

## PLAYING NICE IN THE SANDBOX: MAKING ROOM FOR HISTORIC STRUCTURES IN OLYMPIC NATIONAL PARK

Christopher Chellis\*

**ABSTRACT:** As ambitious as it is at times challenging to meaningfully apply, the Wilderness Act purports to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. Interest groups often seek to extract from the Act a meaning of wilderness that comports with whatever interest they wish to secure for themselves and their members, and their interests often conflict with each other. These conflicts can turn national parks into sandboxes where interest groups draw lines and ask the National Park Service to pick a side. The losing party inevitably looks to a judge who, in her infinite wisdom, will surely see that wilderness means exactly what the party knows it means. Injunction in hand, the now-prevailing party's favored use will flourish and all will be right in the world, or at least in wilderness. A microcosm of litigation over competing uses nationally, Olympic National Park in Washington State has played host to its fair share of sandbox showdowns, the presence of historic structures in the park eliciting perhaps the most wide-ranging response from interest groups. This Article examines arguments from those seeking to preserve these structures and those seeking to remove them, and suggests a reading of the Act and its Washington State counterpart that comports with legislative intent.

I.	INTRODUCTION TO ISSUES ARISING FROM COMPETING USES IN OLYMPIC NATIONAL PARK .....	36
II.	THE WILDERNESS ACT .....	39
	A. The Washington Park Wilderness Act and its Relevance in Creachbaum.....	40
	B. The National Historic Preservation Act .....	43
III.	THE PLAIN MEANING RULE AS APPLIED TO MINIMUM REQUIREMENTS ANALYSIS.....	44
	A. Finding Clarity in the Wilderness Act's Legislative History .....	48
IV.	<i>WILDERNESS WATCH V. MAINELLA</i> : THE NHPA AS SUPPLEMENTAL TO THE WILDERNESS ACT.....	53
	A. Olympic Park Associates v. Mainella: The General vs. Specific Provision Fallacy .....	55
	B. Wilderness Watch v. Iwamoto: A Narrow Threshold for "Administration".....	58
V.	LESSONS LEARNED: RETURNING TO <i>CREACHBAUM</i> .....	62

## I. INTRODUCTION TO ISSUES ARISING FROM COMPETING USES IN OLYMPIC NATIONAL PARK

Stuck between a rock and a hard place, the National Park Service (NPS) does not have the easiest job in managing wilderness areas.<sup>1</sup> Those who depend on recreational use of the area for business will challenge a wilderness management plan restricting visitor access.<sup>2</sup> Motorcyclists litigate \$100 fines for riding over twenty miles in a protected area.<sup>3</sup> A court shoots down an effort to introduce sockeye salmon into a lake because the project was a prohibited “commercial enterprise.”<sup>4</sup>

Given its scenic beauty, diverse landscape, old growth rain forests, and distinct ecosystems, it easy to understand why Washington’s Olympic National Park<sup>5</sup> (the Park) has inspired a series of use-related litigation not unlike the litigation above. A quick glance at the Park’s official website reveals pictures of hikers, backpackers, fishermen, and lodgers, all of whom visit the Park with different, and sometimes conflicting, uses in mind.<sup>6</sup> What a quick glance at the website will not reveal are the historic shelters<sup>7</sup> that dot the Park’s wilderness areas and sharply divide the purists from the preservationists.

Interest groups sparring over permitted and prohibited uses within the Park is hardly new, but litigation over historic

---

\* 2017 JD Candidate at Willamette University College of Law. This Article was researched and written under the supervision and guidance of Professor Jeffrey C. Dobbins, Associate Professor of Law at Willamette University College of Law and Executive Director of the Oregon Law Commission.

1. Distinct from the colloquial “wilderness,” the legal “wilderness area” is “an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or habitation.” 16 U.S.C. § 1131(c) (2012).

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

3. *McMichael v. United States*, 355 F.2d 283, 284 (9th Cir. 1965).

4. *Wilderness Soc’y v. United States Fish & Wildlife Serv.*, 353 F.3d 1051, 1055 (9th Cir. 2003).

5. Located just west of Seattle, in the corner of northwest Washington, Olympic National Park spans nearly a million acres, including 70 miles of coastline. NAT’L PARK SERV., *Discover Olympic’s Diverse Wilderness*, OLYMPIC NAT’L PARK WASHINGTON, <https://www.nps.gov/olymp/index.htm> (last visited Feb. 20, 2017).

6. *Id.*

7. Recognized shelters appear in the National Register of Historic Places, the official list of the Nation’s historic places worthy of preservation. The National Park Service provides a searchable database. See NAT’L PARK SERV., *National Register of Historic Places Program: Research*, OLYMPIC NAT’L PARK WASHINGTON, <https://www.nps.gov/nr/research/index.htm> (last visited Feb. 20, 2017).

shelters in the Park's wilderness areas came to a head in 2005 in a case pitting conservationists against the NPS.<sup>8</sup> Attempting to reconstruct two shelters<sup>9</sup> largely destroyed by snow and to preserve their place in the Park, the NPS flew the shelters to their original location in a wilderness area by helicopter after completely rebuilding them in a Park maintenance yard.<sup>10</sup> Pointing to both the Wilderness Act's call for earth "untrammelled by man"<sup>11</sup> and the designation of the Park as a wilderness area in the Washington Park Wilderness Act (WPWA),<sup>12</sup> a conservation group argued that the NPS had violated both statutes and that the shelters had no place in a wilderness area.<sup>13</sup> Providing a different reading of the Wilderness Act and looking to the National Historic Preservation Act (NHPA) for support, the NPS argued that its actions were not only permitted but encouraged by the statutes.<sup>14</sup> The case highlighted the differences between those who value historic preservation in wilderness and those who value wilderness free from any human influence, a common theme in legal disputes arising from park use.<sup>15</sup>

A dense, ambitious, and often times ambiguous statute, the Wilderness Act requires a close reading to parse its practical effect on Park use. This Article therefore begins, in Part II, by providing historical context for the enactment of the Wilderness Act and background on the NHPA. There are a few key phrases in each statute, the interpretation of which will determine whose competing interest takes precedence over the other. Identifying those phrases and noting how Congress and interested parties interpreted their practical application to national parks before enactment will prove helpful in

---

8. *Olympic Park Assocs. v. Mainella*, No. C04-5732FDB, 2005 WL 1871114 (W.D. Wash. Aug. 1, 2005).

9. *Id.* The names "Home Sweet Home" and "Low Divide" are derived from their location in the Park.

10. *Id.* at 3.

11. Wilderness Act of 1964 § 4(c), 16 U.S.C. § 1131 (2012). The Act's history, purpose, and function are explained in full in Part II.

12. Pub. L. No. 100-668, 102 Stat. 3961 (1988). Its relation to the Wilderness Act is explained in full in Part II.

13. Pls.' Mot. Summ. J., *Olympic Park Assocs. at 16 v. Mainella*, No. C04-5732FDB, 2005 WL 1871114 (W.D. Wash. Aug. 1, 2005) (No. 3:04-cv-05732).

14. Defs.' Cross Mot. Summ. J. at \*8-10, 12-14, *Olympic Park Assocs v. Mainella*, No. C04-5732FDB, 2005 WL 1871114 (W.D. Wash. Aug. 1, 2005) (No. 3:04-cv-05732).

15. Peter A. Appel, *Wilderness and the Courts*, 29 STAN. ENVTL. L.J. 62, 82 (2010).

analyzing how and why courts apply them in the cases that follow.

In Part III, the Article introduces the plain meaning rule. The Article discusses why the exception to the plain meaning rule, which triggers a review of legislative history for clarity, is often and appropriately invoked in competing-interest cases implicating the Wilderness Act. The Article then establishes and uses a competing interest case sample, *Wilderness Watch, Inc. v. Creachbaum*,<sup>16</sup> to explain how applying the exception to the plain meaning rule to the Wilderness Act's minimum requirements exception—one of the key phrases discussed in Part II—leads to the conclusion that courts owe a great deal of deference to the NPS.

