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Parker v. United States: The Forest Service Role in Wilderness Preservation

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PARKER v. UNITED STATES: THE FOREST SERVICE ROLE IN WILDERNESS PRESERVATION

The Wilderness Act of 1964 was an important achievement in a lengthy national campaign to preserve open space. The Act set forth a procedure whereby existing government agencies would review primitive areas for recommendation as permanent wilderness. In Parker v. United States, a citizens' group successfully challenged a Forest Service decision to permit a lumber harvest on the grounds that it would have permanently destroyed the primitive character of the area. This Note discusses the provisions of the Wilderness Act, the implications of the Parker decision, the Forest Service's interpretation of Parker, and the need for further legislative action.

On September 3, 1964, four decades of effort by conservationists to create a national system of institutional wilderness culminated in the signing of the Wilderness Act of 1964, which declared it a national policy "to secure for the American people of present and future generations the benefits of an enduring resource of wilderness." The Act delegates to the Secretaries of the Interior and Agriculture major responsibility for the designation and future administration of the National Wilderness Preservation System. In the Department of Agriculture the Chief of the United States Forest Service reviews candidate areas and is responsible for recommending the extent to which they should be included in the wilderness system. In Parker v. United States, the Tenth Circuit Court of Appeals interpreted the Act's wilderness review and classification provision so as to limit Forest Service discretion to permit the development of certain potential wilderness areas. As a result, the power of the President and Congress to expand the wilderness system should receive some protection from preemptive agency action that would destroy the character of putative wilderness areas. Moreover, the Forest Service attitudes and practices condemned in Parker constitute persuasive evidence that the Service is seriously deviating from the goal of extensive wilderness protection. In light of this blemished record—only partly remedied by the decision in Parker—

Congress should enact further wilderness legislation to prevent the irreparable squandering of our national heritage of wild land.

This Note will first briefly examine the provisions of the Wilderness Act, then analyze the decision in Parker and its immediate impact. The Forest Service's plans for studying and recommending areas for wilderness classification will next be discussed and criticized in light of the implications of Parker. Finally, a legislative solution for the shortcomings of the Wilderness Act and the agency's detrimental practices will be proposed.

I

WILDERNESS PRESERVATION IN THE UNITED STATES

A. Early Preservation Efforts

The designation and protection of wilderness in this century began in the Forest Service's administration of the national forests shortly after the First World War. Areas within the forests were set aside by local Forest Service officials on a discretionary basis and administered to preserve their primitive character. In 1929 the Forest Service issued the first general regulations for the designation and administration of wilderness units to be known as primitive areas. Between 1931 and 1939, the Service, pursuant to those regulations, designated 73 primitive areas throughout the western states comprising about 13 million acres. Due to their increasing popularity and use for recreation, stronger protection was felt necessary. Accordingly, in 1939 revised regulations were issued that barred roads, motorized vehicles, and commercial timber cutting within primitive areas. Because many of the existing primitive areas had roads within their boundaries, the Forest Service began reviewing each area to determine how the boundaries might be redrawn to exclude roads and other non-conforming develop-


5. The authority for these decisions rested in the Organic Administration Act of 1897, which authorized the Secretary of Agriculture to make such rules and regulations and establish such service [the Forest Service] as will insure the objects of such reservations [national forests], to regulate their occupancy and use and to preserve the forests thereon from destruction...

6. In these areas conditions were to be maintained in a primitive state, but low-standard roads, simple shelters, and limited wood cutting were permitted.

7. The regulations further provided that areas in excess of 100,000 acres should be known as wilderness areas and that areas between 5,000 and 100,000 acres should be known as wild areas.
ments. The Second World War, however, precluded completion of this review.

After the war national interest was rekindled in wilderness preservation. Conservation groups, led by the Wilderness Society, advocated statutory status for the administrative system of wilderness. Their suggestions were motivated primarily by the fear that the Forest Service, under pressure from commodity interests, might remove inordinate amounts of land from primitive areas through reclassification pursuant to the 1939 revisions. Further apprehension was fostered because the Forest Service lacked statutory authority to prevent mining and dam construction in wilderness areas.

Continued expression of these concerns eventually resulted in the introduction of the first wilderness bills in Congress in 1956. The Senate bill was initially opposed by both the Forest Service and the National Park Service, and it was strongly resisted by lumber, mining, power, and irrigation interests. The Forest Service objected that the proposed bill would impede flexible management of the national forests and advocated a substitute bill which would protect its discretionary management approach. This proposal was subsequently enacted as the Multiple Use-Sustained Yield Act of 1960, with the proviso that the “establishment and maintenance of areas of wilderness are con-

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8. In 1948 a study of wilderness preservation was commissioned by a House subcommittee on the conservation of wildlife resources. The report, released the next year, concluded that before many years “original wilderness . . . will have disappeared entirely . . . . If, then, there is reason for preserving substantial portions of the remaining wilderness, it must be decided upon before it is too late.” McCloskey, supra note 4, at 297, citing 52 THE LIVING WILDERNESS 29 (1955).

9. Senator Humphrey and eight other senators introduced S. 4013, [84th Cong., 2d Sess.] on June 7, 1956. Five identical bills were introduced in the House. The Senate bill, drafted by conservation groups, had four primary purposes:

1. to provide clear statutory authority for the maintenance of wilderness areas;
2. to remove the administrative authority of Forest Service officials to decrease the size or declassify wilderness areas;
3. to protect national forest wilderness areas against mining and the installation of water projects; and
4. to require designation of wilderness zones in units of the National Park System, federal wildlife refuge and range system, and within Indian reservations.

McCloskey, supra note 4, at 298.


11. 16 U.S.C. §§ 528-31 (1970) [hereinafter cited as the Multiple Use Act]. The Act states: “It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.” Id. § 528. For a discussion of Forest Service Management practices under the Multiple Use Act, see Heyman & Twiss, Environmental Management of the Public Lands, 1 ECOLOGY L.Q. 94, 108-27 (1971).
sistent with the purposes and provisions of this Act."\textsuperscript{12} Conservationists continued their efforts to enact a version of the original Wilderness bill. After several more years of debate, deliberation, and compromise,\textsuperscript{18} the Wilderness Act was finally passed and signed into law on September 3, 1964.

B. The National Wilderness Preservation System

After an introductory statement of policy\textsuperscript{14} and a qualifying definition of wilderness,\textsuperscript{15} the Wilderness Act provides that all national forest lands previously classified as "wilderness," "wild," or "canoe" areas are automatically placed in the National Wilderness Preservation System.\textsuperscript{16} The proviso was added at the urging of conservationists who feared the Act would undercut wilderness preservation efforts. Mercure & Ross, \textit{supra} note 10, at 54.

Proponents of the wilderness bill defeated several efforts in the Senate to weaken it. The bill was passed by the Senate in September 1961 by a vote of 78-8, but the House failed to act on the bill in the ensuing year due to the opposition of Senator Aspinall, Chairman of the Interior and Insular Affairs Committee. The Senate again passed the bill in April 1963 by a vote of 73-12.

The way was paved for the bill to be reported out of Aspinall's committee when conservationists agreed to support his proposal for a general review of public land policies under a Public Land Law Review Commission. However, Aspinall saw the compromise as being quite favorable to the commodity and resource interests he represented. First, congressional approval is required to add primitive areas to the wilderness system, and "hardly a more tedious, time-consuming, and obstructive method could have been devised." Mercure & Ross, \textit{supra} note 10, at 60. Moreover, the final Act permits continuing mining in the wilderness system. See note 18 infra.

