderness lands.<sup>219</sup> The court states, "Congress may separately provide for the preservation of an

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215. See 2B NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 51:2 (7th ed. 2012) ("Courts try to construe apparently conflicting statutes on the same subject harmoniously, and, if possible, give effect to every provision in both.").

216. See Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662–63 (2007) (refusing to find implied statutory repeal unless expressly stated or necessary); Watt v. Alaska, 451 U.S. 259, 266–67 (1981) (attempting to ascertain Congress's intent in two applicable statutes before resorting to general rule of applying more recent statute).

217. These general rules are numerous and include such maxims as applying the more recent statute when two conflicting statutes govern, see 2B SINGER & SINGER, *supra* note 215, § 51.2 ("To the extent that an older statute conflicts with a more recent statute, the older statute must yield to the more recent statute as the latest expression of legislative intent."), and applying the more specific statute over a general statute when both control, see Olympic Park Assocs. v. Mainella, No. C04-5732FDB, 2005 WL 1871114, at \*8 (W.D. Wash. Aug. 1, 2005). If either of these general rules were applied to the Wilderness Act and the NHPA, the result is unclear. For example, the NHPA may control due to its enactment two years after the Wilderness Act, as well as its several amendments; however, if the date in which the structure was listed on the National Register of Historic Places was compared to the date of the designation of the wilderness area where it is located, the Wilderness Act may control. Similarly, it is not clear which statute is more specific. For these types of reasons, the U.S. Supreme Court first attempts to reconcile the text and congressional intent of two equally applicable statutes before defaulting to general rules of interpretation. See cases cited *supra* note 216.

218. See *supra* Part III.B.

219. Wilderness Watch & Pub. Emps. for Envtl. Responsibility v. Mainella, 375 F.3d 1085, 1092 (11th Cir. 2004); see *supra* Part III.A.

existing historical structure within a wilderness area, *as it has done through the NHPA.*"<sup>220</sup> The court then clarifies the narrowness of its holding: the decision found that the Wilderness Act only prohibits the Park Service's motorized tourist transportation across the wilderness area, not the Park Service's historic preservation activities.<sup>221</sup> However, when citing this decision, lower courts have yet to acknowledge the specific caveat that the *Wilderness Watch* court provides for historic preservation, let alone consider the text, purpose, and context of the NHPA and Wilderness Act together.<sup>222</sup>

*B. The Plain Meaning, Purpose, and Context of Both the Wilderness Act and the NHPA Permit Historic Preservation Within Wilderness Areas*

It is well accepted that if the meaning of a statute and the legislature's intent are clear and reasonable on their face, courts are to give effect to the statute's language without resorting to materials outside of that text.<sup>223</sup> In so doing, courts consider the statutory provision at issue<sup>224</sup> and the statute in its entirety,<sup>225</sup> giving effect to each word the legislature included.<sup>226</sup>

Because the Wilderness Act explicitly recognizes the significance of history, application of this canon of statutory construction indicates that an outright prohibition of historical efforts within wilderness areas would be error. The Act's definition of wilderness allows designated wilderness areas to "contain ecological, geological, or other features of scientific, educational, scenic, or *historical* value."<sup>227</sup> The definition also clarifies that a wilderness area "generally appears to have been affected

220. *Wilderness Watch*, 375 F.3d at 1092 (emphasis added).

221. *See id.* ("This appeal turns not on the preservation of historical structures but on the decision to provide motorized public access to them across designated wilderness areas.").

222. *See supra* Part III.B.

223. *See Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms."); *see also* 2A SINGER & SINGER, *supra* note 215, § 46.1.

224. *See* 2A SINGER & SINGER, *supra* note 215, § 47.2.

225. *See id.* § 46:5 ("A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent.").

226. *See United States v. Menasche*, 348 U.S. 528, 538–39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute' . . .") (citation omitted); *see also* 2A SINGER & SINGER, *supra* note 215, § 46.6.

