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# Wilderness Watch, Inc. v. U.S. Fish & Wildlife Service

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***Wilderness Watch, Inc. v. U.S. Fish & Wildlife Service*, 629 F.3d 1024,  
2010 U.S. App. LEXIS 25904, 2010 WL 5157167 (9th Cir. Dec. 21, 2010).**

**Matt Pugh**

**ABSTRACT**

The Wilderness Act generally prohibits the development of all structures within wilderness areas. The U.S. Fish and Wildlife Service built two water tanks for bighorn sheep residing in the especially arid Kofa Wilderness region of southwest Arizona. The Ninth Circuit analyzed whether these structures fell within the narrow “minimum requirements” exception of the Wilderness Act. Although constructed with altruistic motives, the court found the water tanks violated the Wilderness Act because the Service failed to adequately demonstrate that these tanks were truly necessary for the conservation of the Kofa bighorn sheep population. This decision and the showing of necessity requirements it announces will impact all agency action fitting within the “minimum requirements” exception.

**I. INTRODUCTION**

In managing the Kofa National Wildlife Refuge and Wilderness in Arizona, the U.S. Fish & Wildlife Service (Service) must comply with the Wilderness Act and the Refuge Act.<sup>209</sup> Compliance requires a careful balancing of competing concerns to preserve the wilderness nature of the area while effectively managing wildlife populations.<sup>210</sup> After considering these concerns, the Service built two water structures to assist the declining population of desert bighorn sheep.<sup>211</sup>

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<sup>209</sup> *Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 2010 WL 5157167 at \*2 (9th Cir. Dec. 21, 2010).

<sup>210</sup> *Id.* at \*3.

<sup>211</sup> *Id.* at \*1.

Plaintiff Wilderness Watch, Inc., along with several other environmental groups, challenged the Service's decision to build these water structures.<sup>212</sup> The Plaintiffs alleged that the Service's actions violated the Wilderness Act's express prohibition against development of structures within a designated wilderness.<sup>213</sup> The Service argued that the water structures fell within an exception to the Wilderness Act because they were necessary for the conservation of bighorn sheep.<sup>214</sup> The court held that the Service violated the Wilderness Act because it failed to provide enough explanation and evidence proving that construction of the water structures was truly necessary.<sup>215</sup>

## **II. FACTUAL BACKGROUND**

The Kofa Refuge and Wilderness covers over 600,000 acres of land in the Sonoran Desert in southwest Arizona.<sup>216</sup> This extremely dry ecosystem contains sparse vegetation, steep slopes, and poor soil.<sup>217</sup> Summer temperatures can reach 120 degrees.<sup>218</sup> Annual rainfall typically measures only seven inches and occurs primarily within one month.<sup>219</sup>

The Kofa Game Range was established in 1939 primarily for conservation and development of natural resources, including bighorn sheep.<sup>220</sup> In 1976, the Service assumed sole management of the area and it was designated a National Wildlife Refuge.<sup>221</sup> In 1990, about 82 percent of the refuge was declared wilderness, and the area became the Kofa National Wildlife Refuge and Wilderness.<sup>222</sup>

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at \*7.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at \*15.

<sup>216</sup> *Id.* at \*1.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

The State of Arizona, non-profit organizations, and the federal government began developing water sources in the 1950s to provide more water for the bighorn sheep.<sup>223</sup> More than 100 water sources now exist in the area, including catchments, wells, and tanks that refuge personnel maintain and monitor.<sup>224</sup> The availability of water significantly limits the distribution of bighorn sheep, and most can be found within a two-mile radius of these water sources.<sup>225</sup>

Since 1979, the Service has used the Kofa Refuge and Wilderness on a nearly annual basis as the primary source for bighorn sheep translocation programs attempting to re-establish populations throughout southwestern states.<sup>226</sup> The population of sheep within the area “remained comfortably within the acceptable range of 600-800” for decades.<sup>227</sup> In 2006, however, surveys indicated that the sheep population unexpectedly declined by 30-50 percent to only 390 sheep.<sup>228</sup> The Service, in conjunction with the Arizona Game and Fish Department, prepared an investigative report in 2007 to examine this change in population.<sup>229</sup> The report identified “availability of water, predation, translocation, hunting, and human disturbance” as the most prominent factors explaining the decline, though it “contained no overall summary and came to no conclusions about the causes of the decline in the population of bighorn sheep.”<sup>230</sup>

Before deciding what action to take, the Service prepared two more documents.<sup>231</sup> The first was a “minimum requirement analysis” requiring the preparer to answer “YES” or “NO” questions about potential adverse effects on the wilderness area.<sup>232</sup> The second document was a “minimum tools analysis” that provided a detailed analysis of the proposed action, an

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<sup>223</sup> *Id.* at \*2.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at \*3.