In Part IV, the Article traces the evolution of competing interest cases specific to historic structures in wilderness areas, highlighting shortcomings in how the Western District of Washington (WDWA) has applied precedents. In *Wilderness Watch, Inc. v. Mainella*,<sup>17</sup> the Eleventh Circuit provided an easily misinterpreted and misapplied opinion that, despite its narrow holding, the WDWA has continually misread so as not to afford the NPS due deference. In *Olympic Park Associates v. Mainella*,<sup>18</sup> the WDWA misread the Eleventh Circuit opinion in *Wilderness Watch* to pit the NHPA against the Wilderness Act, creating a general versus specific provision fallacy, as if one statute must cancel out the other. Seven years after *Olympic Park Associates*, the WDWA further diminished the weight of deference given to the NPS by narrowing the threshold of acceptable wilderness administration in *Wilderness Watch, Inc. v. Iwamoto*.<sup>19</sup> The Article discusses how *Olympic Park Associates* and *Iwamoto* put the NPS in a precarious position; affording the agency just enough discretionary authority to attempt to administer the Olympic Wilderness, but qualified by the understanding that that any action protecting historic shelters from natural erosion would place the NPS in the Wilderness Act's crosshairs.

Finally, in Part V, the Article discusses how WDWA's failure to recognize the historical context and legislative history of the

---

16. No. C15-5771-RBL, 2016 WL 7231433 (W.D. Wash. Dec. 14, 2016).

17. 375 F.3d 1085 (11th Cir. 2004).

18. No. CO4-5732FDB, 2005 WL 1871114 (W.D. Wash. Aug. 1, 2005).

19. 853 F. Supp. 2d 1063, 1065 (W.D. Wash. 2012).

Wilderness Act and the WPWA diminished the persuasiveness of the Court's analysis in *Creachbaum*. The Article also sketches how a more complete interpretation of the wilderness statutes applies to the fact pattern in *Creachbaum*.

By examining the history of the Wilderness Act and affiliated area-specific statutes, this Article emphasizes that wilderness area legislation has always recognized the value of historic preservation in wilderness areas. Certain actions are necessary to preserve historic structures, even when those actions would otherwise be unlawful in a wilderness area. This Article will demonstrate that historic preservation can be reconciled not only with the plain language of the Wilderness Act, but with the underlying philosophy of that Act, which emphasizes protection from excessive human influence.

## II. THE WILDERNESS ACT

Understanding the tension at issue in *Creachbaum* requires familiarity with the core language of the wilderness statutes. The practical effect of what has been described as the more poetic language of the Wilderness Act may not be obvious to agencies, such as the NPS and the Forest Service, that are charged with following its directives.<sup>20</sup>

The Wilderness Act provides for the establishment of a National Wilderness Preservation System for the permanent good of the whole people.<sup>21</sup> The Act defines wilderness as “an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.”<sup>22</sup> The Act further provides that an area of wilderness is “an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions.”<sup>23</sup> Subsection (4)(c) provides that “there shall be no temporary road, no use of

---

20. Douglas O. Linder, *New Direction for Preservation Law: Creating an Environment Worth Experiencing*, 20 ENVTL. L. 49, 69 (1990); John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 560 n.213 (1996); Kristine S. Cherek, *From Trespasser to Homeowner: The Case Against Adverse Possession in the Post-Crash World*, 20 VA. J. SOC. POL'Y & L. 271, 284 (2012).

21. Wilderness Act of 1964 § 4(c), 16 U.S.C. § 1131(a) (2012).

22. *Id.* at § 1132(c).

23. *Id.*

motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area,” except as necessary “to meet minimum requirements for the administration of the area for the purpose of [the] Act.”<sup>24</sup> Subsection (4)(c), particularly the “minimum requirements for the administration of the area” language, has become the hook by which many a court has hung its hat in finding against the NPS in use-based disputes.<sup>25</sup>

A. *The Washington Park Wilderness Act and its Relevance in Creachbaum*

Congress saw fit to protect much of Olympic National Park when it enacted the Washington Park Wilderness Act of 1988.<sup>26</sup> Designating 95 percent of the park as the “Olympic Wilderness,” Congress recognized the value in maintaining a public park “for the benefit and enjoyment of the people,”<sup>27</sup> and charged the NPS with “[t]he administration, protection, and development of the [Park].”<sup>28</sup> While the text of the WPWA itself merely establishes the boundaries of the wilderness area, an analysis of its legislative history in Part III will provide a clearer understanding of congressional intent relative to park visitors’ permitted uses.

At 1,370 square miles, the Olympic Wilderness is one of the larger wilderness areas in the state.<sup>29</sup> The Makah, Quillayute, Hoh, and Quinalt tribes established reservations at the mouths of the coastal rivers by the 1850’s.<sup>30</sup> European settlers fished, logged, and built homesteads, lookouts, and cabins along the Olympic Peninsula in the late 19th century.<sup>31</sup> While

---

24. *Id.* at § 1133(c) (2012).

25. *E.g.*, *Wilderness Watch, Inc. v. United States Fish and Wildlife Service*, 629 F.3d 1024, 1037 (9th Cir. 2010); *Wilderness Watch and Public Employees for Env’tl. Responsibility v. Mainella*, 375 F.3d 1085, 1092 (11th Cir. 2004); *High Sierra Hiker’s Ass’n v. United States Forest Service*, 436 F. Supp. 2d 1117, 1133 (E.D. Cal. 2006).

26. 16 U.S.C. § 251 (2012).

27. *Id.*

28. *Id.* at § 254.

29. *History & Culture*, NAT’L PARK SERV., <https://www.nps.gov/olymp/learn/historyculture/index.htm> (last visited May 14, 2017).

30. *People of the Olympic Peninsula*, NAT’L PARK SERV., <https://www.nps.gov/olymp/learn/historyculture/people.htm> (last visited May 14, 2017).

31. *Id.*

many homesteaders moved elsewhere, the establishment of the Olympic Forest Reserve in 1897 signaled greater interest in protecting the area's disappearing forests.<sup>32</sup> The Forest Service built many ranger stations, lookouts, cabins, and barns to accommodate increased recreation in the area.<sup>33</sup> When Congress established Olympic National Park in 1938, it gave the Secretary of the Interior the authority to administer, protect, and develop the Park, and it gave President Roosevelt the authority to expand park boundaries.<sup>34</sup> President Roosevelt exercised his authority by stripping 187,000 acres away from the Forest Service and encouraging the development of more structures on this new land, including some of the shelters and cabins in dispute in *Creachbaum*.<sup>35</sup> Exercising its discretionary authority, the NPS maintained many of these structures up to and after the enactment of the Wilderness Act and the WPPWA.<sup>36</sup>

Beginning in 2011, the NPS decided to rehabilitate and repair Wilder Shelter, Bear Camp Shelter, Canyon Creek Shelter, Elk Lake Shelter, and Pelton Creek Shelter in the Olympic Wilderness.<sup>37</sup> Those doing the rehabilitating and repairing sometimes used helicopters and motorized tools.<sup>38</sup> Wilderness Watch, an organization "whose sole focus is the preservation and proper stewardship of lands and rivers included in the National Wilderness Preservation System,"<sup>39</sup> disputed the presence of these structures in the Olympic Wilderness and the lengths to which the NPS went to preserve

---

32. *Supra* note 29.

33. *Appendix B: Extant Buildings Grouped by Historic Themes*, NAT'L PARK SERV., [https://www.nps.gov/parkhistory/online\\_books/olym/hrs/appb.htm](https://www.nps.gov/parkhistory/online_books/olym/hrs/appb.htm) (last visited Apr. 26, 2017).

34. 16 U.S.C. § 254 (2012).

35. *The National Parks: America's Best Idea*, PUB. BROADCASTING SERV., <http://www.pbs.org/nationalparks/history/ep5/4/> (last visited Apr. 26, 2017).

