Mountain Biking in Wilderness

Some History

by Douglas W. Scott

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MacKaye, Marshall, Leopold, and the others who founded the Wilderness Society in 1935 saw wilderness as “a serious human need rather than a luxury and plaything,” concluding that “…this need is being sacrificed to the mechanical invasion in its various killing forms.” Expressing their concern about human intrusions that bring “into the wilderness a feature of the mechanical Twentieth Century world,” the society’s founders identified wilderness areas as “regions which possess no means of mechanical conveyance.”

The words of the Wilderness Act
As historian Paul Sutter notes, “for Leopold the essential quality of wilderness was how one traveled and lived within its confines,” a view shared by the other founders of the Wilderness Society. As he drafted the Wilderness Act in 1956, Howard Zahniser, executive director of the society, drew on this well-understood and fundamental concept of wilderness. In a nationwide radio broadcast in 1949, he had emphasized that “wilderness will not survive where there is mechanical transportation.”

As defined in the dictionary, and as reflected in this whole line of twentieth century wilderness thinking, the term “mechanization” embraces a broader category than just the term “motor vehicles.” Congress adopted this crucial distinction when it enacted the Wilderness Act. Section 4(c) of the act prohibits certain uses, some absolutely and others with limited exceptions:

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

The plain words of the statute distinguish between the use of motor vehicles and any “other form of mechanical transport”—and separately prohibit both. The canons of statutory construction require distinct meaning be given to each provision and each item in a list of items, preventing the assumption that when Congress chose to use two different words or phrases, these were intended to have the same meaning.
Thus, distinct from the phrases involving motors per se, the prohibition on any “other form of mechanical transport” must mean some class of transport devices other than those with motors.

The Forest Service initially got it wrong

Despite the clear words of the law, the first Department of Agriculture regulations (drafted by the U.S. Forest Service and finalized in 1966) violated the canons of statutory construction on this point. This error was highlighted in the first law review analysis of the Wilderness Act, published just a month later.

Commenting on the identical wording as it appeared in the draft form of the regulations, Michael McCloskey noted:

In its regulations to implement the act, the Forest Service has defined “mechanical transport” as “any contrivance…propelled by a nonliving power source.” As a nonliving power source is the same as a motor, mechanical transport is thus defined as being the same as “motorized transport,” and there is no exclusion of horse-drawn vehicles, bicycles, or cargo carriers. The wording of section 4(c) is that there shall be “no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport….” In an effort to give meaning to each item enumerated, the rules of statutory construction would suggest that duplicate definitions should be avoided. For this reason, the Forest Service would appear to be in error in saying that the phrase “mechanical transport” means no more than the preceding phrase “motor vehicles.” The meaning of the sentence would appear to be that the final phrase refers to modes of mechanical transport that are not motor vehicles, motorboats, or motor-driven aircraft. By a process of elimination, this would seem to leave only items such as bicycles, wagons, and cargo carriers as the referent for the phrase.¹³

Responding to the draft regulations in September 1965, both the Wilderness Society and Sierra Club—the national organizations most intimately involved in the drafting and enactment of the Wilderness Act—had put the Forest Service on notice of its error. In comments for the Wilderness Society, its executive director wrote:

The definition of mechanical transport…should specifically include contrivances powered by living power sources (such as wagons drawn by horses, bicycles, and wheeled cargo carriers) as well as contrivances propelled by nonliving power sources. (See Paragraph 4(c) of the

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Act, which distinguishes between motor vehicles, motorboats, and "other forms of mechanical transportation [sic].") The use of various types of wheeled equipment should be specifically prohibited within the regulations to conform with this provision of the Act.\textsuperscript{14}

To correct their obvious error and clarify exactly what is included within the phrase "other form of mechanical transport," the Forest Service subsequently perfected its regulatory definition in the sections of the \textit{Forest Service Manual} that direct its implementation of the Wilderness Act:

\textit{Mechanical Transport.} Any contrivance for moving people or material in or over land, water, or air, having moving parts, that provides a mechanical advantage to the user, and that is powered by a living or nonliving power source. This includes, but is not limited to, sailboats, hang gliders, parachutes, bicycles, game carriers, carts, and wagons. It does not include wheelchairs when used as necessary medical appliances. It also does not include skis, snowshoes, rafts, canoes, sleds, travois, or similar primitive devices without moving parts.\textsuperscript{15}

Other agencies that manage wilderness never made this mistake. In its original regulations, the Bureau of Land Management expressly listed bicycles as a prohibited form of mechanical transport.\textsuperscript{16}

\textbf{Mountain bikes: Exactly the sort of mechanical transport the law intended to prohibit in wilderness}

Mountain bicycles did not exist until long after the Wilderness Act became law. It is understandable that drafters of the earliest Forest Service regulations did not name bicycles as a likely form of mechanical transport. At the time, they could not reasonably have been expected to foresee technological developments that would adapt bicycles to mountainous terrain, both on and off trails. In any case, the words of the statute itself are the controlling law, not the agency’s interpretation.\textsuperscript{17} A bicycle is obviously a mechanical device and obviously a form of transport. The plain words of section 4(c) of the Wilderness Act prohibit bicycles in wilderness areas. Ditto for wheeled game carriers.

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\textbf{NOTES}

2. Benton MacKaye to Arno Cammerer, December 30, 1935, quoted in \textit{Driven Wild}.
6. 16 U.S.C. 1133(c), emphasis added.
7. These quotations are from a 4-page pamphlet, \textit{Reasons for a Wilderness Society} (January 21, 1935), emphasis added.
10. The word “mechanical” is not defined by presence or absence of a motor. \textit{The American Heritage Dictionary of the English Language, Fourth Edition} defines this family of terms: MECHANICAL: “1. Of or pertaining to machines or tools.” MECHANISM: “A device or mechanical appliance.” MECHANIZE: “To equip with machinery.” MACHINE: “1. a. A device consisting of fixed and moving parts that modifies mechanical energy and transmits it in a more useful form. b. A simple device, such as a lever, a pulley, or an inclined plane, that alters the magnitude or direction, or both, of an applied force; a simple machine.”
11. 16 U.S.C. 1133(c), emphasis added. This wording was virtually identical in the first wilderness legislation introduced at the outset of the 8-year campaign leading to the Wilderness Act. That first version provided that “there shall be no road, nor any use of motor vehicles, nor any airplane landing field or other provision for mechanized transportation...” Section 2(b) of S. 4013, 84th Congress, 1st Session, June 7, 1955, 15.
15. Forest Service Manual 2320.5(3). This is the current manual provision, which was adopted sometime in the early to mid-1980s.
16. These BLM regulations were adopted in 1985 (43 CFR 8960.0-5). They were superseded by an updated set of wilderness regulations in 2000 (43 CFR 6301.5). The revised regulations expressly prohibit “bicycles, game carriers, carts, and wagons.”
17. The courts have ruled that “An administrative agency is permitted to change its interpretation of a statute, especially where the prior interpretation is based on error, no matter how longstanding.” \textit{Chisholm v. F.C.C.}, 538 F.2d 349, 364 (D.C. Cir.), \textit{cert. denied} 429 U.S. 890, 97 St.Ct. 247, 50 L.Ed. 2d 173 (1976).