227. 16 U.S.C. § 1131(c)(4) (2006) (emphasis added).

primarily by the forces of nature, with the imprint of man's work *substantially* unnoticeable."<sup>228</sup> These parts of the definition of wilderness are significant for three reasons. First, they indicate that Congress did not intend to confine wilderness strictly to pristine areas without any human impact whatsoever. Had Congress intended such a result, instead of including language for interests other than pure conservation,<sup>229</sup> it should have ended the definition of wilderness with "an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation . . . ."<sup>230</sup> Second, the location of these provisions is important.<sup>231</sup> Congress identified in the definition section at the beginning of the statute that the standard for wilderness is flexible. Third, the inclusion of "historical value" explicitly leaves room for historic preservation.

In addition to the Wilderness Act's definition of wilderness, both the stated uses of wilderness areas and the Act's instructions to agencies responsible for their administration encompass historic preservation. Section 1133(b) of the Wilderness Act provides:

Except as otherwise provided in this chapter, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area *for such other purposes for which it may have been established* as also to preserve its wilderness character. Except as otherwise provided in this chapter, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and *historical* use.<sup>232</sup>

Just as the definition of wilderness leaves room for historic preservation, the Wilderness Act clarifies that administering agencies should manage wilderness areas in accordance with both the Wilderness Act's directives and other established purposes. When a historic place listed on the National Register of Historic Places—and therefore within the ambit of the NHPA's protections—is located within a wilderness area, this is precisely the situation in which Section 1133(b) allows an agency to also fulfill an alternative competing demand. If there were any

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228. *Id.* § 1131(c)(1) (emphasis added).

229. *See, e.g., id.* § 1131(c)(4).

230. *Id.* § 1131(c). If Congress had adopted such a restrictive definition of wilderness, little land would qualify for designation as wilderness.

231. *See* 2A SINGER & SINGER, *supra* note 215, § 47.7 ("As a rule, a definition which declares what a term means is binding upon the court.")

232. 16 U.S.C. § 1133(b) (emphasis added).

doubt about the meaning of allowing administration of wilderness areas for other established purposes, Section 1133(a)(3)'s exception for the major historic preservation statutes in existence in 1964 confirms that historic preservation efforts are "such other purposes" of wilderness areas.

To further substantiate this intent, Congress even identified in Section 1133(b) that one of the public purposes of wilderness areas is historical use. It is not unreasonable to interpret "historical use" to include public historic preservation efforts in compliance with the NHPA as these efforts enhance the "recreational, scenic, scientific, educational, [and] conservation . . . use[s]"<sup>233</sup> of wilderness. The Ninth Circuit recognized as much when concluding:

The [Wilderness] Act also states that the "agency administering any area designated as wilderness" must "administer such area for such other purposes for which it may have been established as also to preserve its wilderness character." Had Congress stopped there, these strongly worded phrases would have suggested that wilderness areas were to remain untouched—not merely untouched by development but, literally, untouched by humans. But Congress did not mandate that the [U.S. Fish and Wildlife] Service preserve the wilderness in a museum diorama, one that we might observe only from a safe distance, behind a brass railing and a thick glass window. Instead, *Congress stated that the wilderness was to be preserved as wilderness and made accessible to people, "devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use."* Congress was specific about what it understood might be necessary to preserve the wilderness for such public purposes. Congress expressly authorized structures, motorized vehicles, and temporary roads if such things are necessary to meet the minimum requirements for administering the area; indeed, the Act permits, under certain circumstances, aircraft and motorboat use and even mining. *Those uses are incompatible with a museum notion of wilderness.*<sup>234</sup>

Additionally, Congress explained that the Wilderness Act should supplement other applicable land-use statutes. Specifically, the Act states that its "purposes . . . are hereby declared to be *within and supplemental* to the purposes for which national forests and units of the

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233. *Id.*

234. *Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1033 (9th Cir. 2010) (emphasis added) (citations omitted).

national park and national wildlife refuge systems are established and administered . . . .”<sup>235</sup>

