Preservation Prevails over Commercial Interests in the Wilderness Act:

Wilderness Society v. United States Fish & Wildlife Service

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In Wilderness Society v. United States Fish & Wildlife Service, the Ninth Circuit en banc evaluated the appropriateness of a sockeye salmon stocking project in the Kenai Wilderness of Alaska. The court held that the project violated the Wilderness Act because its purpose and effect were to aid the commercial fishing industry. The Wilderness Act explicitly prohibits commercial enterprise within wilderness areas, and so the Fish & Wildlife Service’s decision to grant a special use permit was not given deference. This decision is important because it places the Wilderness Act’s mandate for preservation beyond judicial deference to federal agency’s land management decisions whenever there is an arguably commercial enterprise in a wilderness area. The holding also creates a presumption that activities with commercial overtones will violate the Wilderness Act even if they are benign to wilderness values.

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INTRODUCTION

Within the Kenai Wilderness of southern Alaska lies Tustumena Lake. Its waters are fed by the Harding Icefield and support a number of salmon species popular with commercial and recreational fishermen. In the 1970s, the Alaska Department of Fish & Game began stocking Tustumena Lake with juvenile salmon from hatcheries. While this began as a research project, it grew into an operational project to benefit the local fishing industry. The Tustumena Lake Sockeye Salmon Enhancement Project ("Enhancement Project") involved annual harvesting of sockeye salmon eggs from Tustumena Lake, incubation at the Cook Inlet Aquaculture Association (CIAA), and stocking of the lake with young salmon fry raised by CIAA. Recreational fishermen travel to the Kenai Wilderness to fish for salmon from Tustumena Lake, and commercial fishing operations catch the adult salmon downstream at Cook Inlet, which is outside the Kenai wilderness area.

The project became controversial after the Kenai Peninsula, which was a federal wildlife refuge, was designated as wilderness and the state-run project came under control of CIAA, a non-profit group that is strongly influenced by the commercial fishing industry. The Wilderness Society and the Alaska Center for the Environment brought suit against the United States Fish & Wildlife Service (USFWS), claiming that the
project was a commercial enterprise plainly prohibited by the Wilderness Act. Furthermore, plaintiffs claimed that the project was incompatible with the wilderness and wildlife refuge values of the area, and that it contradicted the Alaska National Interest Lands Conservation Act.

Although the Enhancement Project became operational for the purpose of enhancing the commercial fishing industry, the district court deferred to the USFWS’s assessment that it was not a prohibited commercial enterprise under the Wilderness Act because CIAA is a non-profit organization and the commercial fishing operations took place outside wilderness boundaries. The original Ninth Circuit panel applied a similar approach, but the Ninth Circuit *en banc* ruled otherwise. The *en banc* court found that the language of the Wilderness Act clearly prohibits commercial enterprise within the wilderness, that the purpose and effect of the Enhancement Project was to aid the commercial fishing industry, and therefore, that the USFWS clearly violated the terms of the Wilderness Act. No deference was afforded to the agency’s decision.

This Note begins by introducing the Wilderness Act and explaining its purpose, wilderness management goals, and ban on commercial activities. Next, the facts surrounding the Enhancement Project are set out. The facts of this case are important because they demonstrate the mixed commercial and benign wilderness effects of the Enhancement Project on the Kenai Wilderness, and how the unique situation was evaluated by the USFWS. An analysis of the lower court holdings follows. The district court and original Ninth Circuit holdings both failed to recognize the Wilderness Act’s preservationist mandate, and subsequently deferred inappropriately to the agency. The *en banc* decision introduced a novel application of the “purpose and effect” test, which clarified the role of preservation and the presumption of a ban on any commercial enterprise in wilderness management. Finally, the Note analyzes the holding with respect to wilderness management and the role of wilderness and preservation in the federal lands system. The analysis reveals that the Wilderness Act, more than any other law protecting federal lands, ensures preservation by applying a strong presumption against commercial enterprise in evaluating any activity that has potential to violate wilderness values.

I. THE WILDERNESS ACT AND ITS BAN ON COMMERCIAL ACTIVITIES

A. Inception of the Wilderness Act

The Wilderness Act became law in 1964, codifying the unique pattern of land conservation and preservation in the United States. Wilderness preservation is a generally accepted idea today, although this case demonstrates that there is still disagreement over the extent to which
preservation must be furthered through agency management. Today, academics debate the methods of wilderness preservation, rather than discussing whether it should be held in trust by the federal government in the first place.¹

At the turn of the twentieth century, however, preservation of wilderness remained an innovative concept. Wilderness preservation was unique to the United States, and may have been a product of twentieth century nostalgia for the waning frontier and an independent American spirit that has become part of our cultural heritage.² The first great national parks, Yosemite and Yellowstone, were set aside to serve as tourist attractions in 1864 and 1872, respectively.³ These were the first major steps towards wilderness preservation.⁴ Such decisions were made on an ad-hoc basis, however, and preservationist policies did not take firm hold until the early 1900s.⁵ President Theodore Roosevelt established several wildlife refuges during a period of emerging conservation policy and creation of matching administrative agencies, most significantly the National Park Service, created by Congress in 1916.⁶

As early as the 1920s, Aldo Leopold had highlighted the ecological and recreational value of wilderness and the growing threats to its existence.⁷ His advocacy culminated in the creation of the Gila Wilderness in 1924, the first dedicated wilderness area.⁸ The U.S. Forest Service promulgated affirmative steps towards designating and administering wilderness beginning in 1929, when the agency issued regulations to manage particular lands as “primitive areas.”⁹ The Forest

¹. Current wilderness debate surrounds how the how and why of wilderness preservation, rather than whether it should be preserved in the first place. For example, Professor Joseph Sax wrote extensively about how people benefit from participating in wilderness recreation and contemplation. JOSEPH SAX, MOUNTAINS WITHOUT HANDRAILS (1980). This idea has recently been added to by Professor Sarah Krakoff, who describes how the recently expanding popularity of wilderness recreation calls for reconsideration of the consumption of wilderness and why we should care about its preservation. Sarah Krakoff, Mountains Without Handrails . . . Wilderness Without Cellphones, 27 HARV. ENVTL. L. REV. 417 (2003). Recently, an entire issue of the Denver University Law Review was dedicated to covering a symposium about wilderness preservation. Symposium, Wilderness Act of 1964: Reflections, Applications, and Predictions, 76 DENV. U. L. REV. 331 (1999).


⁴. Id.

⁵. Id.

⁶. Id. at 22.


⁸. Id. For an interesting history of the Gila Wilderness, visit the New Mexico Wilderness Alliance website at http://www.nmwild.org/wilderness/gila (last visited Dec. 18, 2004).

⁹. McCloskey, supra note 2, at 296.
Service envisioned that conditions in such areas would be kept in their natural state but certain activities would be permitted, such as building access roads and limited woodcutting. The primitive area regulations proved so popular that, in 1939, the regulations were revised to prohibit roads, motorized vehicles, and commercial timber harvesting. The regulations also provided that primitive areas of a size greater than 100,000 acres should be known as “wilderness areas,” and areas greater than 5,000 acres should be designated “wild areas.” The Forest Service thus began the federal movement towards preserving undeveloped wilderness, but the process was interrupted by World War II and would not become a part of the federal code until 1964.

By the 1950-60s, the emerging environmental movement created an opportunity to codify wilderness preservation. This was a time when people wanted to set aside land for conservation, both in light of the blossoming environmental movement and the historical nostalgia for the American frontier. The spirit was captured by writers such as Wallace Stegner who wrote in his Wilderness Letter of 1960, that “[w]e need wilderness preserved – as much of it as is still left, and as many kinds – because it was the challenge against which our character as a people was formed.”

The process of specifically developing the Wilderness Act began in 1955 when Howard Zahniser of the Wilderness Society called for the statute during an address in Washington D.C. His suggestion was heard by a senator and was soon introduced as the first Wilderness Bill in 1956. The Wilderness Act underwent great debate, including nearly a decade of deliberation, initial opposition from federal agencies, and continuing opposition from lumber, mining, power, and irrigation interests, going through twenty versions, and eighteen hearings. When President Johnson signed the Wilderness Act into law in 1964, however, it still retained many of the wilderness preservation principles envisioned by Zahniser.

Zahniser emphasized that a ban on commercial enterprise should be the starting point for legislation protecting wilderness, remarking that “[w]e must not only protect the wilderness from commercial exploitation.

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10. Id.
11. Id.
12. Id. at 296–97.
13. Id. at 297, 301.
14. Id.
15. Id. at 384–85. See McCloskey, supra note 2, at 292-93.
17. McCloskey, supra note 2, at 298.
18. Id.
19. Id.
We must also see that we do not ourselves destroy its wilderness character in our own management programs." Zahniser envisioned that the Wilderness Act would be a preservationist instrument, where wilderness would be "undeveloped by man's mechanical tools and in every way unmodified by his civilization." The Senate agreed with the basic principal eliminating commercial presence in the wilderness, concluding near the end of the legislative process that "commercial services are authorized only as necessary to realize recreational or other wilderness purposes but are otherwise prohibited." A clear goal, then, of Zahniser and of Congress was that the Wilderness Act would ensure the preservation of wild lands into the future, based on a management system predicated on the elimination of commercial activity in wilderness areas.