36. WASH. ST. DEPT OF ARCHAEOLOGY & HIST. PRESERVATION, *Preservation Groups Unite to Support Historic Structures in Olympic National Park*, WASH. ST. DEPT OF ARCHAEOLOGY & HIST. PRESERVATION (June 15, 2016), <http://www.dahp.wa.gov/blog/2016/06/preservation-groups-unite-to-support-historic-structures-in-olympic-national-park>.

37. *Wilderness Watch, Inc. v. Creachbaum*, No. C15-5771-RBL, 2016 WL 7231433 at \*3 (W.D. Wash. 2016).

38. *Id.*

39. WILDERNESS WATCH, *About Us*, WILDERNESS WATCH, <https://wildernesswatch.org/about-us> (last visited Apr. 26, 2017).

them. Filing a complaint in October 2015 in the U.S. District Court for the Western District of Washington (WDWA), the organization challenged the decisions of Park Superintendent Sarah Creachbaum and the NPS regarding the five shelters.<sup>40</sup> Wilderness Watch alleged violations of the Wilderness Act and sought declaratory and injunctive relief. Taking issue with a lack of communication, the organization noted that “[t]he Park Service also authorized the work without notifying the public” and failed to provide the public with “an opportunity to comment on the proposed actions.”<sup>41</sup>

DOJ denied that the NPS authorized the work without public notice and argued that the Wilderness Act justified the NPS’ use of helicopters and motorized tools for administration of the area.<sup>42</sup> However, before looking to the Wilderness Act, DOJ turned to the NHPA to note how important maintenance of the structures are “as a matter of policy.”<sup>43</sup> DOJ argued that the NPS “ha[d] the authority to preserve these historic structures in compliance with the NHPA and within the requirements of the Wilderness Act.”<sup>44</sup> Adopting the notion that the NHPA is supplemental to the Wilderness Act—an idea discussed later in this Article—DOJ noted that “NPS interprets these statutes not as antagonists working against one another . . . but as legislation to be reconciled in service of NPS’ mission ‘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 we will leave them unimpaired for the enjoyment of future generations.’”<sup>45</sup>

A number of organizations interested in the preservation of the structures intervened<sup>46</sup> and filed a response to Wilderness

---

40. Complaint for Declaratory and Injunctive Relief against Defendant, Wilderness Watch, Inc. v. Creachbaum, No. 3:15-cv-05771-RBL (W.D. Wash. Oct. 27, 2015).

41. *Id.* at 2.

42. Federal Defendants’ Reply Memorandum in Support of Their Motion for Summary Judgment at 4, Wilderness Watch, Inc. v. Creachbaum, No. 3:15-cv-05771-RBL (W.D. Wash. Aug. 26, 2016).

43. *Id.* at 2.

44. *Id.*

45. *Id.* at 2–3 (citing 54 U.S.C. § 100101(a) (2012)).

46. Intervening organizations included National Trust for Historic Preservation, Washington Trust for Historic Preservation, and Friends of Olympic National Park.



Watch's motion for summary judgment.<sup>47</sup> Wilderness Watch's and the intervenors' arguments demonstrated "the breadth of opposing views regarding the management" of the park held by park visitors.<sup>48</sup> At opposite extremes, Wilderness Watch argued that historic structures in wilderness areas were "an eyesore to be demolished" and prohibited by the Wilderness Act,<sup>49</sup> while the intervenors argued that these same structures were "a national treasure to be preserved" and that the NHPA required such preservation.<sup>50</sup> Rather than mine the Wilderness Act for supportive language, the intervenors looked for an NHPA workaround—something in the NHPA that might excuse the NPS's action. Inherent in the intervenors' approach to the legal problem was a concession that the NPS did something that, absent an excuse, was a violation of the Wilderness Act.<sup>51</sup>

### *B. The National Historic Preservation Act*

This Article's premise—that those seeking the preservation of historic structures in wilderness areas too often turn first to the NHPA—is based on the idea that the Wilderness Act provides the NPS sufficient support. However, a primer on the NHPA may help explain the statute's magnetism.

The NHPA provides for the preservation of sites, buildings, and objects of national significance.<sup>52</sup> The Act further provides:

[T]he 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, prior to the approval of the expenditure of any Federal funds on the undertaking . . . shall take into account the effect of

---

47. Intervenors' Answer to Plaintiff's First Amended Complaint, *Wilderness Watch, Inc. v. Creachbaum*, No. 3:15-cv-05771-RBL (W.D. Wash. July 20, 2016).

48. Intervenors' Reply Memorandum in Support of Their Motion Summary Judgment at 2, *Wilderness Watch, Inc. v. Creachbaum*, No. 3:15-cv-05771-RBL (W.D. Wash. Aug. 26, 2016), ECF No. 48.

49. *Id.*

50. *Id.*

51. *Id.*

52. National Historic Preservation Act, Pub. L. No. 89-665, 80 Stat. 915 (1966).

the undertaking on any historic property.<sup>53</sup>

The Act defines an “undertaking” as “a project, activity, or program . . . under the direct or indirect jurisdiction of a Federal agency.”<sup>54</sup> A regulation on the process of identifying historic properties provides that the agency “shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey.”<sup>55</sup> The regulation further provides that “[s]ection 106 of the [NHPA] requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the [Advisory Council on Historic Preservation] a reasonable opportunity to comment on such undertakings.”<sup>56</sup>

“[R]easonable and good faith effort” and “take into account” are to the NHPA what “minimum requirements for the administration of the area” is to the Wilderness Act. In other words, these provisions are the meat of the statute, the interpretation of which will likely determine whose interest takes precedence, or whose competing interest will be prohibited. As discussed in the following section, the plain meaning of these and other provisions relevant to *Creachbaum* are not so obvious and may require looking to legislative history for clarity.

### III. THE PLAIN MEANING RULE AS APPLIED TO MINIMUM REQUIREMENTS ANALYSIS

The plain meaning rule provides that “where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended.”<sup>57</sup> Courts invoke the exception to the plain meaning rule when the same provision is susceptible to

---

53. 54 U.S.C.A. § 306108 (West 2017) (formerly cited as 16 U.S.C. § 470(f)).

54. 54 U.S.C.A. § 300320 (West 2017) (formerly cited as 16 U.S.C. § 470(w)).

55. 36 C.F.R. § 800.4(b)(1) (2016).

56. 36 C.F.R. § 800.1 (2016).

57. See *United States v. Missouri Pac. R. Co.*, 278 U.S. 269, 278 (1929); see also Arthur W. Murphy, *Old Maxims Never Die: The “Plain-Meaning Rule” and Statutory Interpretation in the “Modern” Federal Courts*, 75 COLUMBIA L. REV. 1299 (1975).

multiple reasonable interpretations.<sup>58</sup> For example, one party may argue that the language is unclear, but it may be made clear were the court to examine congressional reports, hearings, and debates. When such doubt as to the meaning of a statute exists, the court may resort to legislative history for clarity.<sup>59</sup> However, where the language is clear, the words used are taken as a final expression of the meaning intended.<sup>60</sup>

While Wilderness Watch and the Department of Justice (DOJ) never explicitly reference the plain meaning rule in *Creachbaum*, it is clear from the pleadings that the parties disagree about the meaning of the same statutory provisions.<sup>61</sup> Section 1133(b) of the Wilderness Act states that “wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.”<sup>62</sup> The provision also states that “each agency shall so administer [any area designated as wilderness] for such other purposes for which it may have been established as also to preserve its wilderness character.” Section 1133(c) prohibits structures or installations and the use of motorized equipment “except as necessary to meet minimum requirements for the administration of the area.”<sup>63</sup>

In an effort to show that its planned use of motorized equipment falls under section 1133(c)’s minimum requirements exception, the NPS will complete a minimum requirements analysis. For example, the NPS completed a minimum requirements analysis for Botten Cabin, Wilder Shelter, and Bear Camp Shelter in Olympic National Park in

---

58. *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1085 (9th Cir. 2007); *Forté v. Wal-Mart Stores, Inc.*, 780 F.3d 272, 278 (5th Cir. 2015).

59. *Missouri Pac. R. Co.*, 278 U.S. at 278.