Finally, after nine years of deliberation, the introduction of some 65 wilderness bills, and the holding of 18 hearings, the House passed a wilderness bill in July 1964 by a vote of 373-1. Following additional trade-offs in conference committee and passage of the final version by both houses, President Johnson signed the Wilderness Act into law in September. \textit{See generally} McCloskey, \textit{supra} note 4, at 298-301.

14. In 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, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness.

\textit{Act} \textsuperscript{2(a)}, 16 U.S.C. \textsuperscript{§} 1131(a) (1970).

15. 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 wilderness is further defined to mean . . . an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (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

System and designated as "wilderness areas." 16 54 previously protected areas, comprising more than nine million acres, were designated as wilderness areas pursuant to this provision. 17 Once an area is placed within the wilderness system, the appropriate agency is directed to preserve its wilderness character while managing the area for recreation and other authorized purposes. 18

The Act further directs the Secretary of Agriculture to study all existing primitive areas within the national forests to determine which are suitable, in whole, in part, or as augmented, for designation as wil-

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16. WILDERNESS PRESERVATION

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

Id. § 2(c), 16 U.S.C. § 1131(c).
16. Id. § 3(a), 16 U.S.C. § 1132(a).
18. Act § 4(b), 16 U.S.C. § 1133(b) (1970). The types of permitted activities range from mining and grazing to appropriate commercial services. Roads, motorized vehicles, boats, aircraft, and man-made structures are prohibited within wilderness areas, except as necessary to meet the minimum requirements of agency administration of the area. Id. § 4(c), 16 U.S.C. § 1133(c). The President may authorize the development of water or power projects within wilderness areas, and grazing of livestock is permitted if it was established prior to passage of the Act. Commercial services may be performed within wilderness areas to the extent they are proper for realizing recreational or other wilderness purposes. Id. § 4(d), 16 U.S.C. § 1133(d).

The Act's major concessions to resource interests are the provisions authorizing mineral prospecting "compatible" with wilderness preservation, and permitting mineral leases and mining on claims patented prior to 1984. Id. § 4(d)(2), (3), 16 U.S.C. § 1133(d)(2), (3).

However, in Izaak Walton League v. St. Clair, — F. Supp. —, 4 ERC 1864 (D. Minn. 1973), a lessee of mineral rights in the Boundary Waters Canoe Area (BWCA) was permanently enjoined from prospecting, despite the Act's provisions and Forest Service regulations permitting such activities. Although the court found some merit in the argument that since the Wilderness Act specifically refers to the BWCA special treatment was intended for the area, the decision is much broader in its terms. The court found it clear that "wilderness and mining are incompatible," [id. at 1875] since "[a] mineral resource developer cannot proceed without making use of the surface of the land [thus] . . . irreversibly and irretrievably destroy[ing wilderness] for generations to come." Id. at 1875-76. Thus the court found "an inherent inconsistency in the [Wilderness] Act . . . Congress demands that the Wilderness remain inviolate and yet at the same time appears to allow mineral development." Id. at 1876. The court concluded that the Act had to be interpreted to foreclose mining and prospecting activities, since "[t]o create wilderness and in the same breath to allow for its destruction could not have been the real Congressional intent," and to permit mineral activities would render the Act a "nullity." Id.

While this is an emotionally satisfying resolution of the problem, it is untenable in light of the legislative history of the Act. Although many members of Congress might have preferred not to permit mining activities in wilderness areas, they were forced to compromise their desire for pristine wilderness in order to get the bill out of Representative Aspinall's committee. See note 13 supra. While the composition and environmental attitude of Congress have progressed in the meantime, certainly the original congressional intent was the resigned acceptance of half a loaf rather than none at all.
derness areas. After reviewing these areas and holding public hearings, the Secretary reports his proposals to the President, who must submit his recommendations to Congress by staged deadlines, with completion required within ten years. In the interim each primitive area is to be managed as it was prior to the passage of the Wilderness Act, until Congress determines whether or not the area will be designated as wilderness. The President may, however, administratively increase the size of a primitive area up to a maximum of 5,000 acres at the time his recommendation is submitted to Congress.

The review of primitive areas within the national forests has nearly been completed, with only 11 areas remaining to be studied. However, of the 23 areas reviewed by the executive branch and submitted to Congress, only 11 have been added to the wilderness system. The controversy in Parker arose out of the Forest Service review of one of these areas, the Gore Range-Eagles Nest Primitive Area near Vail, Colorado.

THE PARKER CASE

A. The Setting

The Gore Range-Eagles Nest Primitive Area was classified as such

19. Act § 3(b), 16 U.S.C. § 1132(b) (1970). The Secretary of the Interior is directed to perform a comparable study of all roadless areas of 5,000 acres or more within the National Park System and the National Wildlife Refuge System and report his findings to the President. Id. § 3(c), 16 U.S.C. § 1132(c).


21. Prior to submitting his recommendations, the Secretary is required to hold public hearings in the vicinity of the proposed wilderness areas, and invite the comment of state and federal officials regarding such proposals. Act § 3(d)(1)(B)-(C), 16 U.S.C. § 1132(d)(1)(B)-(C) (1970). The Secretary may recommend modification or adjustment of the boundaries of a wilderness area only after giving notice of such proposal and holding additional public hearings. Id. § 3(e), 16 U.S.C. § 1132(e).

22. Id. § 3(b), 16 U.S.C. § 1132(b). The President was required to submit his recommendations as to one-third of the primitive areas within three years, two-thirds within seven years, and the remainder within ten years. Id.

23. Id. However if more than 1280 acres of the proposed increase are in a single "compact unit" or the total proposed additions exceed 5,000 acres, they do not become effective until acted upon by Congress. Id.

24. Roadless Area Statement, supra note 20, at 8. The National Wilderness Preservation System correctly consists of 10.7 million acres of national forest lands. Some 1.7 million acres have been proposed for wilderness status but not yet acted on by Congress, and 2.4 million acres of primitive areas are being reviewed by the Forest Service. Id.

25. The description of the factual background is taken in large part from the opinion of the district court, 309 F. Supp. at 594-96, 1 ERC at 1164-66.
by the Forest Service on July 19, 1931. It is located approximately 90 miles west of Denver, Colorado, within the Arapahoe and White River National Forests and has an area of approximately 61,000 acres.  

The primitive area contains major streams, large lakes, and many deer, elk, mountain sheep, and other wildlife. There are no improvements within the area, other than a few abandoned cabins and temporary corrals. The Forest Service, however, maintains extensive foot and horse trails throughout the primitive area.

In April 1969 the Forest Service entered into a contract with Kaibab Industries for the sale of 4.3 million board feet of timber from a sale area of 357 acres within a 1200-acre tract located approximately two miles outside the boundary of the primitive area. The area within which the timber was to be harvested is known as the East Meadow Creek basin. The basin covers approximately 3000 acres, and consists primarily of timbered valleys and ridges. It generally bears little evidence of man’s presence except for an access road running to a point about three-fourths of a mile inside the sale area. The basin also contains a “bug road,” which was constructed during a bark beetle control project in the early 1950's. This road is now closed to motorized vehicles and has, in some places, been so overgrown with vegetation as to be virtually unnoticeable. In addition, there are foot trails in the area.

The Forest Service’s decision to harvest the timber in East Meadow Creek basin resulted from its studies of the area over the preceding ten years. The tentative decision to harvest probably was made in 1962 and subsequently reaffirmed in light of studies made up to the time the contract was awarded. Pursuant to these evaluations, the Forest Service constructed the unpaved, graded access road into the sale area in 1965 and awarded the timber sale contract to Kaibab Industries in April 1969. In addition to providing for timber harvesting, the con-

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26. Included within the primitive area is about 30 miles of the Gore Range of mountains, regarded as one of the most inaccessible ranges within Colorado.