The Wilderness Act set aside 9.1 million acres as wilderness. Though an impressive figure, this was only a fraction of the 800 million acres of federal land in 1964. The protected land was named the National Wilderness Preservation System (NWPS), and its area has grown almost every year since 1964. The system now includes 677 separate wilderness areas in 44 states; its total extending across more than 105 million acres—about 4.4 percent of the entire United States. Congress passed the Alaska National Interest Lands Conservation Act (ANILCA) in 1980, adding more than 56 million acres to the NWPS, and marking the largest wilderness addition to date. This addition included the Kenai Wilderness that is the wilderness area discussed in this Note.

The amount of land dedicated to preservation under the Wilderness Act has been impressive, but the extent to which preservationist ideals ultimately govern wilderness management is yet to be determined, as this Note will discuss. In terms of acreage, the Wilderness Act has had a powerful influence on federal land management and the conservation effort, particularly in Alaska. The Wilderness Act sets forth several principles for wilderness management, including the prohibition on commercial enterprise. Day-to-day management decisions are left to

20. Zahniser, supra note 7, at 11 (addressing the New York State Joint Legislative Committee on Natural Resources in 1953, introducing his vision for a wilderness system throughout the entire United States).
21. Id. at 54.
24. Id.
26. Id.
28. WILDERNESS.NET, supra note 25.
individual agencies, however, and so it is largely up to the agencies to ensure that management comports with the spirit of the Wilderness Act.\textsuperscript{29} The following two sections of this Note describe the purpose and goals of the Wilderness Act, as well as the prohibition on commercial enterprise, which is intended to accomplish these ideals.

\section*{B. The Wilderness Act}

\subsection*{1. Purpose}

The preservationist leaders who wrote the Wilderness Act stated the purpose of the Act in clear, lyrical prose. The statute’s words were carefully selected to transpose the idealistic spirit of preservation into a concrete federal mandate.\textsuperscript{30} Congress established the NWPS “\textit{[i]n order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition...”} \textsuperscript{31} Federal agencies such as the USFWS are the stewards who ensure that wilderness lands remain adequately preserved and protected. By statute, their mandate is to ensure that wilderness is “administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness...” \textsuperscript{32}

The definition of wilderness is central to the requirements for its management, since the goal of the Wilderness Act is to ensure that the land is protected and retains its wilderness characteristics over time. The Act defines it as follows:

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain.... An area of undeveloped Federal land retaining its primeval character and

\begin{footnotesize}
\begin{enumerate}
\item For instance, Zahniser disregarded conventional statutory language when he defined wilderness as an area “untrammeled” by man. He decided to use this description after hearing a friend’s description of how she enjoyed the untrammeled seashore. Although Congress made substantive changes to the Wilderness Act, much of the preservationist ideal embodied in Zahniser’s words remained essential to it. Amy Rashkin et al., The Wilderness Act of 1964: A Practitioner’s Guide, 21 J. LAND RESOURCES & ENVTL. L. 219, 225–26 (2001).
\item Id.
\end{enumerate}
\end{footnotesize}
influence, without permanent improvements or human
habitation.... 33

This definition of wilderness, illustrated by such words as "untrammeled" and "primeval" emphasizes that human influence is to be kept to a minimum. Land managers therefore place the most restrictive use requirements on the NWPS. In contrast, in national parks and national monuments, while human modification of the landscape is restricted, land managers do not specifically value preservation over access.34

In order to ensure that the NWPS achieves its preservationist purposes, management of wilderness land permits fewer uses than for federal lands of any other type.35 For instance, under the Organic Act, there can be franchised businesses, roads, and other "facilities for the accommodation of the public" within the boundaries of parks and monuments.36 Construction of facilities in national parks is commensurate with their purpose: that they "provide... for the enjoyment of future generations."37 Without appropriate facilities such as roads or campsites, people would not be able to view the sights of national parks easily. Wilderness, on the other hand, is intended foremost for preservation, such that man is only a visitor and there are no permanent signs of human influence.38

The Wilderness Act sets out four characteristics that are inherent to wilderness and must be preserved in a wilderness area once it is designated as such by Congress. Wilderness:

(1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable;

(2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation;

(3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and

(4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.39

The first characteristic again emphasizes that human influence must be kept to a minimum. The second introduces the idea that people will enjoy

33. Id. § 1131(c).
34. The National Park Service Organic Act governs the use of national parks, monuments with the purpose "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." Id. § 1 (2000).
35. Glicksman & Coggins, supra note 23, at 400.
37. Id. § 1.
38. Id. § 1131(c).
39. Id.
the natural surroundings of wilderness, and it will be useful as a unique recreation resource for that reason. The final two characteristics—a fairly large size and special features—ensure that the wilderness is an area worth restricting from development, and that its preservation will be feasible.

2. Use of Wilderness Areas

In addition, the Act establishes rules for the use and administration of wilderness areas. When Congress approves of a portion of land as wilderness, the wilderness use restrictions conferred on the land are added to those restrictions that may have already been in place when it was categorized as a national forest, national park, or national wildlife refuge system. When the Kenai Wilderness entered the system, for example, it retained any use restrictions that were already imposed on the land when it was only a wildlife refuge, in addition to the newly imposed use wilderness restrictions.

A variety of federal agencies including the USFWS and the Forest Service may be responsible for managing a wilderness area and enforcing use restrictions within its boundaries. Any agency with jurisdiction over an area of federal property that becomes wilderness assumes responsibility for managing that land under the Wilderness Act's requirements. As mentioned above, the general mandate for the agency is to maintain the land's "wilderness character." More specifically, the agency is directed that "[w]ilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use." This direction is fairly broad. Such uses are circumscribed most by two limits: the prohibition on anything that modifies the "wilderness character," and the ban on commercial enterprise that is discussed in the following section.

3. Ban on Commercial Enterprise

The Wilderness Act contains a blanket ban on commercial enterprise within the wilderness. The Act also includes specific exceptions to this ban for reasons of practicality and legislative compromise. Such exceptions ensure that commercial enterprise will be excluded in every possible instance. The prohibition provision of Section 1133(c) states that "there shall be no commercial enterprise and no permanent road within

40. Id. § 1133.
41. Id. § 1133(a).
42. Id. § 1133(b).
43. Id.
44. Id.
any wilderness area designated by this Act.” According to policy leaders, elimination of commercial enterprise was one of the most basic steps to take in preserving wilderness, and so this blanket ban is of central importance to the Wilderness Act.45

The Act has only two exceptions to the ban on commercial enterprise: to facilitate historical rights or to further recreational opportunities. These exceptions are only made when facilitating the historical right or providing a recreational opportunity will not detriment wilderness values. The Act does not allow any commercial enterprise that is not a historical right or that does not facilitate a recreational activity them regardless of its potential impact on wilderness values.46 Thus the Wilderness Act creates a presumption that all commercial activity not within an exception is banned from the NWPS.

The exception for facilitation of historical rights reflects the Act’s anticipation that traditional activities might conflict with the ban on commercial activities. Special provisions are outlined, therefore, for instances where human interference with the wilderness is acceptable, and possibly inevitable. For example, the general prohibition on commercial enterprise in the wilderness does not override private rights, such as those for grazing that existed before land is designated as wilderness.47 Additional provisions allow for measures needed to control fire, insects, or disease; for mineral surveys, mining, and mineral leases; and for federal water projects selected by the President.48 Although it is possible for commercial entities to conduct such activities without damage to wilderness values, they are allowed only when necessary to manage ecological integrity or historical interests.

The exception to further recreational activities also reflects an area where Congress concluded that some human intrusion into wilderness is acceptable. Congress envisioned that the wilderness would benefit people who can visit, recreate, or simply reflect. Wilderness is intended to persist in relative solitude while other American landscapes are developed, and to remain a more primitive place to visit than other federal lands designed for tourism and recreation. Although wilderness was designed

45. Zahniser, supra note 7, at 59. When Zahniser approached congressional leaders in Washington D.C. in 1955, he stated that “commodity purposes” and “engineering uses” were the most basic threats to wilderness. For these reasons, management needed to go even further towards restricting commercial use in preserving wilderness values by ensuring that the influence of man would be kept to a minimum. This suggests that the ban on commercial enterprise was absolutely basic and an absolute necessity in they eyes of the authors of the Wilderness Act.

46. 16 U.S.C. § 1133(c). The Wilderness Act states, “except as specifically provided for in this Act, and subject to existing private rights, there shall be no commercial enterprise . . . within any wilderness area . . . .” Special provisions provide room for certain commercially funded activities such as guiding under the commercial services clause. See id. § 1133(d)(5).