60. *Id.* (adding that “in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed”).

61. Complaint for Declaratory and Injunctive Relief against Defendant at 10, *Wilderness Watch, Inc. v. Creachbaum*, No. 3:15-cv-05771-RBL (W.D. Wash. Oct. 27, 2015) (“[T]he Park Service repaired and rebuilt structures and used motorized vehicles in the Olympic Wilderness in a manner and to an extent that was not ‘necessary to meet minimum requirements for the administration of the area. . . .’”); Defendants’ Reply Memorandum in Support of Their Motion for Summary Judgment at 6, *Wilderness Watch, Inc. v. Creachbaum*, No. 3:15-cv-05771-RBL (W.D. Wash. Aug. 26, 2016) (“Plaintiff incorrectly argues that NPS failed to determine whether each individual structure was necessary to meet the minimum requirement for administration of the area for the purpose of the Act”).

62. 16 U.S.C. § 1133(b) (2012).

63. *Id.* at § 1133(c).

2011.<sup>64</sup> The minimum requirements analysis has been described as a two-step process. First, the agency demonstrates that the proposed action is essential to achieving some Wilderness Act goal; show that it cannot be accomplished by non-prohibited activities—prohibited activities being activities such as the use of motor vehicles or motorized equipment.<sup>65</sup> Second, the agency must demonstrate that the proposed action would minimize impact on wilderness values.<sup>66</sup>

Under the NPS's two-step process outlined in its management guidance, the agency first determines whether a use is prohibited by the Wilderness Act. If the use is prohibited, the NPS documents whether the prohibited use is necessary to meet minimum requirements for the administration of the area.<sup>67</sup> The NPS then determines which activity will accomplish the action with the least negative impact to the wilderness.<sup>68</sup>

In its complaint against Creachbaum and the NPS, Wilderness Watch argued that the NPS “rebuilt structures, and used motorized vehicles and tools to do so, in a manner and to an extent that was not ‘necessary to meet minimum requirements for the administration of the area for the purpose of [the Wilderness Act].’”<sup>69</sup> While noting that the NPS “often utilizes ‘Minimum Requirements Decision Guides’ to determine whether a prohibited use is ‘necessary to meet minimum requirements for the administration of the area,’” Wilderness Watch argued that the NPS failed to: (1) address whether maintaining fewer than all of the structures in the Park would meet minimum requirements; and (2) explain why using helicopters and motorized vehicles to rehabilitate the shelters was necessary to meet minimum requirements.<sup>70</sup>

In its answer, DOJ argued that the NPS “retains the discretion and authority to preserve cultural resources within

---

64. *Wilderness Watch, Inc. v. Creachbaum*, No. C15-5771-RBL, 2016 WL 7231433 at \*3 (W.D. Wash. 2016).

65. Eric Biber and Elisabeth Long, *The Wilderness Act and Climate Change Adaptation*, 44 ENVTL. L. 623, 673 (2014).

66. *Id.* at 673–74.

67. *Id.* at 674.

68. *Id.* at 675.

69. Complaint for Declaratory and Injunctive Relief against Defendant, *Wilderness Watch, Inc. v. Creachbaum*, No. 3:15-cv-05771-RBL (W.D. Wash. Oct. 27, 2015).

70. *Id.* at 8.

wilderness, so long as the means used to do so are ‘necessary to meet the minimum requirements for the administration’ of the Olympic Wilderness.”<sup>71</sup> DOJ pointed to Ninth Circuit precedent in citing to *Wilderness Watch v. Iwamoto*—discussed extensively later in this Article—for the proposition that historical use is a valid purpose of the Wilderness Act.<sup>72</sup> The court in *Iwamoto* found that, because historical use is listed as one of the six public purposes of the statute, historic preservation could further the goals of the Wilderness Act.<sup>73</sup> DOJ argued that, to the extent that the Wilderness Act is ambiguous as to whether “historical use” embraces the historic preservation of structures, the “well-reasoned and long-standing interpretation” of the NPS is entitled to deference.<sup>74</sup>

DOJ also addressed Wilderness Watch’s argument that the NPS failed to explain why maintaining the five shelters in Olympic National Park was necessary to meet minimum requirements for the administration of the area.<sup>75</sup> In interpreting the minimum requirements language, DOJ framed the relevant question as “whether this maintenance was necessary for the purpose of historical use of the Olympic Wilderness.”<sup>76</sup> According to DOJ, Park officials considered whether the action to be taken for each structure was necessary or appropriate to meet wilderness objectives or the requirements of other laws, policies, and directives, and explained why it found that the action was necessary.<sup>77</sup> Park officials weighed whether damage to the historic structures could be addressed through visitor education or actions outside

---

71. Defendants’ Reply Memorandum in Support of Their Motion for Summary Judgment at 6, *Wilderness Watch, Inc. v. Creachbaum*, No. 3:15-cv-05771-RBL (W.D. Wash. Aug. 26, 2016).

72. *Id.* (citing *Wilderness Watch v. Iwamoto*, 853 F. Supp. 2d 1063, 1074 (W.D. Wash. 2012)).

73. *Iwamoto*, 853 F. Supp. 2d at 1075 (noting that the “Court has deferred to the Forest Service’s conclusion that historical preservation furthers the goals of the Wilderness Act”)

74. *Id.* (citing *Vigil v. Leavitt*, 381 F.3d 826, 835 (9th Cir. 2004); *Iwamoto*, 853 F. Supp. 2d at 1072 (W.D. Wash. 2012)) (“Defendants’ interpretation of the Wilderness Act must be given deference by this Court unless it is unambiguously contrary to the language of the Act, in which case no deference is owed”).

75. *Id.* at 11.

76. *Id.*

77. Defendants’ Reply Memorandum in Support of Their Motion for Summary Judgment at 13, *Wilderness Watch, Inc. v. Creachbaum*, No. 3:15-cv-05771-RBL (W.D. Wash. Aug. 26, 2016)

of wilderness, and found neither option would address maintenance needs.<sup>78</sup>

DOJ highlighted the Wilderness Act's ambiguity to counter Wilderness Watch's claim that the NPS's necessity analysis and determination was insufficient.<sup>79</sup> DOJ argued that the statute "is framed in general terms and does not specify any particular form or content for such an assessment."<sup>80</sup> Citing two Ninth Circuit cases for precedent, DOJ argued that since the Wilderness Act did not specify particular content for necessity analysis, the court should defer to the NPS' format for completing the necessity determination and minimum requirements analysis.<sup>81</sup>

In arguing for the minimum requirement provision's ambiguity, DOJ cracked open the door for a convincing argument based in the plain meaning rule, but stopped short of delving deeper into legislative history. Instead, DOJ argued that "historical use" is not ambiguous, but if the court were to find the term ambiguous, "the legislative history of the [WPWA] demonstrates that Congress did not intend the passage of the Act to require the destruction or removal of these historic structures."<sup>82</sup> Yet, DOJ never provided specific examples from legislative history to prove that Congress intended to preserve historic structures. DOJ merely argued that "Congress intended that [NPS] would retain its discretion to determine the best treatment for these historic resources in wilderness."<sup>83</sup> While that is true, there is more to mine in the legislative history of both wilderness acts, and the next section will reveal why DOJ should have looked deeper for support.

#### A. *Finding Clarity in the Wilderness Act's Legislative History*

In its answer to Wilderness Watch's complaint, DOJ

---

78. *Id.*

79. *Id.* at 6 ("To the extent the Wilderness Act may be construed to be ambiguous as to whether these terms embrace the historic preservation of man-made structures, the well-reasoned and long standing interpretation of these federal agencies is entitled to deference") (citing *Vigil v. Leavitt*, 381 F.3d 826, 835 (9th Cir. 2004)).

80. *Id.* at 12–13 (citing *High Sierra Hiker's Ass'n v. Blackwell*, 390 F.3d 630, 646–47 (9th Cir. 2004)).

