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"The above photo was taken in 2003 at 11,000 feet above sea level, while mountain biking on the jeep road to Gunsight Pass (near Crested Butte, Colorado). It was when I saw this abandoned trailer that I concretely grasped what Congress had in mind in prohibiting mechanical transport that was not motorized but needed roads or other installations to be operable. Readers may have a hard time conceptualizing what kind of transport could be mechanical and yet not be motorized—this photo may be worth 1,000 words in illustrating the concept." —Theodore Stroll

By Law, Mountain Bikes in Wilderness

By Philip Keyes

If I had to take a wild stab in the dark, I'd say 99% of mountain bikers would support expanding Wilderness areas except for one pesky detail—you can't ride there.

As far as current Wilderness policy goes, a bike might as well be a bulldozer, logging skidder or Hummer. Bikes are banned—no ifs, ands or buts. This is especially frustrating for the hundreds of thousands of cyclists who believe in the Leave No Trace backcountry ethos and regard themselves as part of the expanding environmental movement to protect wild areas for future generations.

For their part, Wilderness advocates tend to see the ban of bicycles from Wilderness simply as *collateral damage* in a more pressing war against the commercial development and destruction of the few remaining tracts of pristine American landscape. They hope mountain bikers support their cause for a higher good and back Wilderness proposals despite this one pesky detail. It's a tough sell.

But what if Congress, through the original Wilderness Act, never intended to ban bikes in the first place? What if the regulations that emanated from the 1964 Wilderness Act were misinterpretations and could be

reversed, allowing for backcountry Wilderness mountain biking? It would be a huge boost for the Wilderness movement.

Over the last decade, mountain bikers have become some of the nation's most sophisticated and savvy outdoors advocates, forming organizations that represent the interests of 45 million cyclists through more than 450 local advocacy organizations. Think of all of the energy currently harnessed to limit the impact of Wilderness on cycling if it could be used to fight for expanding Wilderness areas. The natural alliance between mountain bikers and groups like the Sierra Club and Wilderness Society would open up a whole new realm of lobbying for Wilderness support. It would be a new ball game and Team Wilderness would be stronger than ever.

But there's that pesky detail.

However, according to Theodore Stroll, maybe this detail can go away. Stroll recently published an important article in a legal journal that offers groundbreaking evidence that Congress did not intend for bicycling to be banned in Wilderness areas. Rather, Congress wanted to preserve these areas for human-powered forms of recreation that

nurtured and developed the American spirit through adventuresome outdoors experiences in a landscape that was unblemished from the impacts of civilization.

A Judicial Staff Attorney for the Supreme Court of California, Stroll wrote his article in his spare time and published it in the Penn State Environmental Law Review (Volume 12, Autumn 2004, Number 3: 459-484) with the title, "Congress's Intent in Banning Mechanical Transport in the Wilderness Act of 1964." His study delves into the archival record and Congress's legislative history to try to make sense of inconsistencies that result from including bicycles (and other forms of mechanically aided human-powered recreation) in the prohibition of any form of "mechanical transport."

Since many readers don't have ready access to this professional journal, it's important to review Stroll's article in detail.

Stroll argues that the four decades of evolution in recreation technology and the expansion of Wilderness as a tool for resource protection since the Act was passed necessitate that we re-evaluate what Congress meant by prohibiting "all forms of mechanical transport."

Read strictly, this term could be applied to numerous forms of transport: alpine and mountaineering skis, rowboats with oarlocks, antishock hiking poles and gear. Pushed even further, the term could even prohibit the mechanical transport of anything, thus banning fishing reels, wheelbarrows and game carts. We already have high tech kayaks that utilize human-powered propellers, making them more akin to bicycles in their transmission system, and who knows what other forms of human-powered recreational devices might be down the pike.