47. Id. § 1133(c).

48. Id. § 1133(d)(1)–(4).
to remain free from human influence, it was also intended to be a place that people will want to visit for hiking, fishing, or other adventures and so activities such as guiding are exempt from the ban on commercial enterprise. Wilderness is preserved for the people, and management therefore must deal with the sometimes conflicting goals of protecting its raw natural state and encouraging visitors. People should be able to enjoy the wilderness both by having the knowledge it exists, and by being able to explore it if they wish to venture out if wilderness is properly managed by federal agencies.

II. THE FISHERIES ENHANCEMENT PROJECT

A. Beginnings of the Enhancement Project

The Tustumena Lake Sockeye Salmon Enhancement Project ("Enhancement Project") stemmed from an Alaska Department of Fish and Game (ADF&G) fisheries research initiative that gained strength in the late 1960s. The research was likely a response to the transformation of the commercial fishing industry in Alaska, which increased pressures on the fishery with the use of new technologies. ADF&G conducted its first sockeye salmon egg collection at Tustumena Lake in 1974. The first stocking event followed a year later, when juvenile salmon, known as fry, were released into lakes outside the Kenai Refuge. The first release of fry into Tustumena Lake occurred two years later in 1976, and since that date the lake has been stocked with hatchery fry in all but two years.

Tustumena Lake, the largest freshwater lake located within what is now the Kenai Wilderness, was then part of the Kenai National Moose Range. The Enhancement Project was originally a research project for ADF&G's Fisheries Rehabilitation, Enhancement and Development Division, entirely unrelated to the USFWS. Its goal was to determine the effect of stocking salmon on the native salmon population, and also to

50. See id.
51. Id. at 1.
52. Id.
53. Wilderness Soc'y v. United States Fish & Wildlife Serv., 353 F.3d 1051, 1056 (9th Cir. 2003).
54. The Kenai Moose Range was established in 1941 through an Executive Order by President Franklin D. Roosevelt. Id. The Refuge Act, passed in 1966, established the National Wildlife Refuge System, the mission of which is to "administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish . . . resources . . ." 16 U.S.C. § 668dd(a)(1)-(2) (2000). In 1980, the Moose Range was expanded and renamed the Kenai National Wildlife Refuge pursuant to the Alaska National Interest Lands Conservation Act (ANILCA). Wilderness Soc'y, 353 F.3d at 1056.
evaluate the potential for supplementing the fishery. Before the area was designated wilderness, the Enhancement Project was not controversial, both because it was a research project and because state fish and game agencies commonly stock lakes with fish to provide recreational fishing opportunities. In other cases, there has been controversy surrounding the scientific and aesthetic appropriateness of stocking between state wildlife managers who advocate recreational fishing as a historical use of wilderness and federal wildlife managers who maintain that stocking compromises wilderness values. Such disagreement is particularly strong for instances where lakes are stocked with non-native fish species. But in this case, the sockeye salmon were native and the lake was in a wildlife refuge, which is generally accepted among refuge managers as an appropriate site for fishery enhancement.

The protected status of land encompassing the Enhancement Project was affected when Congress passed the Alaska National Interest Lands Conservation Act (ANILCA) in 1980 in order to control the management of Alaska refuge lands. Located in a fairly remote area, close to the western edge of the Kenai Peninsula (see Figure 1), Tustumena Lake is fed by clear water and glacial creeks that originate in the Harding Icefield. The lake supports several fish species, including Coho, sockeye, Chinook, and pink salmon, and rainbow trout. This area is popular with human visitors, and the Kenai region has a century-long history of commercial and recreational fishing. The unique qualities of Tustumena Lake, as well as its popularity with visitors, likely contributed to the congressional decision to make this portion of the Kenai Peninsula a wilderness area.

With its redesignation, the Enhancement Project came under federal purview. The Kenai Refuge Manager, responding to the requirements of ANILCA, notified ADF&G that special use permits would be required for all ongoing projects within the new wilderness area. As a result, the Enhancement Project underwent several structural and objective changes during the next few years, but it remained a research project operating under a special use permit for some time. ADF&G began to work

55. ENVIRONMENTAL ASSESSMENT, supra note 49, at 1–3.
57. Id.
59. ENVIRONMENTAL ASSESSMENT, supra note 49, at 3.
60. Id. at 38.
61. Id.
62. Id. at 5, 41.
63. Id. at 1.
cooperatively with USFWS to structure scientific investigations of Tustumena Lake and the fishery in order to fully address the implications

Figure 1.64

64. Id. The map provided in Figure 1 is taken from the USFWS Environmental Assessment. Note that Tustumena Lake is east of Cook Inlet. Tustumena Lake, where the fish
of the Enhancement Project.\textsuperscript{65} When the final Refuge Comprehensive Conservation Plan/Environmental Impact Statement/Wilderness Review was published in 1985, ADF&G and USFWS entered into a Memorandum of Understanding (MOU).\textsuperscript{66} The MOU entitled ADF&G to continue the Project, annually stocking 17 million sockeye salmon in Tustumena Lake in order to research the effect of stocking on native fish and on the incidence of disease within the fish population.\textsuperscript{67} The MOU also required preparation of future recommendations for stocking levels and further scientific study.\textsuperscript{68}

The Enhancement Project continued through the 1980s with little controversy. The USFWS met with ADF&G in 1989, deciding that by spring of 1993 a decision would be made to either curtail the Project or raise it to operational status with a specific long-term goal.\textsuperscript{69} Although the Environmental Assessment does not specify why this decision was requested, it is the author’s speculation that it had become evident to federal officials that the Enhancement Project was no longer serving research purposes. ADF&G requested that it become a permanent operational project, rather than a short-term research project, that would benefit the Cook Inlet fishing industry.\textsuperscript{70}

\textbf{B. The Enhancement Project Goes from Public to Private}

In the meantime, a reduced Alaska state budget necessitated curtailment of project oversight by ADF&G.\textsuperscript{71} By 1993, ADF&G contracted with the Cook Inlet Aquaculture Association (CIAA) hatchery to take over the mechanics of the Project.\textsuperscript{72} USFWS continued to issue permits to ADF&G and to hold the state responsible for the Project, but ADF&G maintained that making it operational would work well under the new contract with CIAA.\textsuperscript{73} Furthermore, ADF&G proposed that risks to the Tustumena Lake ecosystem would be minimized with a stocking rate of approximately six million fry per year.\textsuperscript{74} Although the state of Alaska maintained ultimate responsibility for the Enhancement Project, it was likely becoming apparent to USFWS that it

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\textsuperscript{65} Id.
\textsuperscript{66} Id. at 1, 3.
\textsuperscript{67} Id. at 1–2.
\textsuperscript{68} Id. at 2.
\textsuperscript{69} Id.
\textsuperscript{70} Wilderness Soc'y v. United States Fish & Wildlife Serv., 353 F.3d 1051, 1057–58 (9th Cir. 2003).
\textsuperscript{71} ENVIRONMENTAL ASSESSMENT, supra note 49, at 2.
\textsuperscript{72} Id.
\textsuperscript{73} Id.; Wilderness Soc'y, 353 F.3d at 1057.
\textsuperscript{74} ENVIRONMENTAL ASSESSMENT, supra note 49, at 2.
was no longer research-oriented, and had become operational exclusively for the benefit of fishing interests, both commercial and recreational.

Additional information about CIAA is useful for understanding this case. CIAA is a private, nonprofit corporation that provides salmon enhancement work throughout the Cook Inlet region. It has two major funding sources: the first is a self-imposed two percent tax on the annual salmon harvest funded by the fishermen of Cook Inlet; the second is the revenue from harvesting fish produced by CIAA in excess of site-specific stocking needs and CIAA common property harvest. The mission of CIAA is fourfold. The Association exists to: (1) protect self-perpetuating salmon stocks and the habitat upon which they depend; (2) rehabilitate self-perpetuating salmon stocks; (3) rehabilitate salmon habitat and (4) maximize the value of the Cook Inlet... common property salmon resource by applying science and enhancement technology to supplement the value attained from protection and habitat rehabilitation of self-perpetuating salmon stocks. These goals are commensurate with fishery research, but the organization's primary interests are also quite closely aligned to supporting the both the recreational and commercial fishing industries.

C. The Enhancement Project Permit is Challenged

In 1994, the USFWS Regional Director contacted the ADF&G Commissioner in order to request an evaluation of the Enhancement Project's current status, as well as its future. The director voiced concerns regarding the project, and he recommended that an evaluation under the National Environmental Protection Act (NEPA) would be timely. In particular, the director highlighted the possibility that the Project could be a violation of both the Wilderness Act and ANILCA, particularly if there were indications that it threatened a unique wilderness area and salmon habitat merely for the benefit of CIAA and the commercial fishing industry.

