Mountain Biking in Wilderness

Some History

by Douglas W. Scott

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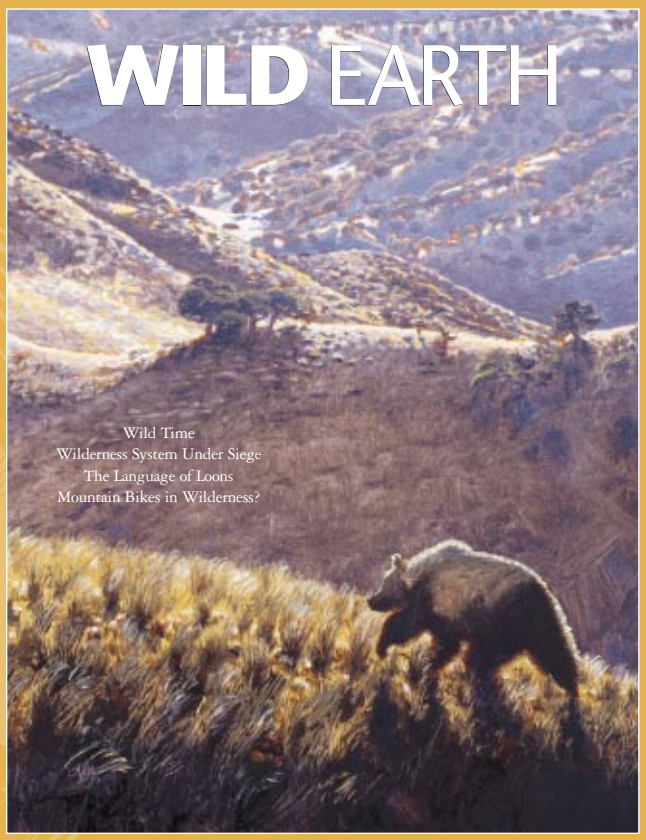

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In December 1933, the director of the National Park Service floated the idea that construction of the Skyline Drive parkway along the wild ridgetops of Shenandoah National Park would be a terrific opportunity for that section of the Appalachian Trail to "be made wide and smooth enough that it could serve as a bicycle path."[1]

Benton MacKaye, father of the Appalachian Trail, was apoplectic. The Appalachian Trail was to be a "real wilderness footpath," he told the director, and one of the prerequisites was "that it is to be a footway and not a wheelway."[2] MacKaye was an enthusiastic bicyclist but believed that like any form of mechanization, bicycles did not belong in wilderness. He "first saw the true wilderness" in 1897, he wrote in his journal, during a long ramble through the White Mountains of New Hampshire, preceded by a 10-day bicycle trip from Shirley Center, Massachusetts. As he and his companions set out on the wilderness hike, he wrote: "The country we are about to traverse is one, I am told, undisturbed by civilization in any form.…We have said 'good-bye' to the bicycles and civilization and will now pursue our way on foot through the White Mountains."[3]

As these episodes illustrate, from their earliest thinking about a practical program for preserving wilderness, wilderness pioneers were intent on excluding all vestiges of "mechanization" from such areas. And that includes anything with wheels, such as bicycles or wheeled game carriers.

In 1930, Robert Marshall defined wilderness as "a region which…possesses *no possibility of conveyance by any mechanical means*."[4]

In 1949, Aldo Leopold wrote, "Recreation is valuable in proportion to the intensity of its experiences, and to the degree to which it *differs from* and *contrasts with* workaday life. By these criteria, mechanized outings are at best a milk-and-water affair."[5]

In 1964, the Wilderness Act set out the essence of federally designated wilderness as being its "*contrast* with those areas where man and his works dominate the landscape" with "increasing population, accompanied by expanding settlement and *growing mechanization*."[6]

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*."[7]

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.[8] 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."[9]

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."[10] 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.[11]

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.[12]