<sup>227</sup> *Id.* at \*4.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at \*\*4-5.

<sup>231</sup> *Id.* at \*6.

<sup>232</sup> *Id.*

explanation for why the project was necessary, alternative action plans, and an examination of each alternative's effects.<sup>233</sup> This document presented three alternatives: (1) no action; (2) constructing the two structures with mechanized means; and (3) construction without mechanized means.<sup>234</sup> The Service selected the second alternative because the no-action option would not help the sheep population, and construction using non-mechanized means would involve increased construction time and therefore greater wildlife disturbance.<sup>235</sup>

The Service constructed the Yaqui and McPherson water structures in 2007.<sup>236</sup> They consisted of aerated PVC pipe buried underground to collect rainwater and funnel it into concrete weirs or troughs.<sup>237</sup> The McPherson tank was located entirely within the wilderness area, while the Yaqui tank was located just outside the wilderness boundary but within the refuge, with two or three of its diversion weirs inside the wilderness.<sup>238</sup>

### **III. PROCEDURAL BACKGROUND**

The Plaintiffs sued the Service soon after the completion of the water structures, alleging violations of the Wilderness Act's prohibition against any "structure or installation" within a wilderness area "except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter."<sup>239</sup> The district court granted summary judgment in favor of the Service, finding its actions fell within the "minimum requirements" exception contained in the Wilderness Act.<sup>240</sup> Plaintiffs appealed.<sup>241</sup>

### **IV. ANALYSIS**

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<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at \*7 (citing 18 U.S.C. § 1133(c) (2006)).

<sup>240</sup> *Id.* (discussing *Wilderness Watch v. U.S. Fish & Wildlife Service*, 2008 WL 4183040 (D. Ariz. Sept. 8, 2008)).

<sup>241</sup> *Id.*

Agency action may be set aside pursuant to the Administrative Procedure Act (APA) only if the court finds the action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>242</sup> “[S]tructures or installations” are generally prohibited within wilderness areas under the Wilderness Act, “except as necessary to meet the minimum requirements for the administration of the area.”<sup>243</sup> At issue in this case was whether the water structures fit within this exception; it is agreed that both water tanks are “structures or installations in the Kofa Wilderness.”<sup>244</sup>

The Service argued that these actions were entirely consistent with the constraints of the Wilderness Act.<sup>245</sup> It maintained the exception applied because the conservation of bighorn sheep was a valid purpose under the Wilderness Act and the structures were necessary to meet the minimum requirements for conservation of the species.<sup>246</sup> The plaintiffs disagreed with the Service’s justifications for the structures.<sup>247</sup> The plaintiffs claimed that bighorn sheep conservation was not a valid purpose of the Wilderness Act and the water structures were unnecessary.<sup>248</sup>

#### **A. Conservation of Desert Bighorn Sheep as a Purpose of the Wilderness Act**

The court first analyzed whether the conservation of bighorn sheep was a valid purpose consistent with the Wilderness Act.<sup>249</sup> If the goal to conserve bighorn sheep was “unambiguously contrary to the language of the Wilderness Act,” the court would grant deference to the expressed Congressional intent and find the structures in violation of the Act.<sup>250</sup>

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<sup>242</sup>*Id.* (citing 5 U.S.C. § 706(2)(a)).

<sup>243</sup>*Id.* (citing 18 U.S.C. § 1133(c)).

<sup>244</sup>*Id.*

<sup>245</sup>*Id.*

<sup>246</sup>*Id.*

<sup>247</sup>*Id.*

<sup>248</sup>*Id.*

<sup>249</sup>*Id.*

<sup>250</sup>*Id.*

The court found that the Wilderness Act “gives conflicting policy directives to the Service.”<sup>251</sup> The Service must protect and preserve the natural condition of land.<sup>252</sup> Concurrently, the Service is charged with providing for “recreational, scenic, scientific, educational, conservation, and historical use.”<sup>253</sup> These competing instructions called for judgment and discretion in the management of these areas, as the Service’s directives were not always clear.<sup>254</sup> After examining these conflicting demands, the court determined the purpose of the Wilderness Act was ambiguous regarding what is meant by “conservation.”<sup>255</sup>

The court next addressed what level of deference to grant the Service’s interpretation of the ambiguous term.<sup>256</sup> The court rejected granting *Chevron* deference to the Service’s interpretation of conservation in its management plan because the record lacked information about the formality of the procedures that produced the plan.<sup>257</sup> Instead, the court applied *Skidmore* deference, which selects a level of deference to be applied based on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>258</sup>

After reviewing the management plan, the court deferred to the Service’s interpretation that conservation of bighorn sheep was consistent with the purposes of the Wilderness Act.<sup>259</sup>

The historical purposes of the area as a refuge for the preservation of bighorn sheep, combined

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<sup>251</sup> *Id.* at \*8.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at \*9.