In response, CIAA prepared a draft Environmental Assessment (EA) for review by the USFWS in 1995, which, after initial review, was

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75. Id.
76. Id. at 2–3.
77. Id.; see also the CIAA webpage, at http://www.ciaanet.org/ (last visited Dec. 20, 2004).
78. Id.
79. Id.
80. Wilderness Soc'y v. United States Fish & Wildlife Serv., 353 F.3d 1051, 1057–58 (9th Cir. 2003).
jointly issued as a draft by both organizations in 1997. This document addressed the Regional Director's concerns over the Enhancement Project, and the USFWS also issued a separate document concluding that any risks could be minimized by applying mitigation measures. The future plaintiff Wilderness Society was among the public parties submitting an opinion on the EA during the 45-day comment and review period. In August of 1997, despite objections raised by public comments, the final EA was issued by the USFWS. Additionally, the USFWS released a “Mitigated Finding of No Significant Impact” (FONSI), which concluded that, with proper mitigation measures, the Project would have negligible environmental consequences for Tustumena Lake, and that the USFWS had administrative discretion sufficient to grant the special use permit. Following this, the USFWS continued to issue annual special use permits for CIAA to implement the Enhancement Project in conjunction with ADF&G.

The Wilderness Society did not challenge the EA's characterization of the Project's physical and environmental impacts. The organization did, however, challenge its compatibility with requirements for wilderness management under the Wilderness Act and for refuge management under ANILCA. According to the Wilderness Society, the USFWS did not have discretion to grant the special use permit because of, among other reasons, the Wilderness Act's ban on commercial enterprise. The USFWS had considered this issue after the Wilderness Society raised it during the EA comment period, but the agency relied upon a Wilderness Act Consistency Review produced by the Department of the Interior that addressed this concern. According to Interior, "under present law, the

82. Wilderness Soc'y, 353 F.3d at 1058.
83. Id. In fact, the Wilderness Society urged USFWS to abandon the Enhancement Project altogether.
84. ENVIRONMENTAL ASSESSMENT, supra note 49, at 34; U.S. FISH & WILDLIFE SERV., MITIGATED FINDING OF NO SIGNIFICANT IMPACT: TUSTUMENA LAKE SOCKEYE SALMON ENHANCEMENT PROGRAM 1 (1997). The EA issued by USFWS addressed three alternative ways in which the Enhancement Project might or might not have been allowed to continue. ENVIRONMENTAL ASSESSMENT, supra note 49, at 36–37. The alternatives included a cessation of the project altogether, continuation of the project at its current rate of stocking six million fry per year, and an inflated project in which many more fry would be released. Id. The final alternative was dismissed from full consideration. Id. at 37. The EA addressed several potential problems that could be encountered as a result of the project. Considerations included environmental consequences such as increased human traffic in the wilderness area, increased fishing downstream, and conflicts with existing wildlife. Id. at 45–48. These findings appear complete and have not been challenged in court.
85. Wilderness Soc'y, 353 F.3d at 1058.
The legal considerations of Interior's review will be addressed in Section III B of this Note. At this point it is sufficient to assume that USFWS had considered both the environmental and legal consequences of the Enhancement Project. The negligible environmental impacts of the Project dismissed in the FONSI have not been challenged. Nevertheless, the Wilderness Society and the Alaska Center for the Environment commenced suit in 1998. They charged that USFWS violated the Wilderness Act by improperly managing the wilderness values of Lake Tustumena and allowing CIAA's Enhancement Project to exist as a commercial enterprise within the wilderness.

III. WILDERNESS SOCIETY v. USFWS

A. Procedural History: District Court and Ninth Circuit's Initial Holdings

The Wilderness Society and the Alaska Center for the Environment (together, "Wilderness Society") used the Administrative Procedure Act (APA) to raise three initial claims against USFWS in their complaint requesting both injunctive and declaratory relief.\footnote{Id.} Arguing that the Enhancement Project violated the Wilderness Act, ANILCA and NEPA, the suit posed three questions to the court: (1) whether the Enhancement Project interfered with the "natural conditions" or "wilderness character" of the Kenai National Wildlife Refuge and the Kenai Wilderness; (2) whether the Enhancement Project was a "commercial enterprise" within the wilderness; and (3) whether ANILCA implicitly prohibits aquaculture programs in wilderness areas.\footnote{Id.}
The first two issues involved statutory interpretation of specific language in the Wilderness Act. In its analysis, the district court employed the two-step *Chevron* test in order to determine whether the USFWS interpretation was within the window of discretion delegated to agencies by Congress under the Wilderness Act. Addressing the first issue, the district court held that the “wilderness character” and “natural conditions” descriptions found in the Act are broad, and may confer different meanings to different people. Because of this alleged ambiguity, the district court proceeded to the second step of *Chevron*, finding USFWS’s construction of the statute to be reasonable and thus entitled to deference.

Analyzing the second issue, the district court addressed whether the Enhancement Project was a commercial enterprise that should be banned from the Kenai Wilderness, again using *Chevron* analysis. Citing a lack of statutory or judicial interpretations of the term “commercial enterprise,” the court concluded that the agency had sufficient discretion to determine that the project did not fall within the Wilderness Act’s categorical ban. The court discussed the facts surrounding the Enhancement Project, and determined the following: CIAA is a nonprofit corporation; the fry benefit not only commercial fishermen but recreational users as well; CIAA has assumed responsibility for a state-run operation over which the state of Alaska retains considerable influence; and commercial benefits occur outside the refuge and years after stocking. The district court also sympathized with the Wilderness Society’s opposite interpretation of the same facts, conceding that CIAA is strongly influenced by the commercial fishing industry, that harvesting of the stocked salmon benefits primarily commercial fishermen, and that the stocking activities do take place in the wilderness. In the end, however, the court concluded that USFWS had sufficient discretion to

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and rehabilitation activities within national forest wilderness and national forest wilderness study areas designated by this Act.

§ 3203(b).

90. *Wilderness Soc’y*, No. A98-0409 at 8. *Chevron* announced the current doctrine used to determine the amount of judicial deference owed to an agency’s interpretation of a statute it is charged with administering. The first step of *Chevron* analysis directs a reviewing court to examine the language of the statute in question. If the language is clear, it controls; if it is ambiguous, the court engages in the second *Chevron* step, an analysis of the agency’s interpretation. *Chevron* directs a court to defer to any agency interpretation that is not unreasonable. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984).


92. *Id.* at 9–10.

93. *Id.* at 18.

94. *Id.* at 20.

95. *Id.* at 19–20.
determine that CIAA was not conducting a commercial activity within the wilderness, and to issue the special use permit. 96

The district court addressed the third question – whether ANILCA prohibits aquaculture programs in wilderness areas – purely as a question of law. 97 In doing so, the court relied solely on its own interpretation of the statutory language and legislative history of ANILCA without referring to the facts of the case. 98 The court held that the language in the statute did not explicitly prohibit USFWS from permitting fishery enhancement projects in wilderness areas. 99 Next, the court analyzed whether the legislative history behind ANILCA implicitly prohibited aquaculture in the wilderness. 100 Finding the legislative history inconclusive, the district court held that the Enhancement Project was permissible, particularly as it was conducted with the consent of the Secretary of the Interior following NEPA review. 101

When the case was brought to the Ninth Circuit on appeal, the Wilderness Society shifted its focus exclusively towards the first two issues of wilderness and refuge use restrictions, dropping its earlier third claim that the Enhancement Project was prohibited by ANILCA. Three questions of central importance to the Wilderness Society, however, remained. 102 First, whether a commercial fisheries program would violate the Wilderness Act’s mandate to maintain the “natural conditions” that are integral to the “wilderness character” of a wilderness area. 103 Second, whether the Enhancement Project violated the Wilderness Act stipulation that there shall be no “commercial enterprise” within any wilderness area. 104 And finally, whether the Enhancement Project was compatible with the National Wildlife Refuge Administration Act, an issue that the Wilderness Society had originally posed but that was not addressed by the district court. 105

On appeal, and over a strong dissent, the Ninth Circuit affirmed the district court’s ruling. The appellate court’s analysis began by addressing the level of deference owed to USFWS’s decision to issue a special use permit. 106 In the time between the district court’s opinion and the appeal, the Supreme Court had modified the approach to agency deference in

96. Id. at 20.
97. Id. at 8.
98. Id. at 8, 20.
99. Id. at 21.
100. Id. at 22.
101. Id. at 25.
102. Id. at 7.
103. Id.
104. Id.
105. Id.
106. Wilderness Soc’y v. United States Fish & Wildlife Serv., 316 F.3d 913, 921 (9th Cir. 2003).
United States v. Mead Corp.\textsuperscript{107} The Mead approach instructs a court to first examine an agency's action to determine whether it was the type of agency decision that Congress envisioned to "carry the force of law."\textsuperscript{108} If it is, the court will apply Chevron deference to the agency decision, since Chevron deference is highly deferential and therefore appropriate for a persuasively decided management act.\textsuperscript{109} In this case, the court found that Congress delegated to USFWS the authority to manage the Kenai Wilderness, that the notice-and-comment procedure followed under NEPA review gave the decision more strength, and that the decision to permit the Enhancement Project was compatible with the USFWS's Final Plan for the Refuge.\textsuperscript{110} These factors convinced the original panel that the USFWS decision at least had the "power to persuade" and should merit the respect necessary to qualify for Chevron deference.\textsuperscript{111}