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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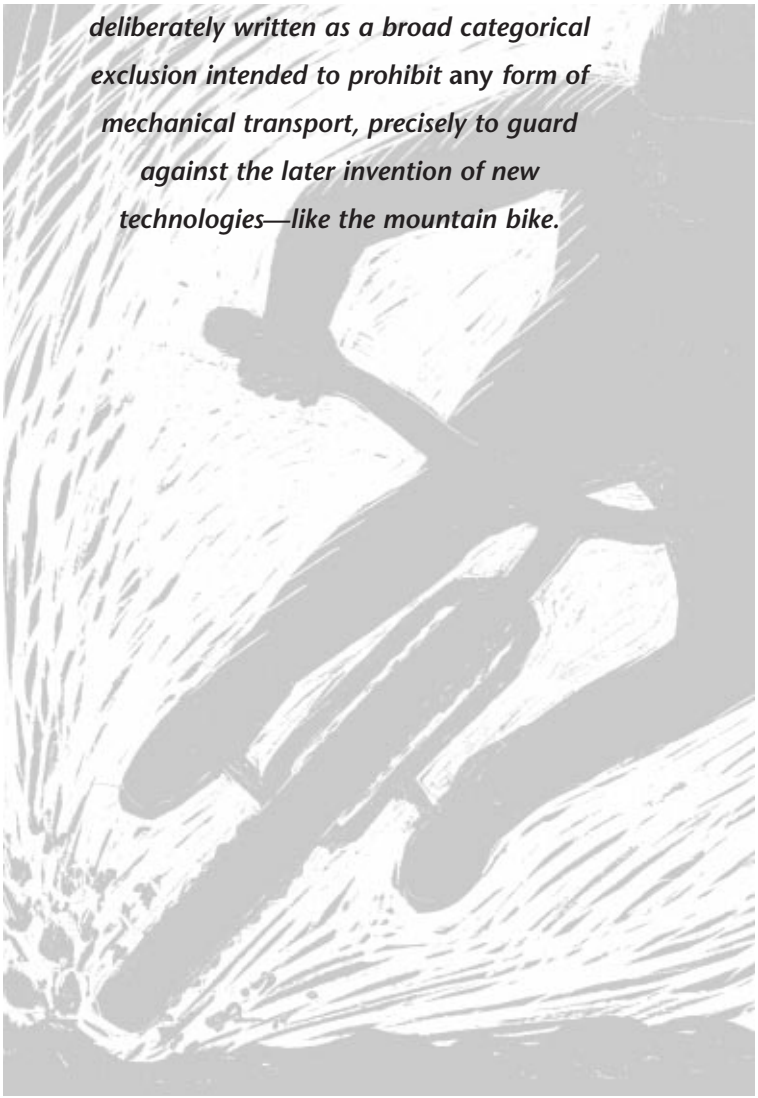

> Act, which distinguishes between motor vehicles, motorboats, and "other forms of mechanical transportation [*sic*]."). The use of various types of wheeled equipment should be specifically prohibited within the regulations to conform with this provision of the Act.[14]

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 *Forest Service Manual* that direct its implementation of the Wilderness Act:

> *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.[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.[16]

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.[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.

The Wilderness Act's prohibition of any "other form of mechanical transport" was deliberately written as a broad categorical exclusion intended to prohibit *any* form of mechanical transport, precisely to guard against the later invention of new technologies—like the mountain bike. ☾

A long-time student of the history of wilderness preservation, **Doug Scott** *has been a lobbyist and strategist for the Wilderness Society, Sierra Club, and Alaska Coalition. He is policy director of Campaign for America's Wilderness. His briefing papers on Wilderness Act interpretation and precedents and a longer paper on mechanization and wilderness can be found at http://leaveitwild.org/reports.*

NOTES

1. Arno Cammerer to Myron Avery, December 2, 1933, quoted in Paul Sutter, 2002, *Driven Wild: How the Fight against Automobiles Launched the Modern Wilderness Movement* (Seattle: University of Washington Press), 185.
2. Benton MacKaye to Arno Cammerer, December 30, 1933, quoted in *Driven Wild.*
3. Journal quoted in Larry Anderson, 2002, *Benton MacKaye: Conservationist, Planner and Creator of the Appalachian Trail* (Baltimore: John Hopkins University Press), 34–35.
4. Robert Marshall, 1930, The Problem of the Wilderness, *The Scientific Monthly* 30: 2 (February): 141, emphasis added.
5. Aldo Leopold, 1949, *A Sand County Almanac and Sketches Here and There* (New York: Oxford University Press), 194, emphasis in original.
6. 16 U.S.C. 1131(c), emphasis added.
7. These quotations are from a 4-page pamphlet, *Reasons for a Wilderness Society* (January 21, 1935), emphasis added.
8. *Driven Wild*, 72.
9. Howard Zahniser, script of radio broadcast, January 13, 1949, on "Newsreel Digest" program, Mutual Broadcasting Company, 1.
10. The word "mechanical" is not defined by presence or absence of a motor. *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 machine 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 3(b) of S. 4013, 84th Congress, 2nd Session, June 7, 1956, 15.
12. "It is the '"cardinal principle of statutory construction"…[that] it is our duty "to give effect, if possible, to every clause and word of a statute"…rather than to emasculate an entire section.' *United States v. Menasche*, 1955, 348 U.S. 528, 538, 75 S.Ct. 513, 520, 99 L.Ed. 615 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 1937, 301 U.S. 1, 30, 57 S.Ct. 615, 621, 81 L.Ed. 893 and *Montclair v. Ramsdell*, 1883, 107 U.S. 147, 152, 2 S.Ct. 391, 395, 27 L.Ed. 431)." Cited in *Bennett v. Spear*, 1997, 520 U.S. 154, 137 L.Ed.2nd 281.
13. J. Michael McCloskey, 1966, The Wilderness Act of 1964: Its Background and Meaning, *Oregon Law Review*, 308, emphasis added. McCloskey was referring to the Secretary's proposed regulation, dated July 12, 1965. The portion of that draft quoted in the law review did not change in the final regulation as adopted a year later.
14. Stewart M. Brandborg to Edward P. Cliff, Chief, Forest Service, September 28, 1965, 3. Similar concern was expressed by the Sierra Club in a statement dated September 30, 1965.
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 8560.0-5). They were superceded 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." *Chisholm v. F.C.C.,* 538 F.2d 349, 364 (D.C. Cir.), *cert. denied* 429 U.S. 890, 97 St.Ct. 247, 50 L.Ed. 2d 173 (1976).