27. The basin is used for light recreation and hunting.

28. It cannot be said precisely when the decision was made to harvest timber in East Meadow Creek. The Forest Service readily admitted that the exact date was not ascertainable from its records. Appendix, vol. 1, at 21, Parker v. United States, 448 F.2d 793 (10th Cir. 1971). Some mention of harvesting is made as early as 1959 in the General Timber Management Statement prepared in that year. Id., vol. 4, at 928. The area is again mentioned for possible harvesting in the Timber Management Plan for the Holy Cross Working Circle prepared in 1962. Id. at 971. The Forest Service prepared further reports including the sale area in March 1966, two in March 1967, and in February 1969. Brief for the Lumber Industry Appellants and Amici Curiae at 4, Parker v. United States, 448 F.2d 793 (10th Cir. 1971) [hereinafter cited as Lumber Industry Brief].

tract required Kaibab to extend the access road two miles further into the sale area and to construct spur logging roads to facilitate the harvesting. After completion of the timber harvesting, the Forest Service envisioned the development of camping and picnicking facilities in the area, as well as the establishment of trail-head facilities to provide access into the primitive area.30

In February 1969, two months prior to the award of the contract, the Colorado Open Space Coordinating Council (COSCC) submitted to the Forest Service its revised proposal that a large portion of the area contiguous to the primitive area be recommended for wilderness status, including most of the East Meadow Creek basin.31 COSCC felt that the basin had substantially the same character as the existing primitive area, and was both ecologically and geographically related to it. In light of COSCC's proposals, the Forest Service restudied the East Meadow Creek basin. On the basis of this reevaluation, the Forest Service reduced the size of the sale tract, moved it two miles back from the boundary of the primitive area and reduced the volume of timber to be harvested.32 However, the Service declined to follow COSCC's recommendation that it include the basin in the wilderness study and report then being prepared for the contiguous Gore Range Primitive Area.33

B. The District Court Decision

As a result of the Forest Service's decision to go ahead with harvesting, COSCC, joined by several other organizations and individ-

30. Statement by David S. Nordwall, Regional Forester of the Rocky Mountain Region. Id., vol. 1, at 333.
31. However the recommendation excluded the access road.
32. Prior to the award of the contract and the submission of COSCC's revised recommendation, the Forest Service had planned a sale of 7 million board feet of timber from a net area of 625 acres within a gross area of 3000 acres that extended right up to the boundary of the primitive area. As awarded, the contract terms were for a sale of 4.3 million board feet from 357 acres within a gross area of 1200 acres. Lumber Industry Brief, supra note 28, at 6.
33. The Forest Service maintained that the area was unsuited for wilderness status because of several non-conforming features: (1) the existence of the "bug road;" (2) the area's proximity (less than two miles) to two previous timber sales; (3) the existence in the area of 14 mining claims; (4) the plans being considered by the Denver Water Board to locate a water diversion project there; and (5) the fact that the area was surrounded on three sides by six privately owned parcels. Federal Petitioner's Brief for Certiorari at 6, Parker v. United States, 405 U.S. 989 (1972) [hereinafter cited as Federal Petitioner's Brief]. These factors, the Forest Service determined, not only disqualified the area under the Wilderness Act's "untrammeled by man" standard [see note 15 supra], but made the East Meadow Creek basin more suitable for timber harvesting than for wilderness use. Federal Petitioner's Brief, supra, at 7.
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The plaintiffs maintained that the East Meadow Creek basin was wilderness in character within the definition of the Wilderness Act and that the Forest Service was therefore required by the Wilderness Act to study and include it in the report to the Secretary and President being prepared for the Gore Range Primitive Area—even if wilderness status for the basin was not recommended. Accordingly, the plaintiffs asked for equitable relief to compel such action and to enjoin the timber sale until such time as the President and Congress had considered and passed upon the Forest Service's study and recommendation. The defendants responded that since the East Meadow Creek basin was outside of the existing primitive area, its management was committed to agency discretion by the Multiple Use Act, and that the Wilderness Act's provisions were inapplicable. They further contended that inasmuch as such management is discretionary, the Forest Service's decisions not to study the area but to proceed with the timber sale were not subject to judicial review.

After denial of defendants' motion for summary judgment, a preliminary injunction was entered pending trial. After full trial on the merits, the district court determined that at least that portion of the East Meadow Creek basin included in COSCC's recommendation met the minimum standards of suitability for wilderness classification, and held that the basin had to be included in the study report submitted to the President and Congress. Consequently, it continued the prelimi-

34. In addition to COSCC, plaintiffs included twelve individual residents and property owners of Vail, a guide who conducted wilderness trips into East Meadow Creek, the Eagles Nest Wilderness Committee, the Sierra Club, the town of Vail, and Colorado Magazine.

35. Named as defendants were the Department of Agriculture, Forest Service officials responsible for the management of the White River National Forest, and Kaibab Industries. On October 23, the Western Wood Products Association, a trade association, joined the action as an intervenor aligned with the defendants. The Association is comprised of 170 forest landowners and producers of forest products in twelve western states, including Boise Cascade, Georgia-Pacific, Kimberly-Clark, and Weyerhaeuser.


37. 307 F. Supp. 685 (D. Colo. 1970). The defendants advanced five grounds in support of their motion for summary judgement: (1) that the matter of timber sales was within the discretion of the Forest Service and hence nonreviewable; (2) that the plaintiffs were without standing to challenge the sale; (3) that the suit was unconsented to by the Government and was thus barred by sovereign immunity; (4) that an injunction would not serve to protect the area because mining claimants would still have the right to remove timber; and (5) that there was no material issue of fact presented and defendants were entitled to prevail as a matter of law. 307 F. Supp. at 686.

nary injunction against the sale and harvest until the President and Congress finally decided whether or not to include the basin in the wilderness area to be created from the Gore Range Primitive Area and suitable contiguous lands.

C. The Appellate Decision

The defendants took an appeal to the Tenth Circuit Court of Appeals. Their principal contention was that the actions of the Forest Service were not subject to judicial review since the Wilderness Act does not mandate Forest Service study of lands outside existing primitive areas, but leaves review and management of such lands to agency discretion. In addition, appellants argued that plaintiffs lacked standing to sue; that the suit was barred by sovereign immunity; and that plaintiffs had failed to exhaust their administrative remedies. However, the court of appeals unanimously affirmed the decision below, in a brief opinion which sidestepped several thorny issues and confirmed the expansive reading given the Wilderness Act by the district court.

1. Reviewability of Agency Action

In answering appellants' contention that the Forest Service was given virtually unbridled discretion in the management of lands outside

39. The Tenth Circuit's treatment of the subsidiary issues of standing, sovereign immunity, and exhaustion of administrative remedies may be examined briefly since these questions were not of central importance in the case. The challenge to plaintiffs' standing was not mentioned by the court of appeals, although even under the recent learning of Sierra Club v. Morton, 405 U.S. 727, 3 ERC 2039 (1972), several of the plaintiffs possessed the necessary interests to justify their standing. The district court had earlier disposed of a challenge to standing, noting that plaintiffs included a local wilderness guide, the town of Vail, and Vail property owners. 307 F. Supp. at 687. Although the district court referred to cases which permitted broader standing than did Sierra Club, the plaintiffs' allegations that some of them actually used the basin, and that the guide, town, and property owners had a direct economic interest in its preservation as a recreation resource and tourist attraction [see Brief for Appellees, at 17-19, Parker v. United States, 448 F.2d 793 (10th Cir. 1971)], would bring the individuals and organizations of which they were members within the Sierra Club standard.

The court's unarticulated rejection of the sovereign immunity defense followed logically from its determination on the merits of the case. Since the Forest Service officials were held to have violated a statutory duty, they were subject to suit. See 307 F. Supp. at 687.