Having determined that the two-step Chevron test was appropriate for analysis of both the Wilderness and Refuge Acts, the court went on to conclude that the language of each statute is materially ambiguous.\textsuperscript{112} Finding it reasonable, the court deferred to USFWS's interpretation that the Enhancement Project was consistent with the Wilderness Act's requirement for "natural conditions" to be maintained in the wilderness.\textsuperscript{113} In addition, the court determined that the requirements of the Refuge Act – to ensure compatibility with the major purposes for which the refuge was established, such as continuing natural diversity of wildlife – were also met by the USFWS decision.\textsuperscript{114}

Finally, the court addressed the question of "commercial enterprise." This portion of the holding is the part that would ultimately be overturned by the Ninth Circuit's en banc opinion. The original panel found two ambiguities in the language of the Wilderness Act, namely the

\textsuperscript{107} 533 U.S. 218 (2001).
\textsuperscript{108} Wilderness Soc'y, 316 F.3d at 921.
\textsuperscript{109} It is unclear from the case law exactly when a court should apply Mead versus Chevron deference. The Supreme Court recognized in Mead that "the limit of Chevron deference is not marked by a hard-edged rule." 533 U.S. at 237 n.18. In this case, the Ninth Circuit admitted that the court was "certain of only two things about the continuum of deference owed to agency decisions: Chevron provides an example of when Chevron deference applies, and Mead provides an example of when it does not." Wilderness Soc'y, 316 F.3d at 921. This picture becomes even murkier considering that the court finds the language ambiguous in this instance, and subsequently finds the language unambiguous, or "clear" upon rehearing. See Wilderness Soc'y, 353 F.3d at 1062. While one might argue that such disagreement reveals that the language was ambiguous by definition, the court confidently applies Chevron in the first instance and Mead in the second. One conclusion in which the author is confident is that there is overlap between these two standards for agency deference.
\textsuperscript{110} Wilderness Soc'y, 316 F.3d at 922.
\textsuperscript{111} Id.; see Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).
\textsuperscript{112} Wilderness Soc'y, 316 F.3d at 922–925.
\textsuperscript{113} Id. at 925.
\textsuperscript{114} Id. at 927.
The court could not definitively determine whether the Enhancement Project was “within” the wilderness since commercial harvesting occurred downstream of the wilderness area, although eggs were collected and fry were stocked inside its boundaries of Lake Tustumena. The court questioned the competing facts surrounding the commercial nature of CIAA and the Enhancement Project, since CIAA could be characterized as a nonprofit that benefited recreational as well as commercial users, and the project was instituted by the state of Alaska. Ultimately, the court found that, given the ambiguity of the Wilderness Act language, USFWS’s interpretation that the Enhancement Project was not a commercial enterprise within the wilderness was permissible. Applying the principles of agency discretion led the court to uphold the USFWS special use permit.

The original Ninth Circuit holding was followed by a strong dissent that took issue with the majority’s characterization of the Wilderness Act as ambiguous, arguing instead that in light of the preservationist mandate of the Wilderness Act its language couldn’t be more plainly clear. According to Judge Betty Fletcher, “the majority’s ambiguity analysis is deeply flawed, and seeks to hold the English language to an unattainable standard of clarity....” Her dissent focused on the purposes of the Wilderness Act. She explained that its language is abundantly clear in requiring that wilderness be preserved in its “natural condition” and so a failure to “allow natural processes to dominate” is unacceptable, and the potential ecological risk posed by the Enhancement Project should not be allowed. Fletcher also saw no ambiguity in describing the Project as a commercial enterprise. She explained that the egg harvesting and fry return indisputably occurred within the wilderness boundary, and more than eighty percent of the fish produced were harvested by commercial fishermen. Given that result, she argued that the fact salmon were eventually harvested outside the wilderness did not escape the plain language of the Act’s ban on commercial enterprise. She also concluded that neither ANCILA nor the Refuge Act provided USFWS with the authority to run fishery enhancement projects in a wilderness

115. Id. at 929.
116. Id.; See Figure 1.
117. Wilderness Soc’y, 316 F.3d at 929.
118. Id. at 929–30.
119. Id.
120. Id. at 930.
121. See id. at 933.
122. Id. at 935.
123. Id.
area if the project is inconsistent with the Wilderness Act and is not specifically permitted under either refuge statute.\textsuperscript{124}

\textbf{B. The Ninth Circuit en banc}

The Ninth Circuit \textit{en banc} reheard \textit{Wilderness Society v. USFWS} a year later, reversing the panel decision with an entirely new assessment of agency deference and with the application of a new "purpose and effect" test that reflects the preservationist mandate of the Wilderness Act. The \textit{en banc} decision departed from the original decision in two important respects. First, it held that the USFWS decision would not merit agency deference under either a \textit{Chevron} or a \textit{Mead} analysis, and illustrated this conclusion by applying both tests in the decision.\textsuperscript{125} Second, following its own analysis, it found that the Enhancement Project was a commercial enterprise that violated the Wilderness Act.\textsuperscript{126}

1. No deference to the USFWS decision.

The original Ninth Circuit opinion conceded that, under \textit{Mead}, the decision to grant a special use permit was not clearly a rule made with the force of law. However, it thought a high level of deference should be given to such decisions, and thus \textit{Chevron} deference appeared most suitable.\textsuperscript{127} In contrast, the \textit{en banc} decision initially held that the Wilderness Act was unambiguous under step one of \textit{Chevron}, and so it was not required to analyze USFWS's interpretation. Because the \textit{en banc} court determined that the ban on commercial enterprise, based on the language, purpose, and structure of the Act, was unambiguous, and because it found the Enhancement Project to be a prohibited "commercial enterprise," the court afforded no deference the USFWS decision to grant a special use permit.

The court strengthened its conclusion by demonstrating that the USFWS decision would also have been rejected if the court had used the \textit{Mead} test.\textsuperscript{128} The court explained that if it had found the Act ambiguous, it would have applied \textit{Mead} and \textit{Skidmore} factors to determine how much respect the agency decision merited rather than proceeding immediately to the \textit{Chevron} test.\textsuperscript{129} Although a \textit{Mead} analysis would

\textsuperscript{124} Id. at 937-38.
\textsuperscript{125} Wilderness Soc'y v. United States Fish & Wildlife Serv., 353 F.3d 1051, 1062, 1069 (9th Cir. 2003).
\textsuperscript{126} Id. at 1067, 1069. Here there is strong similarity in reasoning between the \textit{en banc} opinion and Judge Fletcher's earlier dissent.
\textsuperscript{127} Wilderness Soc'y v. United States Fish & Wildlife Serv., 316 F.3d 913, 922 n.5 (9th Cir. 2003).
\textsuperscript{128} Id. at 1067.
\textsuperscript{129} Wilderness Soc'y, 353 F.3d at 1062.
PRESERVATION PREVAILS

typically have entitled the USFWS decision to at least some deference from the court, the court concluded from these factors that the decision did not merit any deference.130

It is significant to note that this alternate holding is unnecessary, given the court's initial holding that the Wilderness Act was unambiguous.131 Perhaps the en banc court included it in order to avoid Supreme Court review, as well as to bolster confidence in its ultimate conclusion in the eyes of critics who might doubt the certainty of the ban on commercial enterprise.132 By explicitly applying both tests, the court ensured that another court could not interpret the Wilderness Act's ban on commercial enterprise differently simply by applying a different level of agency deference.

2. The Enhancement Project was a commercial enterprise.

The court's evaluation of whether the Enhancement Project violated the commercial enterprise prohibition was complicated due to the relatively benign nature of the project. The Ninth Circuit had no guidance from the Supreme Court that could aid in its assessment of "commercial enterprise" when the activity has mixed purposes and effects, some of which are benign, and some of which are contrary to the intent of the Wilderness Act.133 In the absence of such guidance, the court adopted a test that would evaluate both the purpose and the effect of a challenged activity in order to determine whether a project is a "commercial enterprise" prohibited by the Act.134 As the court remarked, the "test looking to 'purpose and effect' is persuasive here because it gets to the heart of what has occurred in the wilderness."135

The court first concluded that the Enhancement Project neither detracted from nor enhanced wilderness values. The court observed, "[s]urely this fish stocking program, whose antecedents were a state-run research project, is nothing like building a McDonald's restaurant or a Wal-Mart store on the shores of Tustumena Lake."136 Likewise, the opinion noted that, by comparison, this situation was not as clearly antithetical to the ban on commercial enterprise as were others previously litigated before the court such as where commercial fishing was being conducted in the waters of Glacier Bay, inside the wilderness

130. Id. at 1069. In making its decision, the USFWS provided a public comment period for the EA, and asked for a legal opinion from the solicitor general of the Department of Interior. The en banc court held that neither mandated court deference.