<sup>254</sup> *Id.* at \*8.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at \*9.

<sup>257</sup> *Id.* at \*\*9-10 (*Chevron* deference refers to the Supreme Court’s decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) holding that courts should defer to agency interpretations of statutes unless they are unreasonable).

<sup>258</sup> *Id.* at \*10 (citing *Wilderness Society v. U.S. Fish & Wildlife Service*, 353 F.3d 1051, 1060 (9th Cir. 2003)).

<sup>259</sup> *Id.* at \*11.

with the fact that one of the explicit purposes of the Wilderness Act is “conservation” guided the court’s decision.<sup>260</sup> The court also found the Service’s reasoning contained in the management plan was thorough, valid, consistent, and persuasive.<sup>261</sup>

### **B. The Wilderness Act’s Exception for Structures “Necessary” to Meet the “Minimum Requirements” for Conserving Bighorn Sheep**

The general rule against development of structures within wilderness areas is subject to only one exception: “except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter.”<sup>262</sup> Having found the conservation of bighorn sheep a valid purpose of the Wilderness Act, the court next analyzed whether the Service’s decision to build the water structures was founded on “an adequately reasoned determination of necessity.”<sup>263</sup> A generic finding of necessity will not satisfy this narrow exception.<sup>264</sup> The service must make a sufficiently reasoned finding that the structure was necessary to meet the “minimum requirements” of the purpose for which it was constructed.<sup>265</sup>

To determine whether the Service made an adequately reasoned determination of necessity, the court relied heavily on its decision in *High Sierra Hikers Association v. Blackwell*.<sup>266</sup> In *High Sierra*, the court interpreted a similar provision permitting commercial services “to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the area.”<sup>267</sup> The court held that the Forest Service’s needs assessment document failed to make a reasoned finding that the number of commercial permits

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<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* (citing 18 U.S.C. § 1133(c)).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at \*\*11-12.

<sup>265</sup> *Id.* at \*12.

<sup>266</sup> *Id.* at \*\*11-12 (citing 390 F.3d 630 (9th Cir. 2004)).

<sup>267</sup> *Id.* at \*11 (citing *High Sierra*, 390 F.3d at 646, discussing 16 U.S.C. § 1133(d)(5)).



granted was no more than was necessary to achieve the goals of the Act.<sup>268</sup> In order to properly invoke an exception to the Wilderness Act, the Forest Service needed to articulate why the extent of the commercially permitted activity was necessary, and thoroughly consider the competing goals in relation to one another.<sup>269</sup>

The court applied the reasoning of *High Sierra* and determined that the Service failed to make an adequate finding of necessity.<sup>270</sup> The Investigative Report, the Minimum Requirement Analysis, and the Minimum Tool Analysis prepared by the Service all lacked the necessary analysis.<sup>271</sup> The main downfall to the Service's reasoning was that it began with the unexplained assumption that development of and improvements to water facilities were necessary to meet the minimum requirements for the administration of the area.<sup>272</sup> The Service's own documentation strongly suggested that many other management strategies could have accomplished the same result of restoring the bighorn sheep population without requiring new structures.<sup>273</sup> Reduction in mountain lion predation, cessation of translocations, a moratorium on hunting, and temporary trail closures were among the non-prohibited actions the court wanted to see examined.<sup>274</sup> Especially absent was analysis of these possible actions in relation to each other.<sup>275</sup>

The court also noted that the Investigative Report prepared by the Service did not reach any legal conclusions or even cite the relevant legal standard the Service must comply with before developing structures in wilderness areas.<sup>276</sup> Instead, the report provided a thorough,

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<sup>268</sup> *Id.* (citing *High Sierra*, 390 F.3d at 647).

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at \*12.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at \*13.

<sup>275</sup> *Id.* at \*12.