Finally, the court refused to apply the exhaustion of administrative remedies defense since it was raised for the first time on appeal. The court noted that despite the appellees' failure to pursue their right of administrative appeal, exhaustion was improper since the central issues were of law, requiring no administrative expertise; judicial time would not be saved; all levels of the Department of Agriculture had considered the administrative decision; and the defense is not applied for the benefit of third parties, but to insure orderly judicial and administrative procedure. 448 F.2d at 798, 3 ERC at 1137-38.
primitive areas and that the district court therefore lacked subject matter jurisdiction to review the challenged agency decision, the court of appeals turned for guidance to *Overton Park, Inc. v. Volpe.*

In *Overton Park,* a case strikingly similar to *Parker,* the Supreme Court held that administrative decisions are subject to judicial review under section 701 of the Administrative Procedure Act except where there is a statutory prohibition on review or where 'agency action is committed to agency discretion by law.' The Supreme Court further stated that the latter limitation is "a very narrow exception" applicable only in the rare instances where the statute in question is drawn so broadly that there is virtually no law for the administrator to apply. Accordingly, the Tenth Circuit sought to determine whether the Wilderness Act established "law to apply." Since it subsequently held on the merits that section 3(b) of the Act did impose specific duties on the Forest Service, the conclusion followed that judicial review of the agency's actions was authorized.

2. *Forest Service Duties and Discretion Under Section 3(b)*

The Tenth Circuit affirmed the trial court's interpretation of section 3(b) of the Wilderness Act, holding that where national forest lands contiguous to a primitive area are shown to possess the minimum conditions of suitability for definition as "wilderness," the Forest Service must study and include them in its report submitted through the Secretary to the President. Additionally, the Service must refrain from any action which would irreparably harm the wilderness character of such lands, until the President and Congress have determined whether or not they are to be designated as wilderness.

At the heart of the interpretation made by both courts is the language of the provision itself. Section 3(b) provides, in relevant part:

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41. Suit was brought in *Overton Park* to prevent the use of federal funds to finance the construction of an interstate highway through a park in Memphis, Tennessee. At the root of the controversy was the contention that the Secretary of Transportation had disregarded provisions of the Department of Transportation Act of 1966 and of the Federal-Aid Highway Act of 1968 that prohibit the use of federal funds to finance highway construction through a public park if a "feasible and prudent" alternative route exists. If no such route is available, the provisions further stipulate that the Secretary may approve construction only if there has been "all possible planning to minimize harm" to the park. The Supreme Court reversed the lower courts' rejection of the plaintiffs' claim and remanded the case for further proceedings.
44. 401 U.S. at 410, 2 ERC at 1254.
46. See text accompanying notes 60-68 supra.
The Secretary of Agriculture shall, within ten years after September 3, 1964, review, as to its suitability or nonsuitability for preservation as wilderness, each area in the national forests classified on September 3, 1964 by the Secretary of Agriculture or the Chief of the Forest Service as "primitive" and report his findings to the President. The President shall advise the [Congress] of the Recommendations with respect to the designation as "wilderness" or other reclassification of each area on which review has been completed, together with maps and a definition of boundaries. . . . Each recommendation of the President shall become effective only if so provided by an Act of Congress. . . . Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress, the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value.47

a. The Duty to Protect

The Tenth Circuit found that section 3(b) contains two provisions pertinent to the case. First, it requires the Secretary of Agriculture to review the suitability of primitive areas for preservation as wilderness and report his findings to the President. The President, in turn, is directed to advise Congress of his recommendations regarding classification of these areas. Second, and most importantly, section 3(b) provides that the President is not to be limited by the Secretary's findings and can recommend the addition of contiguous areas "predominantly of wilderness value" to the wilderness system.

Reading these statutory provisions in concert, the district court had concluded that the decision whether a contiguous area predominantly of wilderness value should be designated as wilderness "must remain open through the Presidential level,"48 and that "it [would thwart] the purpose and spirit of the Act to allow the Forest Service to take abortive action which effectively [would prevent] a Presidential and Congressional decision."49 The Tenth Circuit adopted this view, observing that it is a cardinal rule of statutory construction that effect be given to every provision of a statute. The court found that if it were to concede to the Forest Service

the discretionary right to destroy the wilderness value of the subject area . . . we would render meaningless the clear intent of Congress expressed in [section 3(b)] that both the President and the Congress shall have a meaningful opportunity to add contiguous areas pre-

48. 309 F. Supp. at 598, 1 ERC at 1167.
49. Id. at 599, 1 ERC at 1167.
dominantly of wilderness value to existing primitive areas for final wilderness designation.\textsuperscript{50}

Thus, the court rejected the appellants’ contention that contiguous areas are subject to the discretionary management authority conferred upon the Secretary of Agriculture by the Multiple Use Act. The appellants had cited the Wilderness Act’s legislative history in an attempt to show that Congress intended to leave the administration of contiguous lands to the discretion of the Forest Service and did not intend to restrict the permitted scope of the commodity interests’ activities.\textsuperscript{51}

The court determined that those portions of the legislative history related only to the provisions of the Wilderness Act that automatically incorporated preexisting wilderness areas into the National Wilderness Preservation System and that “freeze” existing primitive areas pending congressional action. Agency duties pursuant to section 3(b) were said not to be the subject of the cited history.\textsuperscript{52}

And while the legisla-

\textsuperscript{50} 448 F.2d at 797, 3 ERC at 1137.

\textsuperscript{51} The appellants devoted substantial portions of their briefs to a discussion of legislative history, referring to numerous statements by members of Congress during debates on various wilderness bills. See generally Brief for Federal Appellants at 10-30, Parker v. United States, 448 F.2d 793 (10th Cir. 1971); Lumber Industry Brief, supra note 28, at 18-27. The statements generally expressed the feeling that the bill would in no way affect any legitimate economic interests and would serve only to protect areas already excluded from economic consideration. Senator Douglas’s remarks were most representative of this view:

This wilderness bill thus undertakes only to preserve in an orderly, effective, enduring way areas that have already been set aside from commercial uses. It does not apply to any areas that are now available for lumbering, and it carefully avoids interfering with any economic uses, such as grazing, where these are now established.

104 CONG. REC. 6779 (1958).

\textsuperscript{52} The court reasoned that since the Wilderness Act incorporated “wilderness,” “wild,” and “canoe” areas into the wilderness system without expansion, and similarly did not of its own accord expand the boundaries of primitive areas, the legislative testimony was merely designed to assure resource interests that they had nothing to fear from these provisions of the Act inasmuch as these areas “were already unavailable for commercial development under existing administrative policy and rulings.” 448 F.2d at 796, 3 ERC at 1136. However this reading misconstrues the intent behind the cited congressional statements and is untenable. Certainly the speakers were trying to give resource interests more than the assurance that there would be no immediate and automatic expansion of existing areas. The real concern was whether the executive branch would have discretion to extend the boundaries of primitive areas and to recommend the inclusion of contiguous areas for wilderness classification.