Further, the designation of any area of any park, monument, or other unit of the national park system as a wilderness area . . . shall in no manner lower the standards evolved for the *use and preservation* of such park, monument, or other unit of the national park system in accordance with . . . *any other Act of Congress* which might pertain to or affect such area, including, *but not limited to*, [the historic preservation statutes existing in 1964].<sup>236</sup>

Historic sites listed on the National Register of Historic Places are included within this provision from the Wilderness Act as “units” of the national park system.<sup>237</sup> Even if there were ambiguity, this provision alternatively covers historic places as monuments protected under another act of Congress: the NHPA. Most important is the fact that the Wilderness Act itself identifies historic preservation statutes as being unaffected by the Wilderness Act. This caveat protects historic preservation activities in compliance with the NHPA within wilderness areas.<sup>238</sup> This explicit directive to respect the preservation of monuments under other federal land-use statutes becomes meaningless when the Wilderness Act is read to categorically trump the NHPA.

Moreover, the Wilderness Act’s exceptions reflect Congress’s tolerance for activities that could reasonably be considered less consistent with pristine wilderness than historic preservation efforts. For example, when “necessary to meet minimum requirements for the administration of the [wilderness] area,” temporary roads, the use of motor vehicles, motorized equipment or motorboats, landing of aircraft, other forms of mechanical transport, and structures or installations are permitted within wilderness areas.<sup>239</sup> Possibly even more at odds with primeval wilderness are the Wilderness Act’s exceptions for existing private rights, commercial enterprises, and permanent roads.<sup>240</sup> These exceptions permit certain aircraft use, mining activities, livestock grazing, and power projects.<sup>241</sup> Such activities have a far more dramatic

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235. 16 U.S.C. § 1133(a) (emphasis added).

236. *Id.* § 1133(a)(3) (emphasis added).

237. The National Register of Historic Places is administered through the Park Service as part of the national park system. *See* 16 U.S.C. § 470(a) (2006); 36 C.F.R. § 60 (2012).

238. *See* 16 U.S.C. § 1133(a); *see also supra* Part I.C.

239. 16 U.S.C. § 1133(c).

240. *Id.*

241. *Id.* § 1133(d).

impact on wilderness than the preservation of an existing structure, and Congress's tolerance for them further indicates the reasonableness of reading the text of the Wilderness Act to include historic preservation activities.

An examination of the plain meaning of the NHPA similarly reveals that agencies' historic preservation obligations are not trumped by other land-use policies. In addition to a consultation process,<sup>242</sup> Section 110 of the NHPA declares that "all Federal agencies *shall* assume responsibility for the preservation of historic properties which are owned or controlled by such agency. . . . Each agency *shall* undertake . . . *any preservation*, as may be necessary . . . ."<sup>243</sup> Some courts have held that this provision does not affirmatively require preservation, finding Section 110 to be merely an extension of the NHPA's consultation requirements.<sup>244</sup> The plain language of Section 110, however, does not support this interpretation. While the NHPA's consultation obligations do not compel a pro-preservation outcome, Section 110 uses the mandatory language of "shall" in describing agencies' preservation obligations and does not include any exceptions for other land-use policies, i.e., wilderness protection.

The purposes of the Wilderness Act and the NHPA also allow the two acts to be reconciled. The Wilderness Act specifies that its purpose is "to secure for the American people of present and future generations the benefits of an enduring resource of wilderness."<sup>245</sup> In so doing, the Act does not identify or imply that wilderness values trump all others once land is so designated. In fact, the Act permits activities that directly conflict with the idea of untrammeled land.<sup>246</sup> The purpose of the original NHPA was to "encourage" the protection of historic properties.<sup>247</sup> Although "encouraging" historic preservation does not seem to necessarily mandate any preservation activities, in subsequent amendments, Congress has clarified that the purpose of these amendments is to "strengthen the preservation responsibilities of Federal agencies."<sup>248</sup> As neither of the acts specifies that one value controls when the two values conflict, each act provides ample room for harmonization with the other.