Stroll's investigation into Congress's intent shows that the legislators' concern was to protect Wilderness areas as natural areas by prohibiting the transport and delivery of persons and supplies for development purposes. It was not their intent to prohibit human-powered recreation. Stroll's research into the congressional debates shows that

...key House and Senate backers of the Act thought that Wilderness was meant to "develop physical fitness and adventurous habits of mind" and they quoted President Kennedy regarding the virtues of the "traditional bike to school that helped to build young bodies." Had the ability to explore the outdoors by rugged bicycle travel existed in the 1960s, it seems unlikely that the forefathers of the Act would have thought it unsuitable for Wilderness." (470)

In the early versions of both the House and Senate bills, "mechanical transport" was always linked to the transport of persons and supplies. The original legislative text read



Interview With Author, Theodore Stroll

By Philip Keyes

What's the significance of your study?

Probably the most significant finding is what Congress meant when they referred to "no other form of mechanical transport" in the Wilderness Act. It's ambiguous because they don't mean just the mechanical transport of humans; so even a fishing reel is technically implicated by the statute. But when you go into the legislative history, which nobody has ever done before, you find that all Congress meant in the original language was no "mechanical transport or delivery of persons or supplies." Both House and Senate used that language originally and what they're really talking about is large, load-bearing conveyances that would either carry humans or cargo, and this is what the prohibition on mechanical transport means. It means no horse carts, no wagons, no trailers, no tankers—things that, though they're not motorized, probably were propelled behind a motorized vehicle or mule train and would impact the landscape.

Based on your study's finding, do you think that bikes should be allowed in current Wilderness areas or should only be accommodated in future Wilderness?

I think it's essential that bikes be allowed in current Wilderness because that was Congress's intent. Congress intended that human-powered transport should be allowed in Wilderness unless it required some major infrastructure, like a dock or an airstrip. Basically, Congress's view in 1964 when they passed the Wilderness Act was that if you can buy it at REI, you can use it in Wilderness. There is no reason in law or in policy to keep bikes out of current Wilderness, and I really hope that the mountain bike community will not just push for access into future Wilderness but access to current Wilderness as well.

What do you recommend as the strategy to change the current statutes banning bikes from Wilderness?

This is complicated. If you sue the Forest Service or the National Park Service you're probably going to lose because under a recent federal court opinion, as long as the agency interpretations are not arbitrary, capricious or manifestly contrary to the statute, the courts are going to uphold them. The "no mechanical transport" prohibition is ambiguous, so the agencies can at least make a colorable argument that they have correctly interpreted the Wilderness Act to mean "no mountain bikes."

"nor any other *mechanical transport or delivery of persons or supplies*, nor any temporary road, nor any structure or installation, in excess of the minimum required..." This linkage is important, according to Stroll, since Congress was seeking to prevent lasting impacts on the landscape by human activity, such as roads and the infrastructure of development and human habitation. He writes:

This is not language that would be employed to describe exploring Wilderness under one's own power. It connotes the *carrying* of human beings as passengers, or the conveyance of supplies as cargo, on a road in a mechanical conveyance like a wagon or by water on a barge. Congress intended to prohibit the passive transport of passengers. It did not intend to prohibit simple forms of human-powered transport, such as bicycles, snowshoes, skis, kayaks, rowboats, or climbing equipment, that can be used quietly on narrow trails or natural features. These devices do not require roads, nor do they leave any permanent trace. The House wanted to preclude mechanical transport, whether or not motorized, that would require artificial infrastructure and permanent alteration of the physical environment." (471)

So, why did the final 1964 version only refer to "any form of mechanical transport" and not link this phrase directly with moving passengers and supplies? Ironically, it was edited in the name of clarity. According to one member of Congress at the time, the House of Representatives removed the reference to the delivery of persons and supplies in June of 1964, in his words, "solely for the purpose of clarification. The substance and intent of the original language and of the substitute language are the same." As a result of this "clarity," bikes have been thrown out with the bathwater.

Not only did Congress seek to prevent lasting human impact on the environment by prohibiting the means by which development could occur—the transport of persons and supplies—they also wanted to foster human-powered recreation and improve the hardiness of the American mind and body. Congress was concerned with the physical decline of Americans due to the creature comforts of modern civilization. Americans would rather drive than exercise; they'd rather stay in hotels than pitch tents. Americans were becoming lazy, and in the Cold War politics of the time, this could affect the global axis of power.