81. *Id.* at 13 (citing *Blackwell*, 390 F.3d at 646–47 and *Wilderness Watch, Inc. v. United States Fish & Wildlife Serv.*, 629 F.3d 1024, 1036 (9th Cir. 2010)).

82. *Id.* at 9.

83. *Id.*

referenced but failed to define the Wilderness Act's directive to the NPS to ensure the preservation of wilderness areas' "wilderness character."<sup>84</sup> The failure to define wilderness character is understandable given that the Act itself appears to recognize differing definitions of wilderness—one aspirational<sup>85</sup> and the other pragmatic.<sup>86</sup> The first sentence of section 1131(c) defines "wilderness" as an area where "the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain."<sup>87</sup> It states the ideal. However, section 1131(c) also provides that a wilderness area is an area to be protected and managed so man's works are "substantially unnoticeable."<sup>88</sup> Perhaps clearer in theory, the line between "untrammelled by man" and "substantially unnoticeable" becomes more difficult to draw in practice.

While Congress and government officials rarely spoke directly to how the Wilderness Act should treat existing structures and future development of structures within designated wilderness areas, they did hear public support for the preservation of such structures. Maurice Leon, Jr.—an avid outdoorsman based in Story, Wyoming—spoke before the Committee on Interior and Insular Affairs months before the bill's enactment, arguing that "shelter huts" were consistent with wilderness character and preservation.<sup>89</sup> Leon advocated for greater agency deference; "wilderness preservation is an art as well as a science and managed by those who know and respect it[,] it can be used by far larger numbers than use it

---

84. 16 U.S.C. § 1131(a) (2012).

85. Kevin Hayes, *History and Future of the Conflict Over Wilderness Designations of BLM Land in Utah*, 16 J. ENVTL. & LITIG. 203, 208 (2001) ("Although highly aspirational and a powerful tool in the preservation of our country's natural resources, the full potential of the Wilderness Act remains unrealized").

86. Matthew J. Ochs, *Defining Wilderness: From McCloskey to Legislative, Administrative and Judicial Paradigms*, 76 DENV. U. L. REV. 659, 679 (1999) ("Basing decisions on idealized notions or pragmatic considerations, those who are charged with applying the definition Congress incorporated in the Wilderness Act seem incapable of achieving a common interpretation").

87. 16 U.S.C. § 1131(c).

88. *Id.*

89. *S.4 A Bill to Establish a Nat'l Wilderness Preservation System for the Permanent Good of the Whole People, and for Other Purposes: Hearings Before the S. Subcomm. on Interior and Insular Affairs*, 88th Cong. 262 (1963) (statement of Maurice Leon, Jr.).

now, in perfect safety from defilement.”<sup>90</sup>

Speaking well before much of Olympic National Park was designated a wilderness area, Jack Dolstad (the official spokesman for the Olympic Park Association) stated, “[o]n the wilderness ocean strip, where the [student conservation program] has built trails over the headlands and constructed rustic shelters for visitor use, I am amazed at the number of people using these facilities both summer and winter.”<sup>91</sup> Noting that he had “recently seen backpackers traveling over trails that had not been used since pre-park times,” Dolstad suggested that the presence of shelters served the same interests the bill was intended to serve, so long as wilderness itself remained protected: “[w]e have in Washington State a future recreational gold mine, if we refrain from denuding the last few remaining wild areas.”<sup>92</sup>

As revealing as the Wilderness Act’s legislative history may be, congressional hearings leading up to the enactment of the WPWA specifically highlight Congress’s intent with respect to historic structures in Olympic National Park. President Reagan signed the statute into law on November 16, 1988.<sup>93</sup> Over 849,000 acres of land and nineteen separate areas within Olympic National Park, Mount Rainier National Park, and North Cascades NP Service Complex fell under the protection of the Act as components of the National Wilderness Preservation System.<sup>94</sup> Congress acknowledged that it designated certain lands in Olympic National Park as wilderness “[i]n furtherance of the purposes of the Wilderness Act,”<sup>95</sup> and stated “[s]uch lands shall be known as the Olympic Wilderness.”<sup>96</sup> Although the Act does not mention structures of

---

90. *Id.*

91. *Bills to Establish a Nat’l Wilderness Preservation System for the Permanent Good of the Whole People, and for Other Purposes: Hearing Before the H. Subcomm. on Public Lands of the Comm. on Interior and Insular Affairs*, 88th Cong. 166 (1964) (statement of Jack Dolstad).

92. *Id.*

93. James Tricker, et al., *Mapping Wilderness Character in Olympic National Park: Final Report*, OLYMPIC WILDERNESS IN OLYMPIC NATIONAL PARK (2013), <http://www.wilderness.net/toolboxes/documents/WC/Olympic%20NP%20WCM%20report.pdf>.

94. The Washington Park Wilderness Act, Pub. L. No. 100-668, 102 Stat. 3961 (1988).

95. *Id.* § 101(a).

96. *Id.* § 101(a)(2).



historic value in regard to the Park, legislative history reveals that Congress intended for historic structures to have a place in the Park.

Six Olympic National Park rangers advocated for a change in the language of the WPWA “so that in the years ahead the [Park Service] [would] be less likely to again start removing rustic shelters.”<sup>97</sup> Explaining that officials at the Park had started “tearing down or burning down perfectly good rustic cedar shake shelters . . . in the back country,” the rangers noted that “those shelters blended in very well with the back country environment, and [were] welcomed by all but the most dedicated wilderness purists.”<sup>98</sup> The rangers also noted that “[the officials] stopped removing shelters only when people from all over the Pacific Northwest rose up with loud voices of protest, organized a group called Friends of Olympic Shelters, and demanded that park officials stop destroying back country shelters.”<sup>99</sup> Prophetic of the tension at issue in *Creachbaum* and cases discussed in subsequent sections of this Article, the rangers distinguished between the purist backpacker and everyone else in reaffirming the need for the preservation of shelters within the Park: “[the backpacker] wants no sign whatever of man or his works while he is hiking . . . [b]ut this purist represents probably no more than one-fourth of the 80,000 people hiking Olympic back country trails each year.”<sup>100</sup>

Echoing the rangers’ desire to preserve existing structures, Washington Senator Daniel J. Evans said that “[i]t would be my presumption that designation of the park as wilderness by [the] act should not, in and of itself, be utilized as justification for removal of any of these structures from the park.”<sup>101</sup> While acknowledging that some of the structures would need to be removed to protect wildlife in the Park, he said that “[f]or others, repairs and stabilization may be warranted to ensure

---

97. *H.R. 4146 Washington Park Wilderness Bill of 1988: Hearings Before the H. Subcomm. on Nat’l Parks and Public Lands of the Comm. on Interior and Insular Affairs*, 100th Cong. 784 (1988) (statement by six concerned Olympic National Park Rangers) [hereinafter Park Rangers’ Statement].

98. *Id.*

99. *Id.*

100. *Id.*

101. 134 CONG. REC. 31,340, 31,342 (daily ed. Oct. 18, 1988) (statement of Sen. Daniel J. Evans) [hereinafter Sen. Daniel Evans’ Statement].

the preservation of their historic integrity.”<sup>102</sup> Senator Evans noted that the NPS had “plans to evaluate each structure on its own merits,” and he hoped that through those plans decisions would be made “with regard to future use, maintenance, relocation, stabilization, or removal as appropriate for each shelter.”<sup>103</sup> Recognizing that historic preservation could be complimentary to the directives of the Wilderness Act, the NPS would evaluate each shelter individually to determine the appropriateness of repair and stabilization.