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242. *Id.* § 470f.

243. *Id.* § 470h-2(a)(1) (emphasis added).

244. *See supra* notes 148, 198.

245. 16 U.S.C. § 1131(a).

246. *See supra* Parts I.A, I.C.

247. H.R. REP. NO. 89-1916, at 79 (1966).

248. S. REP. NO. 102-336, at 16 (1992).



Finally, the historical contexts of both acts do not evince a congressional intent to interpret the Wilderness Act as excluding the NHPA. Although some courts refuse to consider the broader context of a statute unless the statute is ambiguous or unclear, other courts more liberally consider extrinsic sources that might aid in accurately understanding the statute.<sup>249</sup> Thus, some courts may require a finding that the Wilderness Act and/or the NHPA is ambiguous in respect to historic preservation within wilderness areas to consider the context of the statutes' enactments.

Both the pre-enactment and enactment context of the Wilderness Act and the NHPA support reading the acts together to conclude that they provide for historic preservation within wilderness areas. Although the Wilderness Act was an unprecedented piece of conservation legislation, its enactment was hard fought and resulted in significant weakening of the proposed bill.<sup>250</sup> The examples of compromise are numerous<sup>251</sup> and demonstrate a willingness to accept multiple uses of wilderness land rather than forgo wilderness protection altogether. If wilderness supporters were willing to accept concessions as great as mining and roadway construction, it is difficult to argue against historic preservation activities such as the rebuilding of two isolated snow shelters or the maintenance of visually unobtrusive dams. Similarly, the NHPA's several amendments since its original enactment, each serving to strengthen its commands, do not support the wholesale exclusion of its application within wilderness areas.

*C. Congress Should Accept the High Sierra Hikers Court's Invitation to Amend the Wilderness Act to Expressly Permit Historic Preservation Within Wilderness Areas*

Because it does not appear that courts are likely to change direction in cases interpreting the relationship between the Wilderness Act and the NHPA, Congress should amend the Wilderness Act to explicitly provide for historic preservation efforts within wilderness areas. To do so, Congress should amend Section 1133(a)(3) of the Wilderness Act and expressly name the NHPA as a statute with which the Wilderness Act

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249. See 2A SINGER & SINGER, *supra* note 215, § 48:1 (“While it is acknowledged that there should be some facial statutory ambiguity before a court considers extrinsic evidence of legislative intent, it has also been noted that there should not be a slavish adherence to this principle where it is obvious that the result reached will be a clear distortion of legislative purpose.”).

250. See *supra* Part I.A.

251. See *supra* Part I.A.

does not conflict. This amendment alone would suffice to protect historic preservation efforts within wilderness lands. To ensure historic preservation is permitted, however, Congress should also add another subsection to Section 1131(c), the definition of wilderness. The new subsection should state that wilderness areas may also contain historic sites protected and managed under federal historic preservation statutes so as to preserve their historic value.

## CONCLUSION

Congress passed the Wilderness Act with the recognition that it would not be the only statute applied to wilderness lands and that even lands “untrammeled by man, where man himself is a visitor who does not remain” have value beyond that of wilderness. Thus, Congress provided for concurrent and competing uses of wilderness in the text of the Wilderness Act and specified that the Act would be supplemental to—not exclusive of—other land-use statutes. Since the Wilderness Act’s passage, Congress has continued to strengthen protections for preservation of historic sites. Although the purposes of the Wilderness Act include recreational, scenic, scientific, educational, conservation, and historical uses of wilderness lands, the full spectrum of these purposes has yet to be realized.

Fortunately, even absent congressional amendment, the Wilderness Act’s purposes can be reconciled with the purposes of other land-use statutes. Not only would this interpretation conform to both the letter and spirit of the Wilderness Act, but it would give other land-use statutes, including the NHPA, the effects that they were intended to have. With the Wilderness Act and the NHPA harmonized, future Americans and other visitors will be able to enjoy not just “wilderness in a museum diorama,” but wilderness as a larger part of history.