But the result reached by the court is supportable on other grounds. As noted by appellees [Brief for Appellees, supra note 39, at 41-46], the testimony cited by appellants involved versions of wilderness legislation that contained the proviso that following boundary alterations by the President “any primitive area recommended to be continued in the wilderness system shall not exceed the area classified as primitive on the date of this Act.” Id. at 43, citing 107 CONG. REC. 18,042 (1961); see S. 174, 87th Cong., 1st Sess. (1961); S. 4, 88th Cong., 1st Sess. (1963). This would, of course, have precluded executive branch support for any net expansion of
tive history indicates that the Act "should not be interpreted as a general curtailment of agency discretion in the normal day-by-day administration of the national forests . . . ."53 The court concluded that nothing in the legislative history "would support an ambiguity in word or intent dictating an error in the interpretation of section [3(b)] as made by the trial court."54

The court further observed that it could "find nothing in the Wilderness Act as written" which militated against the trial court's interpretation of section 3(b).55 By this glib statement the court avoided discussing one provision of the act that appears at first glance to contradict the decision. Section 4(a) of the Act provides:

The purposes of this Act are hereby declared to be within and supplemental to the purposes for which national forests and units of the national park and national wildlife systems are established and administered and—

(1) Nothing in this Act shall be deemed to be in interference with the purpose for which national forests are established as set forth in the Act of June 4, 1897 . . . . and the Multiple Use-Sustained Yield Act . . . .56

The Government argued that this section was intended to preserve the Secretary's discretionary management of all lands outside of primitive areas pursuant to the Multiple Use Act.57 But the provision is hardly self-explanatory. In the first place, requiring the Forest Service to study and preserve contiguous areas does not necessarily "interfere with the purpose for which national forests are established," since the Multiple Use Act specifically makes provision for wilderness preservation.58 Second, although the purpose of the Wilderness Act—the preservation of wilderness—is to be "supplemental" to the various purposes for which the national forests were established, it does not follow that Parker is in error. The trial court noted that the Forest Service was free to follow Multiple Use Act criteria in determining whether or not to recommend wilderness status for contiguous areas.59 It hardly seems to be an un-

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53. 448 F.2d at 797, 3 ERC at 1136-37.
54. Id. at 797, 3 ERC at 1137.
55. Id.
57. See Brief for Federal Appellants, supra note 51, at 9.
58. See text accompanying note 12 supra.
59. 309 F. Supp. at 600, 1 ERC at 1168.
reasonable "elevation" of the status of wilderness preservation to require that before the Service reverts to multiple-use management practices that will irreparably destroy the wilderness character of contiguous lands it wait for the President and Congress to have the final word on the extent of the area to be classified. In sum, although the Tenth Circuit should have dealt expressly with the issues raised by section 4(a), it was correct in concluding that the trial court's interpretation was not contradicted by any provisions of the Act.

A question of some importance not adequately addressed by either the trial or appellate court is the extent to which the Forest Service must continue protecting wilderness-quality contiguous areas after the President has made his recommendation to Congress but before that body has acted. Of course if the President recommends inclusion of a given contiguous area in the proposed wilderness area it is unlikely that the Forest Service would permit development there. The issue only assumes importance if the President fails to recommend wilderness status for all or a portion of a contiguous area. In that event, may the Forest Service permit development which would disqualify the area from wilderness status?

The trial court left this issue unexplored, and its language was ambiguous. In its final order the court continued the preliminary injunction "indefinitely or until a determination has been made by the President and Congress that East Meadow Creek is predominantly wilderness in character and should be made part of Gore Range-Eagles Nest or that it should not be . . . ." The Tenth Circuit was similarly unenlightening as it affirmed without considering the distinction between Presidential recommendation and omission of a contiguous area.

The failure to come to grips with this issue may seriously weaken the utility of Parker as a tool for conservationists seeking to freeze development of contiguous areas. The Wilderness Act by its terms only reserves to the President the right to recommend inclusion of contiguous areas predominantly of wilderness value; it does not refer explicitly to congressional discretion except to provide that all future additions to or modifications of the wilderness system must be congressionally approved. Thus, strictly speaking, the Act would not seem to require the Forest Service to protect contiguous areas pending congressional action unless the President had found them "predominantly

60. See text accompanying notes 48-49 supra.
62. See text accompanying note 50 supra.
64. Id. § 3(e), 16 U.S.C. § 1132(e).
of wilderness value," and had recommended them for wilderness status. Such apparently was the reasoning of the district court in *National Forest Preservation Group v. Butz*, however the decision may be explained on other grounds.

There is some support for the contrary position—that protection should be continued until congressional action regardless of the President's recommendation. There can be little doubt of Congress' authority to include federally owned contiguous lands in the wilderness system. And as the district court noted, "[o]ne of the major purposes of the Wilderness Act was to remove a great deal of . . . absolute discretion from the Secretary of Agriculture and the Forest Service by placing the ultimate responsibility for wilderness classification in Congress." In view of this broad purpose, the equally comprehensive congressional authority and responsibility to formulate policy for the public lands, the interim nature of protection involved, and the inevitable preemption of congressional discretion which would follow from lack of protection, it is submitted that the Forest Service and the courts should interpret *Parker* and the Wilderness Act broadly so as to permit ultimate resolution of the competition for contiguous areas by the body most representative of the public will.

**b. The Duty to Study and Report**

The Tenth Circuit, having found that the trial court correctly in-

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66. The *Butz* case dealt with a proposed exchange of national forest land for land owned by a private party. The court briefly disposed of the plaintiffs' argument that *Parker* supported a decision to compel the Forest Service to study and preserve the federal land to be given up. *Parker* was held to be inapplicable since a study of the primitive area had been made, hearings had been held, and the President's proposal (omitting the federal land in question) had been submitted to Congress.

*Butz* does not necessarily support the argument that presidential non-recommendation terminates the Forest Service's duty to protect contiguous areas which are of wilderness quality. In the first place, *Butz* found that the areas in question were not contiguous to the primitive area, whereas *Parker* and section 3(b) of the Act speak only in terms of contiguous areas. Moreover, the land to be received by the Government in *Butz* lay between the primitive area and the land to be given up, and some of the received land was to be included in the proposed wilderness area. In this sense the exchange was much more in keeping with the overall spirit and purpose of the Wilderness Act than was the timber harvesting involved in *Parker*. Finally, the court in *Butz* expressly found that some of the land to be given up was roaded and logged, which would disqualify it from wilderness designation even under the test proposed in *Parker*. For these reasons, as well as the fact that *Butz* avoided any real analysis of the issue, the case is of limited value as authority.

67. "With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations." *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1872).
68. 309 F. Supp. at 597, 1 ERC at 1166.
terpreted section 3(b), further found that the court was justified in or-
dering the Forest Service to restudy and include the East Meadow Creek
area in its report to the President and Congress on the Gore Range Prim-
itive Area. In affirming the order, the Tenth Circuit relied heavily upon
the Forest Service's own regulations and practices for justification.
The Forest Service Manual, which contains the Service's in-house direc-
tives, provides that

each Primitive Area (so classified as of September 3, 1964) and con-
tiguous lands which seem to have significant wilderness resources will
be studied to determine whether to recommend that all or part should
be included in the National Wilderness Preservation System.

The district court had ruled that an area would "seem to have signifi-
cant wilderness resources" if it met the Forest Service Manual's defini-
tion of the minimum conditions of suitability necessary in order to qual-
ify as "wilderness" under the Act. Thus, if the district court was correct
in its determination that the East Meadow Creek basin qualified under
the Act as wilderness quality land, it would follow that the Forest
Service was required by its own regulations to study the basin's wil-
derness potential and make some recommendation concerning classifi-
cation of the area. The Tenth Circuit also stated that the detailed sup-
plemental regulations governing the manner in which the Forest Service
must make its wilderness area reviews recognize "that the duty of the
Forest Service is to study and recommend and that the President and
Congress are to make the final determinations."