Senator Evans hinted at a necessary balance between the interest of park visitors and conservation, stating that on one hand “[t]he development necessary to accommodate park visitor[s] will be confined to the areas already developed, preventing further encroachment into the wilderness area of the parks.”<sup>104</sup> On the other hand, he reaffirmed that the bill would not “shut the park visitor out of the park” but “ensure that all future generations of park enthusiasts will be able to enjoy the same wilderness parks that we enjoy now.”<sup>105</sup> Senator Evans recognized that “[t]he parks are there to provide for recreation as well as the preservation of a natural ecosystem.”<sup>106</sup>

Washington Senator Brock Adams spoke of a similar balance of interests. Senator Adams said that “[w]hile people may continue to visit the wilderness areas, and thereby appreciate nature in its most pristine state, they will be prohibited from altering that condition.”<sup>107</sup> While cautioning that “[o]nce designated as wilderness, the common signs of human activity—roads, buildings, and recreational facilities—[would] be prohibited,” Senator Adams reassured those present at the hearing that the bill would not “cut off access to parks” because “[the] legislation makes exception for those areas

---

102. *Id.*

103. *Id.*

104. *Id.* at 31,341.

105. *Id.*

106. *Id.*

107. *S. 2165 To Designate Wilderness Within Olympic Nat'l Park, Mount Rainier Nat'l Park, and North Cascades Nat'l Park Complex in the State of WA, and for Other Purposes: Hearing Before the S. Subcomm. on Public Lands, Nat'l Parks and Forests of the Comm. on Energy and Nat. Res.*, 100th Cong. 27 (1988) (statement of Sen. Brock Adams) [hereinafter Sen. Brock Adams' Statement].

where human influence is already present.”<sup>108</sup> Those areas would “retain their current status and use under Park Service direction.”<sup>109</sup> In other words, prohibition of the common signs of human activity applied only to those areas where human influence was not already present. Senator Adams’ words seem to suggest that Congress intended for the NPS to retain discretionary authority in determining whether structures in wilderness areas would be retained or rehabilitated.

Despite the clear intention that the NPS retain authority to make individual determinations on the status of each shelter, courts—particularly the WDWA—have rarely afforded the agency such discretionary authority, and it is hard to explicitly find it in the statute. Insofar as its influence on the NPS in Olympic National Park, an Eleventh Circuit case concerning a wilderness area in Cumberland Island, Georgia is at least partly to blame for this failure to recognize the flexibility inherent in the relevant statutes.<sup>110</sup> The problems presented by that CA11 case, *Wilderness Watch v. Mainella*, have been exacerbated by the WDWA’s reliance on its holdings. As the sections that follow demonstrate, however, an accurate reading of *Mainella* establishes that its holding was, in fact, quite narrow. Several WDWA decisions misread *Mainella*, and appropriate application of its holding to *Creachbaum* and other cases would grant the kind of flexibility in Wilderness Area management that has thus far been absent from judicial decisions in this space.

#### IV. WILDERNESS WATCH V. MAINELLA: THE NHPA AS SUPPLEMENTAL TO THE WILDERNESS ACT

In *Mainella*, a debate over competing interests regarding the designated wilderness area in Cumberland Island, Georgia gave rise to a decision that courts and litigants alike cite for the proposition that the NHPA defers to the Wilderness Act when the two are in conflict.<sup>111</sup> However, a closer reading of the Eleventh Circuit’s reasoning in *Mainella* reveals that the NHPA only supplements the Wilderness Act, and the two

---

108. *Id.*

109. *Id.*

110. *Wilderness Watch, Inc. v. Mainella*, 375 F.3d 1085 (11th Cir. 2004).

111. *Id.*

statutes are not in irrevocable conflict.

Wilderness Watch, a national advocacy organization, sought to enjoin the NPS's practice of using a fifteen-passenger van to transport visitors across a designated wilderness area on Cumberland Island, which encompassed two historical sites. Congress designated most of the island as wilderness in 1982,<sup>112</sup> ten years after declaring the island a National Seashore.<sup>113</sup> Visitors left their vehicles on the mainland and traveled by boat to reach the island.<sup>114</sup>

The island contained two historic structures—one just outside the wilderness boundary (Plum Orchard) and the other in a wilderness area (the Settlement).<sup>115</sup> Wilderness Watch disputed the NPS's use of the van to transport park visitors to the historic sites because reaching both areas required the use of a one-lane dirt road that traversed the wilderness area.<sup>116</sup> The NPS initially drove vehicles that held four passengers, but began using a higher-capacity van to accommodate larger numbers of visitors.<sup>117</sup> The NPS claimed that park visitors "piggybacking" along on its personnel trips yielded no net increase in impact on the wilderness character of the area.<sup>118</sup> The agency argued that the need to preserve historical structures furthered the goals of the Wilderness Act, and that its obligation to curate historic resources necessitated motorized access to the sites.<sup>119</sup> Since the NPS argued that it had a separate duty to preserve the historical structures, the preservation of historic structures in wilderness areas was administration to further the purposes of the Act.<sup>120</sup>

The Eleventh Circuit disagreed, finding instead that agency obligations in the Wilderness Act and the NHPA were quite different.<sup>121</sup> While the NHPA requires agencies to assume

---

112. Cumberland Island Wilderness Act, Pub. L. No. 97-250, 96 Stat. 709 (1982).

113. 16 U.S.C. § 459(i) (2012).

114. *Mainella*, 375 F.3d at 1088.

115. *Id.*

116. Brief for Appellants, *Wilderness Watch v. Mainella* at 25–26, 375 F.3d 1085 (11th Cir. 2004) (No. 03-15346-HH).

117. *Mainella*, 375 F.3d at 1090.

118. Brief of Federal Defendants-Appellees, *Wilderness Watch v. Mainella*, 375 F.3d 1085 (11th Cir. 2004) (No. 03-15346-HH).

119. *Mainella*, 375 F.3d at 1089.

120. *Id.* at 1090.

121. *Id.* at 1091.

responsibility for the preservation of historic properties they control, “any obligation the agency has under the NHPA to preserve these historical structures must be carried out so as to preserve the ‘wilderness character’ of the area.”<sup>122</sup> The court found for Wilderness Watch, determining that driving a fifteen-passenger van through the wilderness area failed to preserve the area’s wilderness character.<sup>123</sup>

In limiting its decision to the facts of the case—that the NPS provided motorized public access across designated wilderness areas in violation of the Wilderness Act—the court did not identify an inherent conflict between the NHPA and the Wilderness Act. “Congress may separately provide for the preservation of an existing historical structure within a wilderness area, as it has done through the NHPA.”<sup>124</sup> The Eleventh Circuit decision recognized that the Wilderness Act and the NHPA can co-exist when rehabilitative work on historic structures survives minimum requirements analysis.

In *Mainella*, the agency’s decision was impermissible not because the Wilderness Act took precedence over the NHPA, but because the court determined that driving such a large van so frequently through designated wilderness was not necessary to meet minimum requirements for the administration of the area.<sup>125</sup> The following section will reveal not only how the WDWA failed to make this distinction, but also how the court created bad precedent for similar cases going forward.

A. Olympic Park Associates v. Mainella: *The General vs. Specific Provision Fallacy*

In a 1974 environmental impact statement (EIS), the NPS called for the removal of a majority of shelters within Olympic National Park. However, the agency also concluded that a number of shelters would be retained for health and safety purposes, including the two shelters at issue in the 2005 case of *Olympic Park Associates v. Mainella*.<sup>126</sup> The agency determined in the same 1974 EIS that historic properties were

---

122. *Id.* at 1092.

123. *Id.* at 1096.

124. *Id.*

125. *Id.* at 1092.

126. *Olympic Park Assocs. v. Mainella*, No. 3:04-cv-5732-FDB, slip op. at 5 (W.D. Wash. Aug. 1, 2005).

unaffected by wilderness designation.<sup>127</sup> Despite the fact that the shelters collapsed under snow loads, the NPS later deemed the two structures eligible for the National Historic Register because they contributed to a historic pattern of shelter construction and recreational use.<sup>128</sup>

In 2001, park officials proposed a plan to the State for rebuilding the collapsed shelters.<sup>129</sup> Following notice and comment, the NPS determined that transporting the shelters by helicopter to their historic locations would pose no significant environmental impact. The agency found such action would preserve important historical aspects of the Park's heritage and limit the amount of time spent reconstructing structures in wilderness.<sup>130</sup> Nonetheless, Olympic Park Associates alleged that NPS's replacement of the two collapsed shelters with new structures built off-site, as well as its decision to fly in a helicopter to accomplish the job, both violated the Wilderness Act.