<sup>276</sup> *Id.*

neutral, and scientific assessment of many factors contributing to sheep mortality, and made recommendations regarding each factor.<sup>277</sup>

The report listed the four actions relating to mountain lion predation as a higher priority than the construction of water structures, and yet provided no explanation as to why those actions were not taken before development of new water resources.<sup>278</sup> In regards to translocations, the report recommended the temporary cessation be continued.<sup>279</sup> Additionally, the report noted that hunting results in a population decline, yet did not explain why it recommended that hunting continue.<sup>280</sup> Likewise, the report noted that human disturbance may lead to a lower survival rate of lambs, and temporary trail closures may be advisable.<sup>281</sup> Nowhere in the Service's documentation did it explain why any of these actions, alone or in combination with other strategies, were insufficient to conserve the bighorn sheep population.<sup>282</sup>

Similarly, the Minimum Requirements Analysis and Minimum Tool Analysis both sufficiently described the reasons for the Service's decision to construct the tanks, but again relied on the unjustified starting point that the water structures were necessary.<sup>283</sup> The only place the Service appeared to consider other possible actions was where it circled "NO" in response to the question: "Are there other less intrusive actions that can be taken or that should be tried first inside or outside wilderness that will resolve the issue?"<sup>284</sup> The court found that a single yes/no question cannot suffice to invoke a very limited exception to the Wilderness Act.<sup>285</sup>

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<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at \*13.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at \*14.

<sup>285</sup> *Id.*

The court found that the Service was not free to create structures within the wilderness addressing any particular variable that might in some way affect the sheep population's viability.<sup>286</sup> The Wilderness Act allows for some flexibility in addressing situations as they arise, even given time and budget constraints.<sup>287</sup> However, in order to give meaning to the Act's "minimum requirements" provision, the Service needed to explain why addressing one variable was more important than addressing others and even necessary at all, considering the possibility that other variables could solve the problem just as well or better.<sup>288</sup>

The Wilderness Act requires a careful balancing between the desire to keep land untouched by humans and the practical limitations faced by those responsible for managing these areas.<sup>289</sup> There is little doubt that improvements to the water supply will likely help the bighorn sheep population.<sup>290</sup> However, this finding was inadequate when the issue was a new structure.<sup>291</sup> The rule against the creation of permanent structures in wilderness areas is "one of the strictest prohibitions" under the Wilderness Act.<sup>292</sup> Considering the many other avenues of achieving bighorn sheep conservation, the Service needed to assure the court through evidence and explanation in the record that it fully analyzed the alternatives and nevertheless rationally concluded that the new water structures were indeed necessary.<sup>293</sup> Because this evidence was absent, the court reversed the district court's finding of summary judgment for the Service and remanded it to the district court.<sup>294</sup> The district court could accept briefing from the parties

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<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at \*15.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

regarding whether to dismantle the structures, remand it to the Service for reconsideration, or grant other appropriate relief.<sup>295</sup>

### C. Judge Bybee's Dissent

Circuit Judge Bybee wrote a strongly worded dissent nearly matching the majority opinion's length. According to the dissent, "this should not have been a hard case."<sup>296</sup> The dissent criticized the majority's requirement that the Service engage in a formalized, thoroughly documented finding of necessity accompanied by a comparative, multi-factor, side-by-side analysis of all factors affecting the bighorn sheep's decline.<sup>297</sup> These new demands were inconsistent with the deferential standard of review under the APA.<sup>298</sup> The three primary documents provided by the Service showed a need to supply the bighorn sheep with water, as the population would decline if no action was taken, and no less intrusive actions could be taken to reverse the population trend.<sup>299</sup>

Factually, the Service showed the tanks were distant from other water sources.<sup>300</sup> Also, construction of these structures would reduce the amount of water hauling the Service needed to do, which would in turn reduce human disturbance in the wilderness area.<sup>301</sup> Even considering other factors affecting the Kofa bighorn sheep population, the Service found drought as the principal explanation for the decline.<sup>302</sup> Furthermore, the Service was not required to demonstrate its actions were the only way to conserve the population because "necessary" has commonly been interpreted to mean less than absolutely essential.<sup>303</sup> Additionally, the district

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<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at \*26.

<sup>298</sup> *Id.* at \*15.

<sup>299</sup> *Id.* at \*17.

<sup>300</sup> *Id.* at \*19.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at \*21.

<sup>303</sup> *Id.* at \*24.

court misconstrued the proper remedy; in cases where the reviewing court is unable to fully evaluate the agency action based on the record before it, the proper course is to remand the matter to the agency for additional investigation or explanation.<sup>304</sup>

## **V. CONCLUSION**

In reaching its decision, the court imposed heightened procedural requirements under the Wilderness Act and the APA. While water is critically important to the desert bighorn sheep population that inhabits the Kofa National Wildlife Refuge and Wilderness, the Service overstepped its authority by building two water tanks.<sup>305</sup> In managing wilderness areas and making conservation decisions, the Service must carefully determine that any structure it wishes to build is first of all necessary, and second of all only to the extent required to meet the minimum requirements of its objective.<sup>306</sup> The Service must consider alternatives in relation to one another, and analyze which alternative among them meets the minimum requirements with the least disturbance to the wilderness nature of the land.<sup>307</sup>

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<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*