The court observed that the Forest Service had, in the past, "scrupulously adhered to the
regulations and statutory scheme in other wilderness reviews and rec-
ommendations."

c. The "Minimum Suitability" Standard

A crucial but confused issue in Parker is the question of the stand-
ards by which the Forest Service must judge contiguous areas in determining whether (1) to study and report on them; (2) to protect their quality pending presidential recommendation; (3) to continue protection pending congressional action; and (4) to recommend wilderness status. Section 3(b) of the Act reserves to the President the right to recommend inclusion of contiguous areas "predominantly of wilderness value." "Predominantly" cannot refer merely to the relative amounts of suitable and unsuitable land, since the Act's definition of wilderness would not encompass an area simply because more of it was of wilderness quality than not. Therefore, the phrase must mean that the President can recommend inclusion only when he has determined that the contiguous area as a whole is more valuable as wilderness than for competing uses such as timber harvesting. In other words, the President must weigh the various alternatives and find wilderness to be the "best" use of the area, in addition to finding that the area meet the statutory definition of wilderness. This is the sort of balancing process that the Forest Service routinely carries out pursuant to the Multiple Use Act—and which it had followed in deciding neither to restudy, report on, nor recommend the East Meadow Creek basin for wilderness classification.74

However, the district court held that the Forest Service had violated the statutory directive in its determinations not to restudy or report. The court ruled that the agency's duty to study and its duty to protect contiguous lands are controlled by the same standard: that the area meet the minimum statutory definition of wilderness.75 Thus the President is guaranteed the opportunity to find the area to be predominantly of wilderness value. In other words, in deciding whether to study and protect the Forest Service is not permitted by the Act to weigh the appropriateness and importance of competing alternative uses involved. Secretaries of Agriculture and Interior, Fifth Joint Annual Report Concerning the Status of the National Wilderness Preservation System 17 (Dec. 30, 1968).

74. The Forest Service, having made several prior multiple-use studies of the basin [see note 28 supra], found it to be more suitable for timber production, water development, and trail-head facilities than for wilderness use. Testimony of David S. Nordwall, Regional Forester, Rocky Mountain Region, Appendix, vol. 1, supra note 28, at 300. See note 33 supra.

75. Since the trial court is not terribly explicit on the equation of the study and protection tests, one must read its statements closely:

The only issue . . . is whether the Forest Service must under the Act and its own regulations study East Meadow Creek, include that study in its report to the President and Congress, and refrain from acts . . . which will irrevocably change its character, until the President and Congress have . . . rendered a decision.

309 F. Supp. at 600, 1 ERC at 1168 (emphasis partially supplied). Furthermore, "the answer to this question does not require a consideration of need or availability . . . ." Id. (emphasis supplied).
of the area, but is limited to inquiring whether the area is of "suitable" quality for wilderness classification, based upon the Act's definition. Once this "minimum suitability" standard is met, however, the Service is free to consider traditional multiple-use criteria in deciding whether to recommend the area for wilderness status.\textsuperscript{76}

The district court was careful to point out that it was not "concerned . . . with whether the Secretary erred on his factual findings in ruling East Meadow Creek out as wilderness . . . ."\textsuperscript{77} but with whether the Forest Service had applied the proper standard—the minimum suitability test—and thus had preserved the rights of the President and Congress to find the area predominantly of wilderness value. Since the Service had considered multiple-use criteria and not merely suitability, the district court reviewed the evidence of wilderness quality using the correct test and concluded that at least the major portion of the basin that had been recommended by local conservationists "meets the minimum requirements of suitability for wilderness classification, and must, therefore, be included in the study report to the President and Congress."\textsuperscript{78} And since the "minimum suitability" determination was based upon the "substantially objective criteria set forth in both the Wilderness Act and Forest Service Regulations," the trial court held that the decision was "largely a matter of law."\textsuperscript{79} Hence, the court reasoned, it was not invading a field—such as multiple-use analysis—reserved to Forest Service discretion and expertise.

Unfortunately, the Tenth Circuit lost sight of the trial court's professed "minimum suitability" standard and of the limitations the lower court carefully placed on its own findings. The court of appeals stated that "[t]he trial court . . . determined as a fact that the East Meadow Creek Area had predominantly wilderness value . . . ."\textsuperscript{80} This clear misstatement of the trial court opinion was accompanied by the circuit court's happy assurance that the lower court's construction of the Wilderness Act parallels the Act's construction in the Forest Service Manual. But the trial court expressly found that the Manual imposes the duty to study based only upon findings of minimum suitability, and without permitting weighing of multiple-use considerations.\textsuperscript{81} More-
over, the court of appeals introduced further confusion on the question of standards by its statement that the trial court's alleged finding as to the predominance of wilderness value had not been challenged by the appellants, and was, in all events, supported under any standard of review.\textsuperscript{82} However, the appellants' briefs certainly did not let the trial court findings go unchallenged,\textsuperscript{83} although the challenge should properly have failed. More importantly, the circuit court's misreading of the holding below does little to further the clear "minimum suitability" test which the district court advanced.

d. What Is a "Contiguous Area"?

Parker gave little guidance as to what constitutes a "contiguous area" under the Wilderness Act. The lumber industry appellants had attacked the trial court's finding that the timber sale area was "contiguous" to the Gore Range Primitive Area, since due to public pressure the sale area had been reduced so as to avoid the boundary of the primitive area. However, the court of appeals held that the presence of the "bumper" area was not dispositive and merely served to lessen the impact of the agency action.\textsuperscript{84} Although the court failed to articulate a supportable rationale for its treatment of the question, the outcome is justified. Since the 1200-acre sale area constitutes a substantial part of the 3000-acre East Meadow Creek basin—a geographical and ecological unit abutting the primitive area—it should be immaterial that the sale area itself does not physically adjoin the boundary. If the sale were to proceed, the entire basin would be effectively removed from consideration as wilderness.\textsuperscript{85}

The definition of what constitutes a contiguous area should be based upon functional ecological analysis, and not exclusively on distances or adjoining boundaries. The Service should review the entire scope of the next manageable ecological unit adjoining a primitive area, excluding that unit or portions of it from study, report, and interim protection only when the impact of man is substantial enough to preclude the entire area or portion excluded from meeting the minimum suitability test. As the Forest Service has recognized, a manageable wilderness unit usually should be bounded by a ridge or other significant topographical feature, so as to isolate it from detrimental impacts.\textsuperscript{86}

\textsuperscript{82} 448 F.2d at 796, 3 ERC at 1136.
\textsuperscript{83} See Brief for Federal Appellants, supra note 51, at 40-43; Reply Brief for Lumber Industry Appellants and Amici Curiae, at 20-23.
\textsuperscript{84} 448 F.2d at 796, 3 ERC at 1136.
\textsuperscript{85} 309 F. Supp. at 596, 1 ERC at 1165.
\textsuperscript{86} Cliff, The Wilderness Act and the National Forests, in Wilderness and the Quality of Life 6, 10 (M. McCloskey & J. Gilligan eds. 1969) (proceedings of the
And, as the unhappy experience at the Redwood National Park in Northern California has proven, the failure to assure the integrity of an entire ecological and geographic unit can result in a "spillover" of impact that seriously impairs the wilderness value of the protected area.\textsuperscript{87}

In determining which contiguous areas are of sufficient quality to include in its primitive area classification studies, the Forest Service has followed the practice of reviewing only extremely pristine lands. The usual procedure has been to establish a "study area boundary" by drawing a sweeping line around the existing primitive area intersecting the ends of the closest roads or other man-made structures.\textsuperscript{88} The intent and effect is almost completely to exclude any significant evidence of human impact from the study area—and, therefore, from the wilderness area ultimately recommended by the Forest Service. The rationale for such exclusiveness is that the presence of any man-made intrusions or "defects" would make it difficult for the Forest Service to resist the pressure for similar intrusions after the wilderness area was created.\textsuperscript{89}

Conservationists argue that the Forest Service should take a more liberal approach and include in its studies areas in which the mark of man's presence is substantially unnoticeable or is capable of being made so either by restoration or the forces of nature over time.\textsuperscript{90} This position is supported by the language of the Act's wilderness definition, which recognizes that an area may qualify as wilderness and yet bear some imprint of man.\textsuperscript{91} Moreover, Congress\textsuperscript{92} and the National Park

\textsuperscript{87.} Since the Redwood National Park boundary does not follow a significant geographical feature, timber clearcutting in the immediate vicinity of the Park by neighboring private landowners threatens the visual and ecological integrity of Park lands. The evidence is graphically presented in Wayburn, \textit{Redwood National Park—A Promise Unfulfilled}, \textit{Sierra Club Bull.}, June 1971, at 10.