In the discussions about a primitive ski area called San Geronio, in the San Bernardino Mountains of southern California, the debate didn't focus on whether skiing was an appropriate form of recreation—all presumed that it was—but rather, they wished to prevent the area from becoming a commercial

It's not a correct legal argument, but it is not an absurd argument either. Therefore, if you just go to court and sue the agency, the courts are going to say that maybe the agency is wrong but their position is not frivolous, so we're not going to require them to change the regulation.

The best strategy would be to cooperatively approach the Forest Service, the National Park Service and the Bureau of Land Management, and persuade them through my law review article that they have simply misunderstood the Wilderness Act, and they themselves should re-write the regulations.

In the case of the Forest Service, their original 1966 regulation permits mountain biking in National Forest Wilderness and this is the correct interpretation of the Act. All they have to do is get rid of their incorrect 1977 regulation and enforce the one they have on the books from 1966.

Probably the most foolish thing would be for some mountain biker to simply get on a Wilderness trail and get himself arrested by a forest or park ranger and then go to a federal judge and wave my law review article in his face.

What is your strongest evidence that Congress approved of human-powered recreation?

The congressional record for the Wilderness Act is extensive; they debated the Wilderness Act for years (since the 1950s) before it eventually passed. During all of this, nobody had any problem with healthy, unobtrusive, human-powered transport in Wilderness. People thought that Wilderness was meant for physical fitness or rugged outdoor experiences, for hard earned individual efforts. They didn't talk about bicycling specifically since rugged mountain biking simply wasn't around then, but when you look at what they did talk about (mountain climbing, skiing and the like), [it's clear that] they intended for Wilderness to be used for solitary, self-powered experience, and this is probably the most compelling evidence.

The author the House version of the Wilderness bill and one or two of the principle Senate sponsors of the Wilderness Act were very invested in the idea of fitness, and they even mention their regret of the loss of the traditional bike ride to school by young people. Though mountain biking was not even on the horizon in 1964, the fact is that some of the main backers of the Wilderness Act were very concerned with physical fitness issues and keeping Americans fit. They quoted John F. Kennedy about it, and they even mention the loss of bicycling as an example of the decline of physical fitness that they were concerned about when they were putting forth versions of the Wilderness Act. Later, the 1980 Rattlesnake Wilderness Act specifically authorized and approved of bicycling in the Rattlesnake Wilderness.

Have you thought of approaching the federal agencies to ask them to allow mountain biking in Wilderness?

The more my research showed there was a strong legal argument to reconsider the regulations, the more intent I became on submitting a petition to the Forest Service asking it to reconsider its 1977 no-bikes-in-Wilderness rule. I approached a couple of organizations with the idea, namely Access4Bikes and, of course, IMBA. I also considered submitting it under my own name, without any organizational backing. IMBA looked at early drafts and decided to create a Wilderness committee to consider the petition idea. I joined that committee and discussed my ideas with its other members. I also discussed the petition idea with Access4Bikes board members. Eventually, however, I decided to write a law review article before petitioning any federal agency in order to gauge reaction in the legal community and among the interested public. I told Access4Bikes and IMBA of my new approach. How the legal arguments will be presented formally to the federal agencies is up in the air. Maybe IMBA will do it, maybe another organization will do it, or maybe I'll do it myself.

How can readers get a copy of your article?

My hope is that eventually IMBA will persuade the Penn State Environmental Law Review to either put a PDF copy on Penn State's website or give permission to put a copy on the IMBA website. In the meantime, people can call the Penn State Environmental Law Review and order a back copy for \$10. If they have a friend who's a lawyer, they can have the lawyer download a copy from www.westlaw.com or www.lexis.com. Finally, you can request a copy at your local library from either of these websites. The full citation is "Congress's Intent in Banning Mechanical Transport in the Wilderness Act of 1964." Theodore J. Stroll. *Penn State Environmental Law Review* (Volume 12, Autumn 2004, Number 3: 459-484).

operation with the necessary infrastructure. According to a congressman, the skiers "must also climb the slopes rather than be transported on tows. Is not this the mark of a true sportsman?" Mountain bikers aren't much different: they must earn an exhilarating downhill with an arduous climb.