131. See id. at 1067.

132. Id.

133. Id. at 1063.

134. Id. at 1064.

135. Id.

136. Id. at 1062.
boundary. On the other hand, the court observed that the Enhancement Project had no elements that contributed to wilderness values—at best, it only negligibly interfered with them.

The *en banc* court then adopted a new test for the purpose of evaluating activities such as the Enhancement Project that have a mixed purpose and effect. The test attempts to "get[] to the heart" of what the activity is and does by analyzing the overriding purpose and effect of the activity in question. In this case, the court applied the test through a qualitative discussion of the circumstances surrounding the Enhancement Project. The court first analyzed what it considered to be the primary purpose of the Project. It recognized the existence of incidental benign purposes, but considered the principal aim of the Project to be stock enhancement for the commercial fishing industry. Next, the court examined the primary effect of the Project, and held that it was to benefit commercial fishermen. The court came to each of the above conclusions without providing a specific standard for determining either "purpose" or "effect," and in doing so, it overlooked reasonable arguments that USFWS might have asserted that would characterize each differently.

After so characterizing the Project's "purpose and effect," the court went on to summarily dismiss the arguments posed by USFWS that the Project was benign to the wilderness area and thus not a prohibited commercial enterprise. The court explained that CIAA's non-profit status did not alter the fact that it was supported by and provided benefit to the commercial fishing industry, and it did not matter that harvesting occurred outside the wilderness boundary. It was enough that substantial and essential parts of the project occurred within the wilderness.

The court's holding is important not only because it reaffirms the Wilderness Act's ban on commercial enterprise, but also because it suggests that there is an automatic presumption against activities associated with commercial interests, even if such activities are benign.

138. See Wilderness Soc'y v. United States Fish & Wildlife Serv., 353 F.3d 1051, 1062–63 (9th Cir. 2003).
139. *Id.* at 1064.
140. *Id.* at 1064–65.
141. *Id.* at 1065.
142. *Id.*
143. *Id.*
144. *Id.* at 1065–67.
145. *Id.* at 1066. Although the state had contracted with CIAA, the court recognized that the contract took the project out of state control such that it could no longer be fairly characterized as research-oriented. The state of Alaska also runs cruise ship and oil exploration operations, so it was abundantly clear that the State can be involved in commercial pursuits. *Id.*
146. *Id.*
This newly stated presumption comports with the preservationist mandate that authors of the Wilderness Act attempted to include in the Act at its inception, as will be discussed in the following section.

IV. MANAGING WILDERNESS UNDER A PRESERVATIONIST MANDATE

This section places the Ninth Circuit's holding in *Wilderness Society v. USFWS* in context with the mandate for preservation that is emphasized in the Wilderness Act. Section A argues that, compared with other types of federal lands, wilderness is unique because of the preservationist mandate that was incorporated in the Wilderness Act and that continues to be advocated for by contemporary supporters. With its emphasis on preservation as a priority, the Ninth Circuit's ruling is particularly important now, as outside pressures—including impacts from visitors and complex management decisions—provide potential threats to wilderness lands. Section B discusses the court's evaluation of the Enhancement Project specifically, and demonstrates how the holding is consistent with the Wilderness Act's presumption against commercial enterprise. Section C describes how the Ninth Circuit's “purpose and effects” test can be applied to various management decisions agencies might face involving potentially commercial and mixed-use activities. By applying the Ninth Circuit's test, agencies will be able to ensure that wilderness preservation remains a top priority.

A. Preservationism is Unique to Wilderness Management

The Ninth Circuit’s *en banc* decision respects the unique preservationist mandate of the Wilderness Act, and it holds that agency management of wilderness must comport with it. Compared with other federal lands set aside for public use, such as national parks and wildlife refuges, wilderness areas have significantly more restrictive use requirements.\(^{147}\) National parks, for instance, may contain roads and commercial concessions that facilitate visitor access and a more comfortable experience for tourists. Similarly, wildlife refuges have management plans that are directed, not towards preservation alone, but towards maintaining a healthy habitat for specific species living within the refuge. In contrast, wilderness areas have but one goal—they are to be preserved as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain."\(^{148}\) Wilderness, then, is a place where preservation trumps management techniques designed to protect wildlife or facilitate tourism.

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The holding in *Wilderness Society v. USFWS* recognized this unique characteristic.

Further comparison is helpful. Although the USFWS decision to grant a special use permit was inappropriate for a wilderness area, it would not have been beyond agency discretion for management of a wildlife refuge. For example, the purpose of the earlier Kenai Refuge enumerated in ANILCA was to "conserve fish and wild-life populations and habitats in their natural diversity." The USFWS issued a Compatibility Determination accepting that "the project cannot... be considered as supporting Refuge purposes," but concluding that the fishery enhancement was not "incompatible with" Refuge purposes. The district court and the original Ninth Circuit decisions aptly analyzed agency deference in the context of refuge management, but not with consideration of the Wilderness Act's particular mandate for wilderness. USFWS might have been able to approve a special use permit under the Refuge Act if Lake Tustumena were not also in a wilderness area, but the *en banc* decision did not address this claim and neither did the original holding's dissent concede this point. In the end, what was most important to the court was that the Enhancement Project was a prohibited commercial enterprise, and there was no room for agency deference given the preservationist mandate of the Wilderness Act.

The Ninth Circuit's emphasis on wilderness preservation may be a reaction to increasing pressure on federal land management that has grown apparent over the last ten years or so. National park visitation numbers have exploded, as more and more people are coming out to visit their national splendor. One unfavorable consequence, however, is that the parks have become sites of traffic congestion and smog. We do not know for certain if the early pioneers of land conservation knew that the parks would eventually prove to be as popular as they are today. They did have the foresight, however, to know that some areas should be kept out of commerce.

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150. *Wilderness Soc'y v. United States Fish & Wildlife Serv.*, 316 F.3d 913, 920 (9th Cir. 2003).

151. Plaintiffs likely dropped their ANILCA violation claim on appeal for this reason. See supra note 89 and accompanying text.

152. *Wilderness Soc'y*, 316 F.3d at 920; *Wilderness Soc'y*, 353 F.3d at 1069.

153. In 2003, there were 413,865,726 visits made to National Parks. PUBLIC USE STATISTICS OFFICE, NA T 'L PARK SERV., VISITATION DATABASE REPORTS, available at http://www2.nature.nps.gov/stats/ (accessible by following the “Visitation” link to the “Visitation Databases” link) (last visited Dec. 20, 2004).

154. For instance, in 2004, there were thirteen days when an ozone health advisory was issued in Joshua Tree National Park, and thirty-five days in Sequoia/Kings Canyon National Park. NAT'L PARK SERV., 2004 OZONE HEALTH ADVISORY PROGRAM SUMMARY, available at http://www2.nature.nps.gov/air/data/2004_O3AdvisSum.cfm (last visited Dec. 20, 2004).
in a more primitive state than the national parks. Within a broader land management system, wilderness areas are unique preservation resources since they allow primitive recreation yet prohibit more general management techniques that might also place their "primeval character" in jeopardy. Given the spectacular popularity of national parks, the preservation mandate for wilderness becomes even more critical as one can foresee increased public pressure to make more and more federal land more easily accessible.

Over the past forty years, the Wilderness Act has enjoyed some great successes, but the Act is currently facing potential losses. Today, agencies managing wilderness areas face challenges including the recognition of increasingly complex, technical management issues knowledge of ecosystem science and its uncertainties, changes in wilderness philosophy, and increased workloads for fewer managers of the wilderness. Ensuring that wilderness continues to be managed with a preservationist mandate foremost is only possible if wilderness use is strictly limited to enumerated activities including recreation and conservation. The Ninth Circuit's refusal to question the ban on commercial enterprise further works to ensure that no conflicting uses creep into wilderness areas. The decision of the Ninth Circuit to hear this case en banc may not have been a conscious product of the challenges wilderness faces today, but the holding most certainly reflects the views of wilderness supporters that these lands are in need of protection from external forces, including commercial enterprise.

The Wilderness Act was profoundly shaped by the theories and writings of mid-twentieth century preservationists — it was a response from environmentalists who saw that our other federal public lands were being short-changed on preservationist management prior to its enactment. Congress may not have had the clarity of prediction to know just how popular our national parks would become by the millennium, but the district court was wrong to say that the Wilderness Act was a

155. 16 U.S.C. § 1131(c) (2000) ("wilderness . . . has outstanding opportunities for solitude or a primitive and unconfined type of recreation . . . ").
158. Modern preservationists continue the tradition of bringing wilderness issues to the legislature. Terry Tempest Williams, a native of Utah, author, and advocate for the preservation of the American western wilderness, approached the Senate Subcommittee on Forest & Public Lands Management in 1995 to speak against a bill unfriendly to the Utah wilderness. She asked Senators, [d]id our country's lawmakers who held the vision of national parks in the nineteenth century dream of this kind of hunger? In the end of the twentieth century, imagine what the sanctity of wilderness in Utah might hold for us as a people at the turn of the twenty-first century?

legislative compromise.\textsuperscript{159} From the writings and speeches of its authors, the intent of the Act is clear.\textsuperscript{160} The Ninth Circuit's holding that the Enhancement Project was a prohibited commercial enterprise regardless of its minimal impact recognized that intent, strengthening the argument that courts should interpret the Wilderness Act to carry explicitly a mandate of wilderness protection and preservation.