\textsuperscript{88.} Testimony of Mr. Gaylord Weidenhaft, Branch Chief of Wilderness and Special Areas, Region Two, Appendix, vol. 2, \textit{supra} note 28, at 396. Mr. Weidenhaft was in charge of the Gore Range Primitive Area wilderness study.

\textsuperscript{89.} See Cliff, \textit{supra} note 86, at 9.

\textsuperscript{90.} Interview with Ms. Shelley McIntyre, Staff Assistant to the National Wilderness Committee of the Sierra Club, in San Francisco, March 29, 1973.

\textsuperscript{91.} Section 2(c) provides that an area of wilderness is further defined to mean in this Act an area of undeveloped Federal land . . . which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable . . .

\textsuperscript{92.} Congress, in establishing the Mt. Jefferson Wilderness in Oregon, required the Forest Service to remove man-made structures from the shore of Lake Marion and to restore it to a wilderness condition. Act of Oct. 2, 1968, Pub. L. No. 90-548, 82 Stat. 936. The Forest Service, in its proposal for the area, had purposely excluded the lake area precisely because of the man-made structures. Interview with
Service have not taken so restrictive a view as the Forest Service. Since to permit additional development will inevitably destroy an area's wilderness character, it would be in keeping with the language and spirit of the Wilderness Act for the Forest Service to study any areas which might reasonably be defined as wilderness—even if some evidence of human impact must be included in or gerrymandered out of the area.

e. Equitable Relief

The Tenth Circuit affirmed the trial court's order directing the Forest Service to include the East Meadow Creek basin in its study report to be submitted to the President and Congress, and continued the preliminary injunction of the sale contract until Congress had finally acted. Although such an injunction may cause delay in Forest Service wilderness recommendation plans, and require the reassignment of timber harvesting to non-contiguous lands, the administrative burden should not be insurmountable. Although congressional approval of wilderness areas proposed by the President has been notoriously slow—no doubt in part due to the complaints of conservationists that the Service neglected to study and include many contiguous areas in its reports—the temporary dislocations caused by the Parker result are unquestionably in the long-term public interest. The "lost" timber cut is only a small percentage of the annual allowable harvest, and can be made up by somewhat more intensive harvesting on other national for-


93. The National Park Service recently recommended the inclusion of several roaded areas in its wilderness proposal for the Pt. Reyes National Seashore in California. The roads have been closed to vehicular traffic for some time, and the Park Service anticipated that, in time, nature will restore the area's wilderness character. Telephone interview with Mr. Harold R. Jones, Environmental Coordinator for the Western Region of the National Park Service, April 12, 1973. See also Buell, The Wilderness Act and the National Wildlife Refuges and Ranges, in WILDERNESS PROCEEDINGS, supra note 86, at 26-27, noting that the Wildlife Service shares the Park Service's more liberal interpretation of the Act.

94. If the Forest Service conscientiously follows the minimum suitability test pronounced by the district court in Parker, most areas capable of being defined as wilderness under the Act will be studied, since the test was established to insure that the President and Congress would have the maximum opportunity to include contiguous land in wilderness areas. And in Parker the court found suitable the proposal of conservationists who had gerrymandered out the greatest human impact in the East Meadow Creek basin, the access road.

95. See note 24 and accompanying text supra.

96. The Forest Service claimed that the decision in Parker, if followed generally, "would seriously disrupt the management for multiple use of millions of acres of forest lands." Federal Petitioner's Brief for Certiorari at 14. However, even if timber cutting were halted on the 4.75 million acres of contiguous lands that the Forest Service notes may be of wilderness suitability, only three percent of the annual timber cut from national forest lands would be affected. Id. at 11.
est lands. More importantly, wilderness characteristics, once lost, may take generations to be regained. In view of the heightened concern for environmental values in recent years, and the tremendous increase in utilization of the nation's wilderness areas, all branches of the Government should pause before irreparable damage to the remaining wilderness is permitted.

III

AFTERMATH OF THE DECISION

A. Forest Service Response

Following the Supreme Court's denial of the appellants' petition for certiorari, the Forest Service distributed a memorandum to its regional foresters to guide them in managing contiguous areas. As to those primitive areas which had already been studied and reported on, the memorandum directed that contiguous lands not recommended for wilderness inclusion be managed "with consideration for adjacent wilderness values." With regard to primitive areas currently being studied, no development may take place on contiguous lands within the study area until the President makes his wilderness proposal to Congress. Those lands excluded from the President's proposal may then be planned for development. Contiguous lands outside the study area which were previously determined not to merit further wilderness study should be managed on the "basis of multiple use unit area planning and environmental analysis." Recognizing that sales planned in contiguous areas may be legally challenged using Parker as a precedent, the memorandum suggests that the basis for such sales be fully documented and that "[a]ny implication that a sale is being programmed merely to eliminate the unroaded status of such areas . . . be avoided." Finally, the memorandum notes that the Forest

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97. See note 119 infra.
98. 405 U.S. 989, 3 ERC 1908 (1972).
100. The memorandum defines contiguous lands "as those unroaded and undeveloped lands adjacent to Primitive Areas." Id. at 2.
101. Id.
102. Id. Contiguous lands outside of the study area which were selected for further study [see notes 153-56 and accompanying text infra] were withheld from normal multiple use management.
103. Memorandum, supra note 99, at 3. The memorandum suggested that programming of timber sales in contiguous areas should be based on the normal priorities of scheduling. Newly programmed sales should be added to the action plan in normal sequence, unless carefully documented circumstances dictate the need for more rapid development. The memorandum pointed out that this may permit the completion of the review by Congress prior to the time of the sale harvest.
Service will not initiate action to stop existing contracts within contiguous areas unless it is determined that the area is *predominantly* of wilderness value.\(^\text{104}\)

It is clear from the memorandum that the Forest Service reads *Parker* extremely narrowly.\(^\text{105}\) Contiguous areas included in the study report revert to multiple use management if the President fails to include them in his recommendation, rather than waiting until Congress has made the final determination regarding the areas.\(^\text{106}\) And contiguous areas not found by the Forest Service to warrant classification study are in virtually the same position they were prior to *Parker*: *i.e.*, completely subject to discretionary multiple-use management, with the odd proviso that if the study of other contiguous lands is complete and a presidential proposal has gone to Congress, "consideration" should be given adjacent wilderness values. Clearly the courts in *Parker* meant to provide greater protection than this. Moreover, noting *Parker*'s reliance on the *Forest Service Manual*, the memorandum concludes that "the decision does not impose any obligations for studying contiguous areas beyond those presently imposed by [the Manual]."\(^\text{107}\)

When read in the context of the Forest Service's refusal to perform a reclassification study in *Parker* and the memorandum provision stating that existing contracts will not be halted unless the *Forest Service* decides the affected area is "predominantly" of wilderness value, it appears that the Service rejects the trial court's holding that a study is required whenever the area seems to meet the minimum suitability test without considering need or availability.\(^\text{108}\)

But in spite of the Forest Service's reluctance to accept *Parker* at

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104. In such cases the sale will be referred to the Chief of the Forest Service for review and decision. *Id.*

105. Moreover, in a recent administrative ruling the Department of Agriculture indicated that it would refuse to follow *Parker* outside the Tenth Circuit. *In re Sierra Club, F.S. Docket No. 197* (Sec. Agric., Oct. 16, 1972) (on file with *Ecology Law Quarterly*). In that case the Sierra Club appealed to the Secretary of Agriculture in seeking to halt four timber sales scheduled to take place near the Salmon-Trinity Alps Primitive Area. The Club contended that section 3(b) of the Wilderness Act required studies and preservation of these areas and cited *Parker* as authority. In his opinion the Secretary distinguished *Parker* as involving a "pristine" area while the present case involved substantial evidence of man's presence, including prior logging on numerous parcels, roads, and a permanent structure. *Thus* the Secretary found the area unsuitable for wilderness. The Secretary further stated that *Parker* was wrongly decided and would not be followed outside of the Tenth Circuit. Therefore, he alternatively grounded his decision on the holding that the Forest Service had properly acted pursuant to the Multiple Use Act in determining that the area in dispute should be used for timber production.