According to Stroll, the 1964 Congress placed a great deal of emphasis and framed their Wilderness deliberations on a 300-page report by the Outdoor Recreation Resources Review Commission (ORRRC). This report uses "mechanized" to refer exclusively to motorized transport. Stroll quotes the Commission, "In our judgment, Wilderness recreation will be available in areas having the following characteristics...Not open to auto, jeep, truck, motorcycle, motorboat, airplane, helicopter, or other means of mechanized travel."

For the ORRRC, mechanized travel meant travel by motorized transport. "The authors thought that Wilderness should offer different experiences: adventure, challenge, tolerable discomfort, solitude, and a difficult-to-achieve sensory experience. In their words, "wilderness travel" should be "hard work and often uncomfortable," requiring "good physical conditioning...and confidence in one's own resourcefulness.... There is a fascination in this persistent challenge to the will." Mountain biking would have fit in nicely.

Congress's concern was to prevent the development of human infrastructure that would mar the landscape, thus "Congress intended to exclude from Wilderness only heavy, load-bearing rolling stock or watercraft that would require roads, rail tracks, docks, or other obtrusive infrastructure, or that would have an undue physical or visual impact on the landscape. Congress never desired to prohibit healthful human-powered exploration of federal wildlands with devices that have none of the foregoing deleterious effects."

According to Stroll's investigation, there is only one time that Congress has directly addressed bicycle travel in Wilderness, and it approved and authorized bicycling. The Rattlesnake Wilderness Act of 1980 created the Rattlesnake Wilderness in Lolo National Forest in Montana, and the Act specifically describes bicycling as a form of "primitive recreation" appropriate in Wilderness. Stroll quotes the statute:

[t]he Congress finds that—(1) certain lands on the Lolo National Forest in Montana have high value [as Wilderness]. This national forest area has long been used as a wilderness...as a source of solitude...and primitive recreation, to include such activities as hiking, camping, backpacking, hunting, fishing, horse riding, and bicycling.... (478)

The Congress viewed the 1980 Act as completely in harmony with the 1964 Wilderness Act, and allowing bicycling in this Wilderness was not seen in any way as contradictory. By extension, bicycling should be a form of primitive recreation in any Wilderness, regulated by the appropriate agency, as would any other form of legitimate Wilderness experience.

Yet, the ambiguity resulting from the simplified reference solely to "mechanized transport" in the Wilderness Act has created conflicting regulations. A 1966 federal regulation allowed for human-powered transportation, making biking a legitimate Wilderness activity. The regulation reads, in part:

there shall be in National Forest Wilderness...no use of motor vehicles, motorized equipment, motorboats, or other forms of mechanical transport...(a) *Mechanical Transport*, as herein used, shall include any contrivance which travels over ground, snow, or water on wheels, tracks, skids, or by floatation and is propelled by a nonliving power source contained or carried on or within the device. (464)

But while the 1966 regulation was favorable to bikes, a 1977 federal regulation specifically prohibits bicycles (and hang gliders) from National Forest Wilderness. Further muddling things, a 1981 regulation allowed individual

land managers to permit or deny bicycling on a case-by-case basis.

Finally in 1984, the more flexible 1981 regulation was rescinded, and bicycles were forever eliminated from National Forest Wildernesses. The National Park Service and Bureau of Land Management quickly followed suit, and mountain biking was conclusively prohibited in all Wilderness areas.

According to Stroll, these regulations misconstrue Congress's intent to allow for primitive, albeit mechanically aided, recreation. Congress always intended to prevent transport that would be used to carry people or material, requiring an artificial infrastructure or that would cause damaging alteration to the environment. "It does not mean," according to Stroll, "that exploring Wilderness by mechanically aided human-powered transport is prohibited."

Indeed, for mountain biking to return to the wilds, the Wilderness Act would not need to be altered or amended. All that needs to change is the subsequent regulation created by the managing agencies who oversee Wilderness lands: the US Forest Service, the National Park Service, the Bureau of Land Management, and to a lesser extent, US Fish & Wildlife.

With a bit of solid diplomacy and politicking, let's get rid of this detail so we can have our Wilderness and ride it too. ☺

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