\textbf{B. The Presumption Against Commercial Enterprise}

Finding the Enhancement Project to be a commercial enterprise prohibited under the Wilderness Act is a prime example of the protectionist mandate for wilderness. The district court and the original Ninth Circuit decisions placed significant emphasis on whether the Enhancement Project was compatible with preserving "natural conditions" and the "wilderness character" of the Kenai Wilderness. The \textit{en banc} holding, however, disregards the effect of the Enhancement Project on wilderness character. The perceived commercial enterprise is taken as an automatic signal to ban the project regardless of its impact. This unquestioning application of the prohibition on commercial enterprise is an important preservationist tool.

Although the Enhancement Project was concededly designed to augment commercial fishing returns, there remained reasons to suppose that it might have also benefited the Lake Tustumena salmon population.\textsuperscript{161} Whether or not the Enhancement Project exists, the commercial fishing presence in Cook Inlet likely lowers the numbers of naturally occurring sockeye salmon.\textsuperscript{162} Permitting the Enhancement Project, therefore, could return the salmon population to a number closer to that which would naturally occur if there no human presence at all in the Kenai region.\textsuperscript{163} The USFWS Environmental Assessment discussed several potential risks of the Enhancement Project, and concluded that, with mitigation measures, it is essentially benign. There is little competition to other fish in the waters of Lake Tustumena, naturally occurring salmon do not suffer from the competition, and traffic on the

\begin{itemize}
  \item \textsuperscript{159} Wilderness Soc'y v. United States Fish & Wildlife Serv., No. A98-0409, slip op. at 8 (D. Alaska Mar. 28, 2000).
  \item \textsuperscript{160} As Judge Fletcher wrote in her dissent, "[t]he language at issue in the Wilderness Act is not ambiguous unless we find ambiguity simply because the entire English language contains inherent ambiguity. In fact, as statutes go, the Wilderness Act is remarkably explicit." \textit{Wilderness Soc'y}, 316 F.3d at 933. Recall that the purpose of the Wilderness Act was "to assure that an increasing population . . . does not occupy and modify all areas within the United States . . . leaving no lands designated for preservation and protection in their natural condition . . . ." 16 U.S.C. § 1131(a) (2000).
  \item \textsuperscript{161} \textit{ENVIRONMENTAL ASSESSMENT}, supra note 49, at 3. The CIAA had a self-described mission to "maximize the value of the Cook Inlet . . . common property salmon resource . . . ."
  \item \textsuperscript{162} Id. at 23.
  \item \textsuperscript{163} Id.
\end{itemize}
shores of Lake Tustumena is not significantly increased given that private in-holdings were already present in the area where the salmon eggs are captured.\textsuperscript{164} Genetic modification of the hatchery-raised salmon was also considered, but the EA concluded that it was not a critical factor.\textsuperscript{165} From an ecological standpoint, the FONSI produced by USFWS sufficiently addressed and dismissed harm to the Kenai environment and wildlife as a result of the Enhancement Project.

Furthermore, despite the Ninth Circuit's holding, there remained reasons to question whether the Enhancement Project was definitively a "commercial enterprise" within a wilderness area. CIAA is a nonprofit over which the state of Alaska and ADF&G retain significant influence, and so, theoretically, its commercial role is questionable.\textsuperscript{166} Furthermore, any commercial harvest occurs outside the wilderness boundary and involves full-grown adult salmon, years after the fry are released under the Enhancement Project.\textsuperscript{167} Other facts, nevertheless, support the conclusion that the Enhancement Project was indeed a commercial enterprise within wilderness. For example, the same fishermen who make up the CIAA harvest the largest proportion of salmon.\textsuperscript{168} Indeed, the existence of such conflicting facts might suggest that judicial deference to agency determinations would be appropriate, particularly given the benign environmental consequences of the Project. Such was the reasoning of the district court and the original Ninth Circuit panel majority.

Nevertheless, the Ninth Circuit \textit{en banc} was swayed by what it saw as the clear preservationist mandate of the Wilderness Act. Given that mandate, even though the USFWS judged the Enhancement Project to be benign, deference was inappropriate. Neither the courts nor federal agencies are entitled to consider an activity's impact on the ecology of a wilderness area when determining whether to allow a project with even minimal commercial purpose or effect.

The court saw the Wilderness Act's general ban on commercial activity as precluding the sorts of balancing decisions common in managing other types of federal lands. For example, if the goal of the Wilderness Act were that wilderness areas should be actively managed in a manner promoting environmental or wildlife health, as in wildlife refuges, the court would have owed deference to the USFWS decision. After all, USFWS, not the court, is the expert on what management practices work best for Chinook salmon. However, with its strong preservationist interpretation, the court held that the Wilderness Act

\textsuperscript{164.} \textit{Id.} at 43-44.  
\textsuperscript{165.} \textit{Id.} at 44.  
\textsuperscript{166.} \textit{Id.}  
\textsuperscript{167.} \textit{Id.}  
\textsuperscript{168.} \textit{Id.}
prohibits all commercial enterprise in wilderness areas, regardless of the impact on the area, whether it is negative, benign, or even positive. Any commercial enterprise would constitute human interference in the wilderness, which is intended to be a place where man is a “visitor who does not remain,” and with the “imprint of man’s work substantially unnoticeable.”

Even if the Enhancement Project held some benefit for the Chinook salmon, it would still be an intrusion of man’s work in the wilderness.

Active public lands management may intend to improve land, or even to restore natural processes in the wilderness. The Wilderness Act, however, recognizes that management may be plagued by uncertainty, such as doubt surrounding the long run genetic changes imposed by the Enhancement Project. In light of such risks, the Act places some lands outside the province of general land management techniques. By changing the rules for wilderness areas, the Act hopes to avoid potential conflicts and the slippery slope by which activities that are a mix of benign and commercial overtones might begin to creep into the wilderness system.

C. Protectionist Management Decisions

Despite this clear mandate for preservation, agencies responsible for wilderness lands still face difficult regulatory decisions. Importantly, the Ninth Circuit’s “purpose and effect” test can be used as a tool by such agencies to evaluate decisions in three types of situations. First, when purely commercial activities are proposed in the wilderness, this test easily demonstrates how the activity violates the Act’s ban on commercial enterprise. Second, when agencies are faced with tougher questions regarding mixed-character activities such as the Enhancement Project, the “purpose and effect” test provides guidance previously missing that will ensure that wilderness preservation prevails. Finally, the “purpose and effect” test will support agency action in situations where an activity—despite its overwhelmingly commercial overtones—might be an appropriate or even necessary wilderness management tool.

1. Clearly Commercial Activities

The “purpose and effect” test was designed to assist federal land managers in determining the appropriateness of an activity with a mixed character of commercial and benign characteristics (“mixed character activity”). In situations where there is an unquestionably commercial enterprise operated in the wilderness, then, the “purpose and effect” just

170. ENVIRONMENTAL ASSESSMENT, supra note 49, at 44.
makes the decision even more clear. An example of such a case in which the test would have been helpful is *Alaska Wildlife Alliance v. Jensen*, where the court found that commercial fishing in Glacier Bay, which is a wilderness area, was clearly subject to the ban on commercial enterprise.\textsuperscript{171} Had the test been as clearly articulated as it was in *Wilderness Society*, the agency evaluating the fishing industry's operations in *Jensen* would likely have easily concluded that the purpose was the support commercial fishing, that the effect was to allow commercial fishing in a wilderness area, and thus prohibited.

2. Mixed Character Activities

As stated above, the "purpose and effect" test should prove most useful for agencies to evaluate management decisions for mixed character activities in wilderness areas. As the Ninth Circuit stated in justifying the test, its aim is to identify the common-sense "heart" of what the activity is, and what effect it has.\textsuperscript{172} With its clear articulation in *Wilderness Society*, the "purpose and effect" test should offer the extra guidance agencies need to make the proper initial decision and avoid needless litigation. It is important to note that in this case USFWS was not at all reckless in its determination to grant a special permit. It consulted attorneys at the Department of the Interior, and the resulting memorandum supported permit issuance. Had USFWS been guided by the "purpose and effect" test, however, it might have denied the Enhancement Project permit and avoided litigation.