106. See text accompanying notes 60-68 supra.


face value, the decision should have some salutary effect. Regional foresters, advised of the risk involved in planning developments on contiguous lands, may turn elsewhere to find saleable timber. Moreover, using Parker as a bargaining tool, conservationists may have greater luck in forcing Forest Service concessions, as was the case in the East Meadow Creek basin even without the precedent to rely upon.

B. Beyond the Wilderness Act—Roadless Area Studies

Although the decision in Parker is specifically limited to the review of existing primitive areas under section 3(b) of the Wilderness Act, a process which will soon be completed, the implications of the decision will continue to be relevant. Recognizing that the national forests contain many areas of wilderness value not included within either wilderness or primitive areas, the Forest Service, in 1967, issued a directive to the regional foresters to identify all areas which seemed to satisfy the criteria for inclusion in the wilderness system. The inventory included all roadless and undeveloped areas of the national forests larger than 5,000 acres as well as smaller areas contiguous to existing wilderness and primitive areas. When the inventory was completed, 1,448 roadless or undeveloped areas, comprising 56 million acres, had been identified. On January 18, 1973, the Chief of the Forest Service announced the tentative selection of 235 of these areas, comprising 11 million acres, for full wilderness study. A final list of study areas should be released by June 1973.

The areas selected on the final list will be studied in essentially the same manner as were the primitive and contiguous areas.

109. According to the Sierra Club Wilderness Staff, at least six sales in contiguous areas have recently been stopped or modified in this manner. McIntyre interview, supra note 90.

110. Forest Service reviews and presidential recommendations must be completed by September 3, 1974. See text accompanying note 31 supra.


112. Roadless Area Statement, supra note 20, at 12. The report contains the details of how the areas were selected and inventoried.

113. Staff Report, National Wilderness on the Line, SIERRA CLUB BULL., March 1973, at 9. Of the areas selected, 61 were already under study as areas contiguous to primitive areas. The article criticizes the manner in which roadless areas were inventoried and selected for further study, noting the absence of many areas favored by conservationists, and the subjective nature of the process.

114. Joy interview, supra note 92. The Chief of the Forest Service has upheld the agency's authority, challenged by a timber firm, to manage a disputed area as a "new study area," thus insuring interim protection of wilderness values. In re Intermountain Co. (Clear Creek Area of Salmon Nat'l Forest), F.S. Docket No. 283, 2 ELR 30027 (Chief, Forest Service, Oct. 3, 1972). The Chief held that the Wilderness Act "clearly reserves to Congress the right to add to the Wilderness System," [2 ELR at 30027] and noted that Wilderness Act criteria would be applied in determining whether to recommend wilderness status for "new study areas."
Forest Service's authority to conduct these studies is conferred, however, by the Multiple Use Act rather than the Wilderness Act. Thus, *Parker* would not be applicable to question the Forest Service's decision not to study or protect a particular roadless area. While the Service has agreed in *Sierra Club v. Butz* to submit environmental impact statements before proceeding with development of areas excluded from study, the practices illustrated in *Parker* call for congressional legislation to assure adequate protection and study of wilderness-quality land until final congressional action is completed. To be sure, such an interim "freeze" on the development of roadless and undeveloped areas would exacerbate the current timber supply shortage and thus have an adverse effect on housing prices. However, the timber "crisis" is not necessarily a long-term problem since it is possible to substitute other materials for wood, to reuse wood products more efficiently,

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115. Civil No. 72-xxxxx, *3 Env. Rptr.—Curr. Dev.* 938 (N.D. Cal., Nov. 29, 1972). After issuance of a preliminary injunction, [4 ERC 1637 (N.D. Cal. 1972)], the Forest Service agreed with plaintiffs to file environmental impact statements pursuant to the National Environmental Policy Act prior to entering any timber contracts or permitting other development in any roadless areas—whether or not contiguous to a primitive area. Upon settlement of this issue, the court dismissed plaintiffs' motion to enjoin performance of prior timber contracts pending the filing of impact statements. Although the settlement did not cover 96 timber contracts entered into prior to July 1, 1972, the court held that plaintiffs would have to bring separate suits against each contract for which they want to force an impact statement. Such a supplemental suit was recently reported. *See 3 Env. Rptr.—Curr. Dev.* 1435 (1973). This settlement should insure that wilderness values are taken into account by the Forest Service, but, unlike the protection afforded wilderness-quality contiguous lands by *Parker*, once the Forest Service has weighed the conflicting values and filed its impact statement, it has broad discretion in deciding how it will proceed.

116. The Sierra Club reported the importance of the timber production as it related to the initial Forest Service studies and the effect of the need for timber on the final Forest Service recommendations:

A rough estimate of the potential annual timber yield on the 1,448 roadless areas amounts to 2.3 billion board feet, about 17 percent of the annual allowable cut of 13.6 billion board feet. Had the Forest Service elected to study all the roadless areas, it would have had to reduce the annual allowable cut to 11.3 billion board feet. By reducing the number of tentative study areas to 235 (only 20 percent of the total inventory) and omitting areas with high timber volume, the Forest Service acknowledges that wilderness studies will reduce the annual cut by only two percent. The tentative study list released last January is, in effect, a "woodless area inventory."

*Staff Report, supra* note 113, at 9.

117. Since housing is estimated to use about 45 percent of all softwood lumber and plywood consumed in the United States, the shortage, and the corresponding price rise, have had a major impact. One builder recently lamented that the cost on his 112-unit apartment complex had risen from $250,000 to $400,000 in about a year. *A Lumber Crisis A-Building*, San Francisco Sunday Examiner & Chron., This World, April 22, 1973, at 18, col. 3. In an effort to lower prices for soft woods and plywood, John McGuire, Chief of the Forest Service, recently announced that timber cutting on federal lands would be increased by 1.8 billion board feet. *San Francisco Chron.*, April 28, 1973, at 49, col. 4.
and to cut down on wasteful practices such as the excessive use of packaging materials. What is irrefutable is the inevitable long-term impact of the loss of wilderness resources. Since federal wilderness is likely to account for only about two percent of the nation's surface area, and in light of the exponentially increasing demands being placed on wilderness by the public, it is time for Congress to weigh again the conflict between wilderness development and preservation.

If the purpose of the Wilderness Act, "to secure for . . . present and future generations the benefits of an enduring resource of wilderness," are to be met, that Act's limited scope must be extended. The courts read the Act as broadly as could be justified in Parker; it is up to Congress to take the next step.

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119. See, e.g., Taylor, "No Vacancy" in the Wilderness, SIERRA CLUB BULL., Oct., Nov. 1972, at 5. In the California Region, 304,000 people visited wilderness and primitive areas in the state's national forests during 1972, forcing the Forest Service to institute permit systems in several areas. San Francisco Chron., April 21, 1973, at 2, col. 1.