Favoring Olympic Park Associates, the court stated that while NHPA's goals included rehabilitation, restoration, stabilization, and maintenance, they did not include reconstruction: "[w]here the former shelters at issue here have been destroyed by natural forces, NHPA does not require reconstruction."<sup>131</sup> Pointing to the Wilderness Act and its mandate on "preserving the wilderness character" of an area as a "specific provision," and the NHPA as being "general," the court restated the rule of statutory construction—specific provisions as being superior to general provisions where the specific provisions govern an issue—to find that the NPS could administer the Olympic Wilderness for other purposes only insofar as to also preserve its wilderness character.<sup>132</sup>

The WDWA did devote some discussion to the wilderness character of the Olympic Wilderness, but the court's analysis was limited.<sup>133</sup> For example, the court noted that shelter

---

127. *Id.* at 2.

128. *Id.* at 3.

129. *Id.*

130. *Id.* at 3.

131. *Id.* at 10.

132. *Olympic Park Assocs. v. Mainella*, No. 3:04-cv-5732-FDB, slip op. at 11–12 (W.D. Wash. Aug. 1, 2005).

133. *Id.* at 13.

construction and recreational use were “in the past,” and that if the NPS had wanted to preserve history the agency could have taken photographs of the shelters as the structures once stood.<sup>134</sup> In response to the NPS’s argument that the shelters were significant aspects of historic use within the Park, the court merely quoted the “untrammelled by man” statutory language.<sup>135</sup>

The WDWA referenced *Mainella’s* distinction between natural and man-made features in wilderness areas.<sup>136</sup> However, that discussion played a negligible role in the Eleventh Circuit’s holding because the Eleventh Circuit never questioned the validity of the pre-existing, man-made structures in the Cumberland Island wilderness area. Rather, the Eleventh Circuit questioned the permissibility under the Wilderness Act of the great lengths the NPS went to provide park visitors opportunities to see the Settlement.<sup>137</sup>

In *Olympic Park Associates*, the WDWA embraced only part of the Eleventh Circuit’s approach to fact-specific analysis. A more complete view of the approach was consistent with the legislative history of the statutes giving rise to the wilderness area at issue in the Cumberland Island case. Debate over the Cumberland Island Wilderness Act, for instance, recognized the tension between historic structures and wilderness free from human presence. In speaking to historic structures included in Cumberland Island’s wilderness area, Russell E. Dickinson, Park Service Director, stated that because “[t]hese are manmade features [,] [t]hey would be, by ordinary circumstances, considered an intrusion in the wilderness.”<sup>138</sup> When President Reagan signed the Cumberland Island Wilderness Act into law, he stated that because some proposed wilderness areas contained structures of historic significance, neither of those areas would have been wilderness within the

---

134. *Id.*

135. *Id.*

136. *Id.* at 9.

137. *Wilderness Watch, Inc. v. Mainella*, 375 F.3d 1085, 1095 (11th Cir. 2004). (“Obtaining a large van to accommodate fifteen tourists hardly appears to be a ‘routine and continuing’ form of administration and maintenance”).

138. *S. 2569 A Bill to Declare Certain Lands in the Cumberland Island Nat’l Seashore, Georgia, as Wilderness, and for Other Purposes: Hearing Before the S. Subcomm. on Public Lands and Reserved Water, Comm. on Energy and Nat’l Res.*, 97th Cong. 22–23 (1982) (statement of Russell E. Dickenson).

meaning of the Wilderness Act of 1964.<sup>139</sup> In spite of whatever effect the Wilderness Act would have had on such structures absent the Cumberland Island Wilderness Act, the Eleventh Circuit read the latter statute to permit the presence of the Settlement within the island's wilderness area. The WDWA overlooked this observation in its analysis and failed to draw a parallel between the structures on Cumberland Island and the historic shelters within the Olympic Wilderness. Congress recognized that while maintaining these structures within the wilderness areas might be viewed as contrary to the platonic ideal of a "wilderness area," their presence was consistent with the creation and maintenance of those *particular* wilderness areas.

Rather than engage in a discussion concerning general versus specific provisions, the WDWA should have limited its analysis (like the Eleventh Circuit in *Mainella*) to the NPS's particular actions in relation to the historic structures, and in light of the initial creation of the Olympic Wilderness Area. When the court provided a fact-specific analysis, distinguishing between rehabilitation and reconstruction of historic structures, its observations read as logical and in keeping with *Mainella's* minimum requirements analysis.

*Olympic Park Associates* shows how district courts can easily misinterpret the relationship between the Wilderness Act and the NHPA to arrive at the conclusion that one statute must cancel out the other (i.e. the "general" versus "specific provision" discussion). Even when these courts focus on the wilderness-specific statutes, however, they can easily read them too narrowly, and thereby fail to reflect Congress's intent with respect to designating the wilderness area in Olympic National Park. The following case exemplifies such a narrow application, with the WDWA restraining the NPS's ability to exercise the discretionary authority Congress intended for the agency.

*B. Wilderness Watch v. Iwamoto: A Narrow Threshold for "Administration"*

Built in the 1930s, the Green Mountain lookout (located in

---

139. Presidential Statement on Signing S. 1119 into Law, 18 WEEKLY COMP. PRES. DOC. 1107 (Sept. 9, 1982) (statement of President Ronald Reagan).



what would become the Glacier Peak Wilderness in the North Cascades of Washington State) went through a few rehabilitation efforts that included reconstructing its roof and reinstalling its windows, shutters, and door.<sup>140</sup> Originally used for fire protection, the lookout became a popular hiking destination by the time Wilderness Watch filed suit against the Forest Service in 2010.<sup>141</sup> The Forest Service maintained the lookout prior to its listing on the National Historic Register, but condemned the structure from public access in 1994, pending repair on an as-funded basis.<sup>142</sup>

After soliciting advice and input from interested individuals and groups, the Forest Service considered: “(1) disassembling the lookout and removing it from the wilderness . . . ; (2) relocating it to an area outside of wilderness; (3) burning it down; (4) leaving it alone to naturally deteriorate; and (5) stabilizing and repairing it, either with or without motorized equipment.”<sup>143</sup>

In 1998, the Forest Service decided to repair the lookout using a rock drill and a helicopter to transport supplies, and issued a decision memo detailing as much.<sup>144</sup> However, extreme weather damaged the lookout’s foundation, so the Forest Service disassembled and removed the lookout piece-by-piece by helicopter.<sup>145</sup> In 2009, seven years after the Forest Service removed the lookout, the agency hired the NPS to construct a new foundation for the structure.<sup>146</sup> The NPS flew the disassembled pieces to the mountain and reassembled on site, which required at least sixty-seven helicopter trips in the wilderness.<sup>147</sup> Wilderness Watch filed suit, and the court granted the group’s motion for summary judgment and injunctive relief.<sup>148</sup>

The Forest Service failed to persuade the WDWA that its actions to preserve the lookout were justified in light of the Wilderness Act’s devotion to “historical use” of wilderness

---

140. *Wilderness Watch v. Iwamoto*, 853 F. Supp. 2d 1063, 1065 (W.D. Wash. 2012).

141. *Id.*

142. *Id.* at 1066.

143. *Id.* at 1067.

144. *Id.*

145. *Id.*

146. *Id.* at 1063.