The potential operational value of the "purpose and effect" test can be seen by applying it retroactively to other cases involving mixed-character activities. For example, in *Sierra Club v. Lyng*, the case from which the Ninth Circuit adopted the "purpose and effect" test, the court examined a Forest Service program to control infestations of the Southern Pine Beetle in southeastern wilderness areas.\textsuperscript{173} A key issue in the case was whether the challenged program primarily protected commercial timber interests, and therefore violated the ban on commercial enterprise, or instead qualified under the Wilderness Act as a wilderness management activity necessary to control insects.\textsuperscript{174} Although the court used the language "purpose and effect," its analysis was not as

\textsuperscript{171} 108 F.3d 1065, 1069 (9th Cir. 1997).

\textsuperscript{172} Wilderness Soc'y v. United States Fish & Wildlife Serv., 353 F.3d 1051, 1064 (9th Cir. 2003).

\textsuperscript{173} 662 F. Supp. 40, 42 (D.D.C. 1987). The court in *Lyng* used the language "purpose and effect" but did not carefully evaluate the facts of the case under each term as was done in *Wilderness Soc'y*, where the court applied the analysis as a test. In *Lyng*, the court simply stated, "indeed the purpose and effect of the program is solely to protect commercial timber interests and private property . . . ." Id. at 40.

explicit as that in Wilderness Society v. USFWS. If the “purpose and effect” test had been more clearly presented by the court, the Forest Service could have made a more defensible management decision, directing the program focus towards beetle control and away from commercial timber interests, likely saving the agency and the Sierra Club from additional litigation.

There have been other situations where agencies could have based their management decisions on the “purpose and effect” test in order to ensure that mixed-character activities squared with guiding principles of the Wilderness Act. In Forest Guardians v. Animal and Plant Health Inspection Service, a coalition of conservation organizations sought to enjoin the Animal and Plant Health Inspection Service (APHIS) from killing mountain lions in the Santa Teresa Wilderness. 175 The APHIS predator control program aimed to protect private livestock. If the “purpose and effect” test had been applied in this case, the court’s holding, which permitted the program to continue, would likely have been the same though its reasoning would not. The test would have likely focused the court on the real issue—that is, that the Wilderness Act allows protection of pre-existing private grazing rights, but not additional commercial benefit.176 Such a distinction is important as the ranchers’ commercial interests were inevitably furthered by the predator control program. However, to the extent that the benefit exceeded that which was incidental to the necessary protection of grazing rights, aspects of the program could have been enjoined.177

3. When Commercial Enterprise Works Towards Preservation

Agencies should also be able to apply the “purpose and effect” test in a third type of situation—in instances where they believe it makes sense to conduct an activity that has commercial overtones but which is nevertheless necessary for successful wilderness management. Many have remarked that wilderness does not exist in a vacuum.178 The preservationist mandate of the Wilderness Act seeks to minimize the influence of human intervention with ecological systems in the

175. 309 F.3d 1141, 1142 (9th Cir. 2002).
177. Id. The Wilderness Act provides for the grazing of livestock to continue where it was established prior to the effective date of the Act, subject to reasonable regulations as deemed necessary by the Secretary of Agriculture.
wilderness, but at what cost? Agencies may justly fear that if they take a
do-nothing approach to wilderness management, outside forces will
degrade it. Air pollution may be checked by mountain ranges or great
distances, but it is not necessarily halted altogether, and a wilderness
boundary certainly means nothing to its dispersion. Environmental
problems are not restricted by legislated boundaries, only geographical
ones, and so it is important to consider whether the preservationist
mandate of the Wilderness Act prohibits agencies from mitigating the
effects of such problems in the wilderness.

If the commercial fishing industry were to expand greatly in Cook
Inlet and the Chinook salmon population were to be jeopardized, would
the protectionist principles of the Wilderness Act halt USFWS from
actively working towards the preservation of the salmon? Would it still
prohibit attempts to rehabilitate the fish population using measures
similar to those rejected in Wilderness Society? Again, the Ninth Circuit
has emphasized that any management decisions supporting mixed-
character activities will not merit deference if the purpose and effect is to
support commercial enterprise, even if the wilderness impacts are benign.
There is a blanket presumption against any activity with commercial
implications. The Wilderness Act does, however, contain provisions for
management necessary to control disease, fire, and insects.179 This
measure has been applied to endorse mixed-character activities in the
wilderness so long as the overriding purpose and effect is acceptable
under the Wilderness Act, such as controlling beetles in Sierra Club v.
Lyng.180 The Act recognizes that wilderness does not exist in a vacuum,
and so there is room for the management necessary for the health of the
wilderness and its wildlife. Interference beyond what is necessary to
protect the wilderness, however, is to be limited.

In such a hypothetical case, USFWS would be entitled to
administrative deference where the agency has made a well-informed
decision supporting a mixed-character activity whose purpose and effect
was to aid sockeye salmon rather than to aid the Cook Inlet fishing
industry. Under the special provisions in the Wilderness Act,
“[c]ommercial services may be performed within the wilderness areas
designated by this Act to the extent necessary for... realizing the
recreational or other wilderness purposes of the areas.”181 If the purpose
of the challenged Enhancement Project had been to re-establish natural
diversity among the salmon, and if the effect of their action were to
improve the situation of salmon in the Kenai Wilderness, the USFWS
might have successfully demonstrated that the Project was a management

tool intended to rehabilitate salmon stocks and enhance recreational fishing — a legitimate wilderness purpose. Years of research results, however, were inconclusive regarding the benefit conferred on salmon by the Project, and the lower court had determined that the program was benign to wilderness values but did not further them. This line of reasoning is not enough to satisfy the “purpose and effect” test or, in turn, the preservationist mandate of the Wilderness Act. Furthermore, benign purposes are not enough to push a mixed-character activity over the hurdle of the Ninth Circuit’s presumption against commercial enterprise.

On the other hand, in our hypothetical, USFWS would likely not be prohibited from engaging the help of a commercial entity like CIAA if the purpose and effect of its action were to protect sockeye salmon. To meet the “purpose and effect” standard, such a project would have to be necessary for realizing restoration of salmon stocks, and USFWS would need to demonstrate that protecting the salmon is consistent with the purpose of the Kenai wilderness. If both of the above requirements were met, the USFWS could have discretion to permit a future enhancement project, even if it was still maintained by ADF&G but was not designed primarily to benefit the commercial fishing industry.

It is even possible that a court could uphold a decision by USFWS to permit the Enhancement Project with CIAA as the fisheries operator benefiting the commercial fishing industry. In such a case, USFWS would need to demonstrate that the action, regardless of its commercial implications, was “necessary for realizing” the restoration of the fishery. Although this is a mixed-character activity, a reviewing court may consider such a decision as permissible under the Wilderness Act. Indeed, given limited agency resources, some cases might be most sensibly carried out with the aid of private entities. Though an entirely non-commercial management technique would be preferable under the Wilderness Act, if a mixed-character activity achieves the same purpose and is the least commercial tool available, a court should grant deference to the agency decision to use it.

Federal land management agencies walk a fine line when managing wilderness under the Wilderness Act. On the one hand, they strive to balance the rights of wilderness users, whether they are recreational fishermen, commercial fishermen with a long history in the area, backcountry hikers, or commercial guides. On the other, they are charged with maintaining a wilderness where man remains a visitor only, and the

183. 16 U.S.C. § 1133(c)(5).
forces of nature prevail. The Ninth Circuit has emphasized the preservationist mandate of the Wilderness Act in Wilderness Society v. USFWS by articulating a “purpose and effect” test that overrides administrative deference for mixed-character activities that may not directly conflict with wilderness values, but nonetheless contradict the presumptive ban on commercial enterprise.

The ultimate preservationist approach would be to prohibit any activity with a tie to commercial enterprise. Such an approach, however, would ignore the fact that carefully constrained management employing mixed character activities might effectively protect wilderness values. Courts, agencies, and Congress have agreed that wilderness does not exist in a vacuum; that wilderness has been preserved for the benefit of the people who should be allowed and encouraged to enjoy wilderness; and that effective management of this resource is necessary. The “purpose and effect” test provides a mechanism for making management decisions that focus on preserving the wilderness character of the land while accommodating the realities of federal land management.

CONCLUSION

The Ninth Circuit’s holding in Wilderness Society v. USFWS helps to ensure that that wilderness preservation will continue as envisioned by Howard Zahniser and Congress in 1964. It is consistent with and helps to strengthen the Wilderness Act’s presumption against commercial enterprise in wilderness areas—prohibiting agencies from allowing commercial uses even if they appear benign to wilderness values. On the fortieth anniversary of the Wilderness Act, this decision affirms the preservationist mandate of the Act, such that wilderness will remain one of the few places where people interfere as little as possible with natural processes. Moreover, the Ninth Circuit also gave federal agencies and the lower courts a practical test through which multi-purpose management decisions may be evaluated. The “purpose and effect” test enables decision-makers to thoughtfully examine a wilderness use and determine whether it fits as a tool for wilderness management within the context of preservation. As Congress stated in 1964, wilderness should be managed with an eye towards the enjoyment of the American people, and the ban on commercial enterprise is an important step towards preserving a portion of our lands in a natural state for the people to experience and admire.