147. *Id.*

148. *Id.* at 1079.

areas and the agency's responsibilities pursuant to the NHPA to preserve historic property.<sup>149</sup> Wilderness Watch argued that the NHPA was merely procedural, requiring agencies to take properties into consideration when undertaking actions that may affect properties eligible for or included in the Historical Register.<sup>150</sup> In contrast, the Forest Service argued that the NHPA authorized affirmative action in furtherance of historical preservation.<sup>151</sup> The WDWA rejected the notion that the agency had any affirmative obligation to preserve the lookout pursuant to the NHPA.<sup>152</sup> Instead, the court found that there was no conflict between the Wilderness Act and the NHPA because neither action nor inaction toward the lookout would have placed the Forest Service in violation of the NHPA, since the NHPA itself did not compel a particular outcome.<sup>153</sup>

In this respect, the WDWA corrected course after finding a conflict between the two statutes in *Olympic Park Associates*. Instead, the court found potential conflict between two Wilderness Act provisions. The court recognized that the reference to "historical use" in the Wilderness Act's Section 4(b) created a potential conflict with an agency's obligation to preserve the "wilderness character" of a wilderness area.<sup>154</sup> However, the court determined that "historical use" created an ambiguity requiring deference to the Forest Service's interpretation that historical use was a valid goal of the Act.<sup>155</sup>

Even so, the court needed to determine whether the Forest Service's actions were necessary to meet the minimum requirements for administration of the area for the purpose of historical use.<sup>156</sup> The principal issue, as the WDWA saw it, was

---

149. *Id.* at 1070–71.

150. *Id.* at 1070 ("Thus, according to Plaintiff, there is no basis for the claim that the Forest Service's duties under the NHPA justified its actions with respect to the Green Mountain lookout").

151. *Id.* at 1070. ("[I]n the Service's view, certain sections of the Act grant the Service more than mere procedural responsibility with respect to preservation of historic properties").

152. *Id.* at 1071.

153. *Id.*

154. *Id.* at 1074 ("[T]o the extent that the reference to 'conservation' in the list set out in Section 4(b) creates an instruction that conflicts with an agency's obligation to preserve the area's 'wilderness character,' the reference to 'historical use' in that same list would logically create the same conflict").

155. *Id.*

156. *Id.*

whether the decision to rehabilitate and reconstruct the lookout and use mechanized transport to do so was necessary for the minimum administration of the area for historical use.<sup>157</sup>

This is where the WDWA showed too little deference to the agency's discretionary authority yet also provided little to no guidance on where to draw the line between permissible and impermissible rehabilitative efforts in wilderness areas. The court stated that "the nature of the Forest Service's initial decision to allow the lookout to remain in the wilderness area and to be periodically maintained . . . is entirely different than the nature of the . . . decision to fully disassemble the lookout, transport the pieces off-site by helicopter . . . [and] fly new and restored lookout pieces back in to the site."<sup>158</sup> Continuing, the WDWA stated: "[i]t is clear that the Forest Service went to extraordinary lengths to protect a man-made structure from the natural erosive effects of time and weather. The Forest Service went too far."<sup>159</sup>

In making its minimum requirements determination, the WDWA failed to recognize that there is no standard wilderness character—it varies depending upon the nature of the wilderness at issue. The court found that "less extreme measures . . . could have been adopted, such as relocation of the lookout outside the wilderness area, which would have had less impact on the 'wilderness character' of the area but still furthered the goal of historical preservation."<sup>160</sup> If the court had looked to the legislative history of the WPWA to define the otherwise ambiguous wilderness character of the Olympic Wilderness, it would have discovered that a historic shelter such as Green Mountain lookout is part and parcel of the wilderness area. As Washington State Senator Adams noted in a hearing shortly before the bill was enacted, the NPS was tasked with the administration of those areas where human influence was already present.<sup>161</sup> The agency "evaluate[d] each

---

157. *Id.* at 1075 ("The essential question at this point is whether the 2002 decision to engage in extensive rehabilitation and reconstruction of the lookout and the related use of mechanized transport was 'necessary' for the 'minimum administration' of the area for historical use").

158. *Id.* at 1076.

159. *Id.*

160. *Id.*

161. Sen. Brock Adams' Statement, *supra* note 107.

structure on its own merits,” and exercised its discretionary authority in determining the most feasible option for the lookout’s repair.<sup>162</sup>

The determinative question in any similar case may be, “How far is too far?” The WDWA’s decisions in *Olympic Park Associates* and *Iwamoto* put the NPS in a precarious situation, affording the agency its discretionary authority to administer the Olympic Wilderness, but qualifying that authority with an understanding that any action protecting man-made structures from natural erosion puts the agency in the crosshairs of the Wilderness Act.

## V. LESSONS LEARNED: RETURNING TO *CREACHBAUM*

In its answer to Wilderness Watch’s amended complaint in *Creachbaum*, DOJ noted that the NPS interprets the Wilderness Act and the NHPA “not as antagonists working against one another . . . but as legislation to be reconciled in service of the NPS’s mission ‘to conserve the scenery and the natural and historic objects and the wild life therein.’”<sup>163</sup> The WDWA, acknowledging that “historical use is a valid goal of the [Wilderness] Act,” appeared to recognize the need for this reconciliation in *Iwamoto*.<sup>164</sup> While this recognition represented a significant progression from *Olympic Park Associates* insofar as to the court discussed minimum requirements analysis, the court stopped short of affording the NPS the discretionary authority the Wilderness Act provides the agency.<sup>165</sup>

*Iwamoto*’s narrow interpretation of what constitutes the minimum and necessary requirements for the administration of a given wilderness area must be highlights the problematic ambiguity of and inherent tension in the Wilderness Act’s language. For example, the WDWA determined that since the Forest Service relocated lookouts in another national forest to a location outside the wilderness area, the Forest Service and the NPS had alternatives to using the rock drill and helicopter

---

162. Sen. Daniel Evans’ Statement, *supra* note 101.

163. Defs.’ Reply Mem. in Supp. of Their Mot. Summ. J. at 1, *Wilderness Watch v. Creachbaum et al*, No. 3:15-cv-05771-RBL (W.D. Wash. Aug. 26, 2016).

164. *Iwamoto*, 853 F. Supp. 2d at 1074.

165. *Id.* at 1075.

in *Iwamoto* that would be consistent with furthering the purposes of “historic use” of the lookout.<sup>166</sup> The narrowness of the WDWA’s determination serves to ignore important context, such as that the location of the Green Mountain lookout provided much of the structure’s historical importance, or that, in enacting the Wilderness Act, Congress intended for the NPS to evaluate each shelter individually.<sup>167</sup>

Were the WDWA to apply the same minimum requirements standard it applied in *Iwamoto* to the facts in *Creachbaum*, the court would have found that alternatives to using the helicopter for shelter transport existed and thus the NPS’ actions violated the Wilderness Act. After reading *Olympic Park Associates* and *Iwamoto*, it is difficult to imagine a scenario where the court would find that no alternatives to rehabilitation existed.

In failing to look to the WPWA’s legislative history, the WDWA not only did itself a disservice by setting poor precedent, but also left the NPS with a discretionary authority the agency may be afraid to exercise in the future for lack of knowing its real value. Legislative history reveals Congress’s desire for NPS to apply its expertise to minimum requirements determinations. Even if the WDWA were only to “pay ‘respect’ to the agency’s determination on this issue,”<sup>168</sup> the court must acknowledge that Congress intended for the NPS to determine which rehabilitative efforts are most appropriate for each individual shelter.

NPS maintenance of Wilder Shelter, Bear Camp Shelter, Canyon Creek Shelter, Elk Lake Shelter, and Pelton Creek Shelter was not the “further encroachment into the wilderness area of the parks” Senator Evans spoke of the WPWA prohibiting in 1988.<sup>169</sup> Washington State senators drafting the bill, Olympic National Park rangers, and the general public made clear their intent that the WPWA ensure historic structures such as those in *Creachbaum* had a place in the Park after the statute’s enactment. If purist backpackers still represent no more than one-fourth of the people hiking

---

166. *Id.*

167. Sen. Daniel Evans’ Statement, *supra* note 101.

168. *Iwamoto*, 853 F. Supp. 2d at 1075.

169. Sen. Daniel Evans’ Statement, *supra* note 101.

Olympic back country trails each year,<sup>170</sup> the NPS maintaining these shelters after conducting minimum requirements analysis is in keeping with the Wilderness Act's directive that the National Wilderness Preservation System exists "for the permanent good of the whole people."<sup>171</sup>

---

170. Park Rangers' Statement, *supra* note 97.

171. 16 U.S.C. § 1131 (2012).